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THE

FEDERAL REPORTER,

(ANNOTATED)

VOLUME 165.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 165.

JUDGES

OF THE

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ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

NORTHERN PAC. RY. CO. et al. v. PACIFIC COAST LUMBER MFRS.'
ASS'N et al.

(Circuit Court of Appeals, Ninth Circuit. October 5, 1908.)

No. 1,520.

1. COURTS (§ 407*)—JURISDICTION OF CIRCUIT COURT OF APPEALS—INTERLOCUTORY ORDERS.

Under section 7 of the act (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]) creating the Circuit Courts of Appeals, as amended by Act April 14, 1906, c. 1627, 34 Stat. 116 (U. S. Comp. St. Supp. 1907, p. 209), which enlarges the jurisdiction of such courts to include appeals from interlocutory orders or decrees granting or continuing an injunction or appointing a receiver "in any cause," an appeal lies from such an order, although the sole question involved is the jurisdiction of the court making the same.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1100; Dec. Dig. § 407.*

Jurisdiction of Circuit Court of Appeals in general, see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

2 COURTS (§ 407*)—CIRCUIT COURTS OF APPEALS—APPEALABLE ORDERS—ORDERS GRANTING INJUNCTION—"UPON HEARING IN EQUITY."

An order of a Circuit Court granting a preliminary injunction made after the filing of a bill and on notice to the defendants, pursuant to which their counsel appeared specially to object to the jurisdiction, but were heard upon the merits as amicl curiæ, was made "upon a hearing in equity" within the meaning of section 7 of the act (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]) creating the Circuit Courts of Appeals as amended by Act April 14, 1906, c. 1627, 34 Stat. 116 (U. S. Comp. St. Supp. 1907, p. 209), and is appealable thereunder.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1100; Dec. Dig. § 407.*]

3. Carriers (§ 34*)—Jubisdiction of Federal Courts—Suit to Enjoin Enforcement of Interstate Rates.

Under section 22 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 387 [U. S. Comp. St. 1901, p. 3170]), which expressly preserves all legal remedies, a Circuit Court of the United States has jurisdiction of a suit to enjoin railroad companies from filing or enforcing a

[•]For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—1

proposed new schedule of rates alleged to be unjust and unreasonable pending a determination of their reasonableness by the Interstate Commerce Commission, where it is shown that their enforcement would result in irreparable injury to complainants.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 34.*]

4. COURTS (§ 280*)—JUBISDICTION OF FEDERAL COURTS—SUITS ARISING UNDER INTERSTATE COMMERCE ACT.

The federal courts have exclusive jurisdiction of all suits arising under the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) and its amendments.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.*]

5. Courts (§ 271*)-Federal Courts-District of Suit.

The provision of section 1 of the federal judiciary acts of 1887 and 1888 (Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 5081, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) relating to the Circuit and District Courts, that "no suit shall be brought in either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," does not apply to suits of which such courts are given exclusive jurisdiction; and a suit to enjoin railroad companies from establishing and enforcing unreasonable rates in violation of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) is of such character and may be maintained in any district in which the defendants can be found.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. § 271.*]

6. COURTS (§ 328*)—JURISDICTION OF FEDERAL COURTS—"MATTER IN DISPUTE."

In a suit to enjoin railroad companies from establishing a new schedule of rates, the matter in dispute is the right of the defendants to enforce such proposed rates, and, where the value of such right exceeds \$2,000, a federal court has jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*

For other definitions, see Words and Phrases, vol. 5, pp. 4414, 4415; vol. 8, p. 7718.

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

Appeal from the Circuit Court of the United States for the Western District of Washington.

The appeal in this case is taken from a temporary injunction order made in a case in which the appellees herein, consisting of a number of corporations and persons engaged in the lumber and shingle business in the states of Washington and California, brought their bill against the Northern Pacific Railway, a corporation of the state of Wisconsin, the Great Northern Railway Company, a corporation of the state of Minnesota, the Chicago, Burlington & Quincy Railroad Company, a corporation of the state of Iowa, the Oregon Railroad & Navigation Company, a corporation of the state of Oregon, the Oregon Short Line Railroad Company and the Union Pacific Railroad Company, corporations of the state of Utah, each of which corporations, the bill alleged, was engaged in business within the district in which the suit was brought. The bill alleged in substance that the appellants are common carriers engaged in commerce between the states, and as such had the power, by concurrence of action, to absolutely fix and maintain rates on lumber and forest products from points within the state of Washington to eastern and southern destinations in other states; that the interests controlling the Great Northern Railway Company also dominate and control the Northern Pacific Railway Company, and that these two dominate and control the Chicago, Burling-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ton & Quincy Railroad Company through the ownership of its capital stock, so that there is no competition between said lines; that the Union Pacific Railroad Company dominates and controls the Oregon Railroad & Navigation Company and the Oregon Short Line Railroad Company by virtue of ownership of the stock of said two companies, so that there is no competition between said lines; that, in making freight rates from the Pacific Northwest to the East, all of said lines act in concert through the medium of the Transcontinental Freight Bureau; that the first group of railroad companies so mentioned are designated in the bill the "Hill Lines," and the second group, the "Harriman Lines"; that said corporations have filed with the Interstate Commerce Commission and have published, to take effect on November 1, 1907, a revised tariff of rates on lumber and other forest products from the state of Washington and other Northwestern points of origin to Eastern and Southeastern destinations in other states, whereby such rates are to be advanced 10 cents a hundred pounds to eastern destinations and 5 cents a hundred pounds to certain Southeastern destinations; that said rates will go into effect on November 1, 1907, unless restrained by the court; that in promulgating said tariff the said railroad companies have combined, conspired, and agreed to enormously advance the rates, and that such advance is made in restraint of interstate trade and in violation of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), known as the "Sherman Anti-Trust Act," and of acts amendatory thereof; that said increase in rates is unjust, unreasonable, and in violation of section 1 of the act of Congress of February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), known as the "Act to regulate commerce," and the acts amendatory thereof; that the Great Northern Railway Company and the Northern Pacific Railway Company, in connection with other participating carriers, have filed with the Interstate Commerce Commission, to take effect November 1, 1907, a revised tariff of rates on lumber and other forest products from the state of Washington and other Northwestern points of origin, to Porthill, Idaho, and to Gateway, Sweet Grass, and Butte, Mont., and intermediate points, and to Sherwood, Crosby, Maxbass, Antler, Bunseith, St. John, Hansboro, Sarles, Hanna, Walhallo, Neche, Ojata, Argusville, Colfax, and Hankinson, N. D., and intermediate points, whereby the prevailing rates are to be greatly advanced; that such rates will go into effect unless restrained by the order of the court; that said advances in rates are unjust, unreasonable, and arbitrary, and in violation of the Sherman anti-trust act, and of the act to regulate commerce. The bill charges, upon information and belief, that an agreement and understanding exists between the Hill lines and the Harriman lines, whereby the Northwest Pacific Coast territory is parceled between them for transportation purposes, and that, in pursuance of such agreement and understanding, neither will invade the territory of the other; that upon shipments of lumber originating in the territory of the one, to be transported over the lines of the other, a large if not prohibitive differential in rates is exacted, so that practically each dominates the transportation from points within its own territory, and names the rate to be exacted therefrom; that the advance in rates announced to become effective on November 1, 1907, was brought about by agreements and understandings between said Hill and Harriman lines in suppression of competition and for their mutual advantage, without regard to the rights and interests of the public; that the appellees and others engaged in the lumber business in the state of Washington have invested in plant, machinery, equipment, and appurtenances \$100,000,000, not including the value of the material on hand, logs, standing timber or timber lands, and that more than 90,000 persons are directly engaged in said industry, the annual pay roll whereof exceeds \$60,000,000, and that approximately 200,000 people are directly dependent upon said industry; that the annual output of lumber exceeds \$65,000,000, and the annual output of shingles exceeds \$17,000,000; that the freight paid annually on shipments from the points in the state of Washington to be transported to other states approximates \$25,000,000; that a large part of such investment in the lumber industry was made upon faith that the existing rates of freight to the consuming markets would not be increased, but rather decreased, and the appellees allege on information and belief that the rates generally in the United States on the average of all traffic have been

reduced 20 per cent. in the last 20 years, and allege that the existing rates on lumber were voluntarily established by the carriers in the year 1893, and ever since have been continuously in effect. The bill sets up the present tariff as it has existed for 14 years, and alleges that under such rates it is difficult for the lumber manufacturers of Washington to compete in the markets with similar products, and that only in the highest grades on the market, under said rates, can they move their product to consuming territories in other states. The bill alleges that not only are the existing rates greater than a large part of the traffic can bear, but that under said rates the appellants have greatly prospered. The bill then sets forth in detail the proportion of tonnage of forest products to other products carried by said railroad companies under the present rate, and alleges that dividends have been paid by said companies in addition to operating expenses, fixed charges, a large amount of interest on bonds and indebtedness, and large expenditures for improvements, and that the tonnage on forest products constitute 17.33 per cent. of their entire tonnage, and has paid 27.80 per cent. of the entire gross earnings of the Great Northern Railway Company; that the proposed advance in rates will greatly injure, and to a large extent destroy, the lumber industry in the state of Washington, and will work irreparable injury to the appellees and others engaged in the business in that state and in the Northwest Pacific Coast, as well as cause serious detriment to the public interests; that the advance will amount to \$48 a car on lumber and \$36 a car on shingles to St. Paul, Denver, Chicago, and other Eastern markets, which is excessive, unreasonable, and unjust, and more than the traffic can bear; that the proposed advanced rates will force the mills to shut down; that the appellees have no remedy at law; that the Interstate Commerce Commission has no jurisdiction to afford relief in the premises until after the threatened advance in rates shall have gone into effect, and the reasonableness thereof shall have been investigated and determined by said commission, and that in the meantime the advance in rates would drive the appellees out of competing markets, disrupt the established trade regulations of the appellees, and force them to shut down their lumber mills or to make enormous sacrifices in the disposition of their product, which injury is irreparable, and incapable of pecuniary estimation.

The bill was filed on October 1, 1907. On October 31, the Circuit Court made an order holding in abeyance certain motions and pleas to the jurisdiction of the court over the parties defendant, and enjoining the appellants, until the further order of the court, from putting into effect the advanced rates or any rates in advance of the present established rates, and directing that the appellees execute to the appellants a bond with good and sufficient sureties in the sum of \$250,000 to indemnify them from loss, cost, and damages by reason of the injunction, in case said advance in rates should finally be held to be reasonable, or in case rates in excess of the existing tariff should be established by the Interstate Commerce Commission.

James B. Kerr and W. W. Cotton, for appellants. Wimbish, Watkins & Ellis and Austin E. Griffiths, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellees moved to dismiss the appeal on the grounds, first, that jurisdictional questions only are presented, and that therefore, if the order is appealable, the appeal lies to the Supreme Court alone; and second, that the order appealed from was made ex parte and not upon "a hearing in equity," and is therefore not appealable. To the first ground of the motion, the answer is that by the act of April 14, 1906, c. 1627, 34 Stat. 116 (U. S. Comp. St. Supp. 1907, p. 209), amending the seventh section of the act of March 3, 1891, c. 517, 26 Stat. 828 (U. S. Comp. St. 1901, p. 550), to establish the Circuit Courts of Appeals, appellate jurisdiction is given to this court from an interlocutory or-

der or decree granting or continuing an injunction or appointing a receiver "in any cause," whereas before such amendment the law had permitted such an appeal only in "a cause in which an appeal from a final decree may be taken under the provisions of said act to the Circuit Court of Appeals." The amendment enlarges the right of appeal from such interlocutory orders and extends it to "any cause," causes in which the jurisdiction of the court is the sole question involved, as well as other causes. Grainger v. Douglas Park Jockey Club, 148 Fed. 513, 78 C. C. A. 199.

Nor is the appeal subject to dismissal on the ground that the order appealed from was not had upon a "hearing in equity." After the bill had been filed, the court, on October 1, 1907, issued an order upon the defendants therein to show cause on October 29th why the injunction should not issue as prayed for, and directed that a copy of the bill and of the order be served upon each of the defendants in the suit at least five days before the day so "set for the hearing." The injunction order made on October 31st recites that the cause came on to be heard, pursuant to said rule to show cause, that the complainants appeared by their counsel, that the defendants appeared specially by counsel to move for the dismissal of the bill on the ground that they were corporations foreign to the state of Washington, and were entitled to be sued only in the Circuit Court of the United States for the district of which they were respectively inhabitants, and that they also appeared specially to file pleas to the same effect. It recites further that the court heard arguments upon the complainant's application for an injunction, and arguments of the counsel for the defendants as amici curiæ. This sufficiently shows that there was "a hearing in equity," such as the act of April 14, 1906, contemplates. The defendants to the bill each had notice and opportunity to appear and present all objections to the issuance of the injunction order, and we may assume that their counsel as amici curiæ did present every available objec-This view of the statute is in harmony with our decision in Pacific Northwest Packing Co. v. Allen, 109 Fed. 515, 48 C. C. A. 521. The motion to dismiss will be denied.

Had the Circuit Court jurisdiction of the subject-matter of the suit? The Constitution declares that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution and the laws of the United States. By the terms of section 22 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 387 [U. S. Comp. St. 1901, p. 3170]), existing legal remedies were expressly preserved. Prior to its enactment, the equitable jurisdiction to enjoin excessive charges and discriminations by common carriers on the ground that the wrong was a constantly recurring one, for which there was no adequate remedy at law, was generally recognized. High on Injunctions, § 616; Menacho v. Ward (C. C.) 27 Fed. 529; Southern Express Co. v. Memphis, etc., Ry. Co. (C. C.) 8 Fed. 799; Coe v. Louisville & Nashville R. Co. (C. C.) 3 Fed. 775; Vincent v. Chicago & A. R. Co., 49 Ill. 33; American Coal Co. v. Consolidation Coal Co., 46 Md. 15; Rogers L. & M. Works v. Erie Ry. Co., 20 N. J. Eq. 379. The question here is whether by implication the equitable remedy is, by the interstate commerce act, held in abeyance and post-

poned until after the proposed future rate shall have gone into effect, and the Interstate Commerce Commission shall have passed upon the question of its reasonableness. The appellants claim that such is the purport of the decision in Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. In that case it was held that a shipper cannot maintain an action at common law in a state court to recover damages by reason of excessive and unreasonable freight rates exacted on interstate shipments, where the rates charged were those which had been duly fixed by the carrier under the provisions of the act, and had not been found to be unreasonable by the Interstate Commerce Commission, and that the commission was intended to afford an effective and comprehensive means for redress of all wrongs resulting from unjust discriminations and undue preferences. In the course of the opinion, the court, after pointing out the fact that the judgment of a court based on a complaint by a shipper without previous action by the commission would give rise to a change of the schedule rate and result in the destruction of the act and the remedial provisions which it afforded, said:

"For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the commission in the premises. This must be, because, if the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

The decision leaves untouched the question whether or not a shipper may, since the passage of the act to regulate commerce, resort to equity to enjoin the promulgation of a new schedule of rates which are alleged to be unreasonable, extortionate, and ruinous to the shipper's business. That this is so is expressly recognized by the subsequent decision of the court in Southern Railway Co. v. Tift, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1061. In that case the court had under review a de-

cision of the Circuit Court of Appeals for the Fifth Circuit, affirming the decree of the Circuit Court for the Southern District of Georgia in Tift et al. v. Southern Railway et al. (C. C.) 123 Fed. 789, 138 Fed. 753. An original bill had been filed by Tift and others to enjoin an advance in freight rates which was to be made effective shortly thereafter. A temporary restraining order was issued. It was subsequently dissolved, however, and the court, while sustaining its jurisdiction to entertain the bill, ruled that in case the rate complained of should be enforced, and the complainants should make application to the Interstate Commerce Commission to redress their alleged grievances, the court would thereafter entertain a renewed application on the record so made, and such appropriate additions thereto as might be proposed by either party, that the enforcement of such rates be enjoined pending the investigation of the commission unless otherwise ordered, and that, on presentation to the court of the report of the commission, such further action might be taken as would be conformable to law and the principles of equity. The complainants thereupon filed their petition before the Interstate Commerce Commission, and, upon the issues framed in answer thereto and the testimony adduced, the commission found that the advance in rates was not warranted and was unreasonable and unjust. Thereafter the complainants presented a petition to the Circuit Court stating the substance of the findings of the commission, and presenting a copy of its report and opinion. The defendants answered the petition, and the complainant filed also a supplemental bill to obtain restitution of the excess of rates charged over those which it was alleged were reasonable. It was stipulated by counsel for the respective parties that the testimony taken before the Interstate Commerce Commission be filed in the case subject only to objections to its relevancy. Other testimony was taken, and the Circuit Court decreed that the advance in rates was excessive, unreasonable, and unjust, and in violation of the provisions of the act to regulate commerce, and enjoined the defendants from enforcing the same. It will be seen that, while that case in its beginning was parallel with the case at bar, it became in its progress essentially variant therefrom in that it was finally heard and decided upon a petition presented to the court after the Interstate Commerce Commission had acted upon the question of the reasonableness of the advanced rates. In the Supreme Court, however, the appellants, who were the defendants in the court below, renewed the objections which they had urged to the jurisdiction of the Circuit Court to entertain the original bill for the injunction. As to those objections, the Supreme Court said:

"In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decisions in Texas & Pacific Railroad Company v. Abilene Cotton Oil Company, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, upon a different record than that before us. We are not required to say, however, that, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of unreasonable rates or a change to unjust or unreasonable rates. The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings identical with those be-

fore the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these in effect the decree of the court was rendered."

This language of the opinion must be deemed to have been used advisedly and with the approval of all the members of the court who participated in the decision. Evidently its purpose was to make it clear that the question of the jurisdiction of a Circuit Court to entertain such a bill as is here before us was not presented and had not been adjudicated in the Abilene Cotton Oil Company Case, and that its decision was not deemed essential to the disposition of the case then before the court. So far as the Supreme Court is concerned, there-

fore. the question now under consideration is an open one. Upon a careful consideration of the interstate commerce act, we find no ground on which to say that it impliedly denies the equitable jurisdiction to enjoin a threatened injury such as is alleged in the bill in the present case. It is true that the courts have no power to pronounce an interstate rate unreasonable or to declare what is a reasonable rate, but this is not to say that a court of equity may not enjoin the enforcement of a threatened ruinous schedule of rates which is proposed to be adopted in the future. If such is the effect of the act, we have the anomalous situation of a threatened irreparable injury for which there is no remedy, for the Interstate Commerce Commission has no power to enjoin a proposed unreasonable new schedule of rates. Interstate Commerce Commission v. Railway Co., 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243. To what does the reservation of legal remedies in section 22 of the act refer if not to such a remedy as this? The case calls for the exercise of a power which is inherent in a court of chancery, the power to enjoin a proposed unlawful act. The exercise of that power does not invade the province of the Interstate Commerce Commission. It prohibits the enforcement of an alleged unreasonable rate only until the commission shall have had time and opportunity to adjudge the question of its unreasonableness. To afford such relief is not to fix rates or to change existing rates, or to decide on the reasonableness of established rates, or in any way to interfere with the functions of the Interstate Commerce Commission, nor does it result in the confusion or derangement of rates so forcibly pointed out as the ground of decision in the Abilene Cotton Oil Case. Such has been the decision of the federal courts in every case in which the question has arisen. Tift v. Southern Ry. Co. (C. C.) 123 Fed. 789; Jewett Bros. & Jewett v. Chicago, M. & St. P. Rv. Co. (C. C.) 156 Fed. 160; M. C. Kiser Co. v. Central of Georgia Rv. Co. (C. C.) 158 Fed. 193.

Further objection to the jurisdiction is presented in the argument that to afford the relief granted the appellees herein is to make discriminatory rates, since the court can act only as between the parties to the suit, and the result of its successful termination would be to give the appellees better rates than others similarly situated. The answer to this is that all persons subject to the payment of the advanced rate may, if they choose, obtain the benefits of the order by complying with its conditions. The injunction makes no discrimination. It sus-

pends the collection of the increased rate pending the decision of the question of its lawfulness, upon security that the carrier shall not suffer ultimate loss.

It is earnestly insisted that the court below had no jurisdiction of the defendant corporations which were not inhabitants of the district in which the suit was brought, for the reason that the judiciary acts of March 3, 1887 (Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 5081), and August 13, 1888 (Act August 13, 1888, c. 866, 25 Stat. 433 [Ú. S. Comp. St. 1901, p. 508]), provide that no civil suit shall be brought before either the Circuit Court or the District Court "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." The interstate commerce act was passed at a time when the judiciary act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), was in force. Under that act a cause cognizable in the federal courts could be brought against a defendant in any district wherein he might be found at the time of serving process. The acts of 1887 and 1888, being limited to actions of which there is concurrent jurisdiction in state courts, do not apply to an action in which the federal jurisdiction is exclusive. United States v. Mooney, 116 U. S. 104, 6 Sup. Ct. 304, 29 L. Ed. 550; Atkins v. Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841; In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; United States v. Standard Oil Co. (C. C.) 152 Fed. 290; Southern Pac. Co. v. Earl, 82 Fed. 690, 27 C. C. A. 185; Westinghouse Air Brake Co. v. Great Northern Ry. Co., 88 Fed. 258, 31 C. C. A. 525. We have to inquire, therefore, whether the present suit is of a class of cases of which the state courts would have concurrent jurisdiction. The case is clearly one which presents a federal question. It arises under the Constitution and laws of the United States. Its purpose is to compel compliance with the provisions of the interstate commerce act, and its correct decision depends upon the construction of that act. In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; Toledo, A. A. & M. Ry. Co. v. Pennsylvania Co. (C. C.) 54 Fed. 730, 19 L. R. A. 387. It seems clear also that the iurisdiction of the federal courts over such a case must be exclusive. It is true that the remedy here sought is not one of those which are expressly provided for by the terms of the act. The act makes special provision for but two remedies, an appeal to the Interstate Commerce Commission and an action at law to recover damages for violation of the provisions of the act, which action, it is declared, shall be brought in "any District or Circuit Court of competent jurisdiction." That the federal courts have exclusive jurisdiction of such actions has been held in Van Patten v. Chicago, M. & St. P. R. Co. (C. C.) 74 Fed. 981, and Sheldon v. Wabash R. Co. (C. C.) 105 Fed. 785. The express provision of the act for an action at law to recover damages should not have the effect to exclude resort to other remedies unless the intention so to do is manifestly expressed. In the act of August 7, 1888, c. 772, 25 Stat. 382 (U. S. Comp. St. 1901, p. 3583), requiring all railroads subsidized by the United States to maintain and operate telegraph lines, for governmental and other purposes, the only remedy expressly given was the right to bring mandamus to enforce the pro-

visions of the act; but it was held in United States v. Union Pacific Railway, 160 U. S. 1, 50, 16 Sup. Ct. 190, 40 L. Ed. 319, that the remedy so afforded was not exclusive, and that the United States was entitled to resort to equity for other and further appropriate relief. The existence of other remedies to enforce the provisions of the interstate commerce act is not left to implication. Not only is there no inhibition of other remedies in the interstate commerce act, but in section 22 there is express provision for the conservation of existing remedies. This can only mean that it was the intention of Congress to permit recourse to all appropriate remedies not inconsistent with the scheme and purpose of the act, for the protection of rights accorded by the act and the redress of wrongs arising thereunder. Prior to the adoption of the interstate commerce act, the state courts had no jurisdiction over interstate rates, for the fundamental reason that no state had the power through any department of its government to regulate commerce with other states. The only courts named in the act to which recourse may be had in actions at law to recover damages are the District and Circuit Courts of the United States. It must have been the intention of the act to give to those courts exclusive jurisdiction of all cases arising under it. "It is manifest," said Justice Story, "that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and, in all others, may be made so at the election of Congress." Martin v. Hunter, 1 Wheat. 304, 337, 4 L. Ed. 97. The whole of the reasoning in the Abilene Cotton Oil Case, upon which the court reached the conclusion that no court may award damages for unreasonable rates until the Interstate Commerce Commission shall have adjudged them unreasonable, applies against the interference by state courts by injunction against the enforcement of proposed illegal interstate rates. For if one of the courts of a state might adjudge interstate rates unreasonable and enjoin them, other courts of the same or of another state might reach a contrary conclusion, resulting in the confusion and conflict which the Supreme Court said would be destructive of the purposes of the act. That objection does not apply to the exercise of the jurisdiction of a federal court.

The appellants rely on In re Keasbey & Mattison Co., 160 U. S. 221. 16 Sup. Ct. 273, 40 L. Ed. 402, to sustain their contention that the provisions of the acts of 1887-1888 limiting the place of suit to the district whereof the defendants are inhabitants, is applicable to the present case. But in that case those provisions were held to be applicable for the reason that the jurisdiction of the federal courts in that class of cases was concurrent and not exclusive. The case was an original proceeding in the Supreme Court for mandamus to the judges of the Circuit Court for the Southern District of New York, requiring them to take jurisdiction of a suit brought against a corporation created under the laws of the state of Massachusetts for infringement of a trade-mark under the act of 1881 (Act March 3, 1881, c. 138, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401]), providing for the registration in the Patent Office of trade-marks used in commerce with foreign nations or with Indian tribes, and providing for an action for damages, or a suit in equity to protect such trade-mark in any court having jurisdiction over the person guilty of such unlawful act,

and giving to the courts of the United States original and appellate jurisdiction in such cases without regard to the amount in controversy. The decision was expressly based upon the ground that the act did not assume to take away or impair the jurisdiction which the courts of the several states always had over suits for infringement of trademarks

Objection is made to the jurisdiction on the ground that it does not appear from the bill that the necessary jurisdictional amount is in controversy. The bill alleges that the matter in controversy "exceeds, exclusive of interest and costs, the sum and value of \$2,000." In Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, it was held that a suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction unless the facts appear upon the record to create a legal certainty of that conclusion. In Lee v. Watson, 1 Wall. 339, 17 L. Ed. 557, it was said:

"By 'matter in dispute' is meant the subject of the litigation—the matter for which the suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined."

The matter in dispute in the present suit is the right of the appellants to enforce a proposed schedule of rates. Railroad Co. v. Ward, 2 Black, 485, 17 L. Ed. 311. In principle the case is similar to Washington Market Co. v. Hoffman, 101 U. S. 118, 25 L. Ed. 782, a suit in which a number of complainants whose several interests did not equal the jurisdictional amount sought to enjoin the market company from interfering with their right to occupy their respective stalls. The court said:

"The case is one of two hundred and six complainants suing jointly. The decree is a single one in favor of them all and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable."

In Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987, the complainants were taxpayers who sought to restrain the collection of interest and principal on bonds alleged to have been unlawfully issued by the county. The court said:

"The rule applicable to plaintiffs each claiming under a separate and distinct right in respect to a separate and distinct liability and that contested by the adverse party is not applicable here."

So in City of Ottumwa v. City Water Supply, 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604, in a suit by a taxpayer to enjoin the city from issuing bonds, it was held that the power of the city to issue such bonds is the matter in dispute for the purpose of ascertaining the amount or value in controversy, and not the tax to which the complainant would be subjected. Other cases in point are Texas & P. Ry. Co. v. Kuteman, 54 Fed. 548, 4 C. C. A. 503; American Fisheries Co. v. Lennen (C. C.) 118 Fed. 869. But if it is necessary that the bill aver the requisite amount in controversy as to each complainant, it is evident from the facts stated that such an averment can be made by amendment, and its absence from the bill is not ground for reversing

the injunction order. Giles v. Harris, 189 U. S. 475, 485, 23 Sup. Ct. 639, 47 L. Ed. 909; Fuller v. Montague, 59 Fed. 212, 8 C. C. A. 100. The order appealed from is affirmed.

NOTE—The following is the opinion of Hanford, District Judge, on the motion to dismiss:

HANFORD, District Judge. This suit is by individuals and corporations, who are citizens of Washington and California, against six railroad corporations engaged in interstate commerce, incorporated, respectively, in the states of Minnesota, Wisconsin, Iowa, Utah, and Oregon. The object of the suit is to obtain a decree restraining the defendants from putting into effect a new schedule of rates on lumber to be carried from this state to points of destination in the several states of the Mississippi Valley, which schedule increases the rates heretofore charged for similar services, and is alleged in the bill of complaint, to be unfair, excessive, and discriminatory. Each of the defendants has appeared specially to contest the jurisdiction of the court, and the case has been submitted upon motions to dismiss the suit for lack of jurisdiction.

Jurisdiction cannot be maintained on the ground of diversity of citizenship, because the complainants are not all citizens nor inhabitants of the state of Washington, and all of the defendants have their legal domiciles in states other than the state of Washington. Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768. It is the opinion of the court, however, that the jurisdiction rests firmly and safely upon the ground that the suit is one arising under the laws of the United States, and that the restrictive clauses of the statute defining the jurisdiction of the United States Circuit Court are not applicable. This is so because the bill of complaint by positive and specific averments accuses the defendants of having entered into a combination to suppress competition in violation of the act of Congress commonly referred to as the "Sherman Anti-Trust Law," the fourth section of which provides: The several Circuit Courts of the United States are invested with jurisdiction to prevent and restrain violations of this act. And section 5 provides: Whenever it shall appear to the court before which any proceeding under section 4 may be pending that the ends of justice require that other parties shall be brought before the court, it may cause them to be summoned, whether they reside in the district in which the court is held or not. Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201).

Here we have a suit, the object of which is to prevent and restrain violations of this law, and in express terms the law invests this court, as a Circuit Court of the United States, with power to grant the preventive relief which the complainants have sued for. The defendants say that they cannot be sued in this district because they are not inhabitants of the district; but the law provides that, when justice requires it, parties may be brought before the court, whether they reside in the district or not, and certainly in this case justice does require the presence of all these defendants, because they are accused of having entered into an unlawful agreement to increase the cost of carrying on interstate commerce, and a decree which sustains or annuls that agreement will affect the pecuniary rights of every party to the agreement. Therefore they are all entitled to have their day in court. They operate connecting lines of railways traversing state boundaries, and, to obtain adequate protection, exporters of lumber must bring them all into the same forum, in order to compel the carrier which receives a consignment in one state and the one which delivers it in another state to observe the same obligation with respect to the charge for the entire service.

It is apparent that the objection which the defendants are urging here might with equal propriety be urged to defeat the jurisdiction of any other Circuit Court in which a civil action may be instituted to restrain the defendants from violating the anti-trust law by adhering to the alleged unlawful combination. Therefore the clause of the jurisdiction statute which requires civil action to be commenced in the district of which the defendant is an inhabitant, if applicable to this case, is antagonistic to the statute which confers jurisdic-

tion. The Supreme Court of the United States has decided that the restrictive clause is not applicable when its effect is destructive of jurisdiction which the law confers. In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211.

After deliberation and careful examination of the authorities to which my attention has been directed, it is my opinion that the jurisdiction is not doubtful. Therefore the several motions to dismiss will be denied.

UNION PAC. R. CO. et al. v. OREGON & WASHINGTON LUMBER MFRS.'
ASS'N et al.

(Circuit Court of Appeals, Ninth Circuit. October 5, 1908.)

No. 1.525.

Appeal from the Circuit Court of the United States for the District of Oregon.

James B. Kerr, W. W. Cotton, and W. D. Fenton, for appellants. A. B. Winfree, J. N. Teal, Wirt Minor, Thos. G. Greene, and H. M. Stephens, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This case is in all respects similar to that of Northern Pacific Railway Company et al. v. Pacific Coast Lumber Manufacturers' Association et al. (just decided by this court) 165 Fed. 1. It involves the same questions, and its decision is governed by the same principles.

The decree appealed from is affirmed.

ROSS, Circuit Judge (dissenting). This is an appeal from an interlocutory order enjoining the defendant railroad companies from collecting from the complainants in the court below the rates prescribed by the tariff on file with the Interstate Commerce Commission covering the transportation of forest products from points within to points without the state of Oregon, or any rates on such traffic higher than the rates fixed by the tariffs which were superseded by the tariffs in question. The bill on which the injunction was granted was filed by various corporations alleged to be engaged in the manufacture and sale of lumber, against the railroad companies that are appellants here. The bill alleges that the complainants are corporations organized and existing under the laws of the state of Oregon, and that the incorporation of the various defendant railroad companies is as follows: The Union Pacific Company and the Oregon Short Line Company under the laws of the state of Utah; the Southern Pacific Company under the laws of Kentucky; the Northern Pacific Company under the laws of Wisconsin: the Great Northern Railway Company under the laws of Minnesota; the Burlington Company under the laws of Iowa; and the Oregon Railroad & Navigation Company, the Astoria & Columbia River Company, the Oregon & California and the Corvallis & Eastern Companies under the laws of Oregon. The bill alleges that all of the complainants with the exception of the Oregon & Washington Lumber Manufacturers' Association are corporations engaged in the

manufacture and interstate shipment of lumber, and that the manufacturers' association is formed for the purpose of promoting the manufacture and sale of lumber, enlarging the market for its members, and securing suitable transportation routes and reasonable rates for the transportation of lumber from the Pacific Northwest to other points in the United States. It alleges that the defendants are common carriers, and that they, with other participating carriers, filed with the Interstate Commerce Commission, to become effective November 1, 1907, a revised tariff of rates on lumber and forest products from Pacific Coast points to Eastern and Southeastern destinations in other states, "whereby existing interstate rates on said forest products are to be advanced on the first day of November, 1907, in various degrees, amounting substantially to ten cents a hundred pounds to what is known as the Denver, St. Paul and Chicago territories, seven and one-half cents per hundred pounds to St. Louis territory, and five cents per hundred pounds to Missouri River territory, and certain southeastern destinations in other states. That other changes and advances have been made in the rates on forest products from points and places in the state of Oregon to points and places in other states, all of which will appear in said tariff, which is numbered S. R. 963, I. C. C. No. 850, which said complete and revised tariff of said defendants, and other carriers, showing the advanced rates on lumber and other products, announced to become effective November 1, 1907, is filed herewith."

It is alleged that such increased rates will be exacted by the defendants on and after November 1, 1907, unless restrained by an order of the court, and that such rates were prepared, adopted, and filed by the defendants and the other participating carriers "in pursuance of a combination and conspiracy to stifle and destroy all competition among all of said defendants respecting the transportation of forest products from the state of Oregon and other Northwest Pacific states, and to exact and extort an unreasonable and unjust compensation for the services performed in transporting said forest products, and to divert to the treasuries of said railway companies, through such unjust and unreasonable transportation tax, all, or nearly all, of the profits of the business of the complainants and others engaged in the manufacture of lumber in the state of Oregon and of the other Pacific Northwest states, without regard to the reasonableness of said rates or to the value of the service to be performed and the cost of transporting said products. That each and all of said defendants well knew, at the time said tariff rates were agreed upon and adopted, that said rates were unjust, excessive, unreasonable, extortionate, prohibitive, and discriminatory rates for the transportation of the said lumber products from points and places in the state of Oregon and other states in the Pacific Northwest to the points and places in other states as set out in said tariff, and that the imposition of such advance was not and is not made necessary by reason of any exigencies of the business of any of the said defendants, or by reason of any condition connected therewith or with the transportation of said forest products and the services required with respect thereto; that the imposition and collection of said rates will render the business and plants of your orators and those similarly situated in the state of Oregon and other points and places in the Pacific Northwest of but little value, and subject

your orators to great and irreparable loss."

It is alleged that the said advance in rates so announced to become effective on November 1, 1907, was "brought about by and is the result of agreements and understandings between said 'Hill Lines' and 'Harriman Lines' to suppress competition and for their mutual advantage, without regard to the rights and interests of the public, wherefore your orators submit that said agreements and understandings eliminate the element of competition and constitute a combination in restraint of interstate trade and in violation of said 'Act to protect trade and commerce against unlawful restraint and monopolies,' approved July 2, 1890 (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and amendments thereto, and further result in imposing upon your orators and others engaged in the lumber industry an advance in rates which is arbitrary, unjust, unreasonable, and discriminatory both as to places and commodities, and subjects them also to undue and unreasonable prejudices and disadvantages in violation of said act of Congress entitled 'An act to regulate commerce,' approved February 4, 1887 (Act Feb. 4, 1887. c. 104, § 1, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and acts amendatory and supplementary thereto."

It is alleged that the manufacture of lumber and other forest products constitutes one of the largest and most important industries in the state of Oregon and in the Pacific Northwest; that the complainants and others engaged in the lumber business in the state of Oregon have invested in plants, machinery, equipment, and appurtenances about \$60,000,000, not including the value of material on hand, logs, standing timber, or timber lands; that more than 50,000 persons in Oregon are directly engaged in that industry; that the annual pay roll exceeds \$30,000,000, and that approximately 100,000 people are directly dependent for their livelihood upon the said industry; that the annual output of lumber of Oregon exceeds 2,000,000,000 feet, of the value of about \$30,000,000 at the mills; that the amount of freight annually paid on rail shipments from points in the state to points in other states approximates \$12,000,000, such estimates being based on the movement by rail of 600,000,000 feet of lumber, representing about 30,000 car loads. It is alleged that a large part of the investment in the lumber industry in the state of Oregon was made upon the faith that the existing rates of freight to the consuming markets voluntarily placed in effect by all said defendants would not be increased, but rather, in view of the fact that the general trend of rates has been downward for a number of years, and of the marked increase in the tonnage of lumber, said rates would be decreased.

The bill prayed for a final decree of injunction, and also for an injunction pendente lite restraining the defendants from putting into effect the tariff in question. By an amendment to the bill, the com-

plainants added these words:

"Your orators show that this is a civil cause in equity and the amount in controversy exceeds, exclusive of interest and costs, the sum or value of two thousand (\$2,000) dollars."

Certain parties were also permitted to join the complainants by petitions in intervention.

Upon a rule to show cause why an injunction pendente lite should not be granted, a hearing was had in the court below on the 31st of October, 1907, at which hearing the Northern Pacific Railway Company appeared specially and moved to dismiss the bill as to it upon the ground that it was entitled, as a corporation of the state of Wisconsin, to be sued only in the district in which it was an inhabitant. The Southern Pacific Company, a Kentucky corporation, likewise appeared specially and for the same purpose, as also did the Oregon Short Line Company. The Burlington Company, the Great Northern Company, and the Union Pacific Company each filed a plea to the jurisdiction, setting up the fact that neither of them was engaged in business in the state of Oregon, and that the pretended service of the subpœna was void. The Oregon Railroad & Navigation Company appeared generally and filed a separate demurrer to the bill. The Astoria & Columbia River Railroad Company, the Oregon & California Railroad Company, and the Corvallis & Eastern Railroad Company appeared generally and filed a joint and several demurrer. After argument, the court, on the 21st of November, 1907, entered an order denying the motions of the Oregon Short Line Railroad Company, the Southern Pacific Company, and the Northern Pacific Railway Company for the dismissal of the bill of complaint, and on the 31st day of October, 1907, entered this order:

"First. The court holds in abeyance motions and pleas as to the want of jurisdiction of this court over the parties defendant and the demurrer to be passed on by this court at a future date, and for the present assumes juris-

diction over such parties.

"Second. That until the further order of this court the carriers who are parties defendant to this suit shall not collect from the parties complainants to this suit, nor the members, firms, and corporations composing, forming, or now represented by the Oregon & Washington Lumber Manufacturers' Association as shown by the list submitted by said association on file in this cause, or from consignees of such parties complainant or parties represented by said Oregon & Washington Lumber Manufacturers' Association, amounts on the shipment of the commodities shown in the tariffs, described in the bill as amended, to wit: I. C. C. No. 850 and Great Northern I. C. C. No. A-2667 and Northern Pacific I. C. C. No. A-3432, in excess of the rate shown in the schedule of tariffs now on file with the Interstate Commerce Commission, covering the transportation of said commodities, superseded by the tariffs on file and above shown, provided that, as a condition of this order, complainants shall execute to the defendants their joint and several bonds, with good and sufficient sureties, in the sum of two hundred and fifty thousand (\$250,000) dollars, to be approved by the court, conditioned that the complainants will save, indemnify, and keep harmless the defendants, and each of them, from all loss, cost, and damage by reason of the issuance of this injunction, and further conditioned that if said rates shall be finally held to be reasonable. or rates in excess of those of the superseded tariff shall be established by the Interstate Commerce Commission or this court, each of the complainants who may be served by either of the defendants as a carrier of lumber or shingles shall pay to such carrier or carriers the difference, if any, between the amount paid for such service at the rate heretofore chargeable and whatever rate shall be finally established as the rate lawfully chargeable on and after November 1, 1907. This order shall take effect immediately, and the bond required shall be executed, approved, and filed on or before November 9, 1907.

"This court specially reserves the right, on showing made, to have additional bonds given from time to time, as it shall deem just and proper.

"This order applies to freight originating on the lines of any party defend-

ant hereto in the state of Oregon.

"Fourth. Whenever any person now a party to this suit as a complainant, or who may hereafter become such party by intervention, shall offer to any of the defendant carriers any of the commodities above specified for shipment under the tariff now in force as prescribed herein, he shall be required to execute and deliver to the carriers an instrument in writing, declaring that he is the consignor of the commodities so offered for shipment, and that the shipment is tendered in accordance with the provisions of this order.

"And it is further ordered that there shall be forthwith filed with the clerk herein, and delivered to each of the defendants, a true and correct statement of the names of all firms, persons, and corporations who are members of or represented by the Oregon & Washington Lumber Manufacturers' Association, and the locations of the mills of such respective parties, and of the location of the mills of all other persons who are parties complainant hereto or may

become so by intervention.

"Fifth. Each of the defendants is hereby ordered to furnish and deposit with the clerk of this court reports monthly showing with respect to each shipment made by any of the complainants or interveners in this cause under present rates: (1) The name of the shipper; (2) the character and weight of the shipment; (3) the points of origin and destination; (4) the amounts paid or charged under the present rate; and (5) the difference in amount between the amount so paid or charged and the amount that would accrue under the advance in rate restrained by this order.

"Done and dated in open court this 31st day of October, 1907.

"Charles E. Wolverton, Judge."

From this order the appeal is taken, the errors assigned by the appellants being:

(1) The Circuit Court erred in failing to dismiss the bill upon the

ground that there was no jurisdiction of the controversy.

(2) The court erred in failing to dismiss the bill as to the defendants which were corporations under the laws of states other than the state of Oregon, upon the ground that none of said defendants was an inhabitant of the District of Oregon, and each of said defendants was objecting to being sued in that district.

(3) The court erred in granting the decree of injunction against the defendants which were corporations under the laws of the state of Oregon, for the reason that all of the complainants were corporations of the state of Oregon, and the court had no jurisdiction of the case as to said defendants because the complainants were citizens of the same state.

(4) The court erred in failing to dismiss the bill for the reason that no controversy was presented involving \$2,000, exclusive of interest and costs, and therefore the court was without jurisdiction.

(5) The court erred in failing to dismiss the bill for the reason that the suit is not one arising under the Constitution or laws of the United States, or treaties made under their authority, and therefore the court had no jurisdiction.

(6) The court erred in failing to dismiss the bill for the reason that the controversy with respect to the reasonableness of the rates in question is a matter committed exclusively to the Interstate Commerce Commission by the act to regulate commerce, approved February 4, 1887, and the acts amendatory thereof.

(7) The court erred in entering the decree appealed from for the 165 F.—2

reason that it commands the defendants to discriminate between per-

sons in violation of the act to regulate commerce.

(8) The court erred in entering the decree appealed from for the reason that it commands the defendants to collect from the complainants amounts less than the amounts shown in the tariffs which are by law fixed as the only legal rates.

(9) The court erred in entering the decree appealed from for the reason that it appears on the face of the bill that there are omitted, as parties defendant, participating carriers, parties to the tariff complained of, whose names are set forth at pages 01 and 02 of the tariff filed

as a part of the bill.

In this court the appellees moved to dismiss the appeal on the ground that only questions of jurisdiction are involved, and therefore that the appeal should have been taken to the Supreme Court. The answer to the motion is that the appeal to this court was taken not only on the ground of the lack of jurisdiction of the court below over the cause of action alleged, but also upon the ground that the order appealed from commands the defendants to violate the act of Congress to regulate commerce, and on the further ground that it was made in the absence of indispensable parties. Only the question of jurisdiction can be taken from the trial court directly to the Supreme Court, and then only questions "involving the jurisdiction of the Circuit Court as a federal court." Louisville Trust Co. v. Knott, 191 U. S. 225, 233, 24 Sup. Ct. 119, 122, 48 L. Ed. 159; U. S. v. Jahn, 155 U. S. 105-115, 15 Sup. Ct. 39, 39 L. Ed. 87.

I agree that the motion to dismiss should be denied. Also untenable, in my opinion, is the position of the appellants to the effect that the case does not present a federal question, and that therefore the citizenship of the parties was the test of jurisdiction in the court below.

1 think it obvious that the real question in the case was whether or not the interstate commerce act deprived the court below of the power to grant the injunction complained of, which it otherwise unquestionably had; for I do not understand it to be disputed—certainly it cannot be successfully disputed—that but for that act a court of equity is not only empowered, but that it would be its duty, to enjoin a common carrier from exacting exorbitant or unreasonable rates for the transportation of freight. I repeat, therefore, that the real question here is, what is the effect of the interstate commerce act upon that otherwise conceded power in the court below, the solution of which question is essentially and necessarily a federal question, since it depends entirely upon the proper construction of an act of Congress? Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426-433, 27 Sup. Ct. 350, 51 L. Ed. 553. In that case the question was whether the conceded common-law right of the oil company to recover in an action at law in the Circuit Court the excess over a just and reasonable rate, of a charge exacted by the carriers for the transportation of certain cotton seed, was taken away by the provisions of the interstate commerce act.

"Both parties," said the court (204 U. S. 437, 27 Sup. Ct. 353, 51 L. Ed. 553), "concede that the question for decision has not been directly passed upon by this court and that its determination is only persuasively influenced by ad-

judications of other courts. They both hence mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

"Let us, without going into detail, give an outline of the general scope of that act with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress, and the remedies which the act established to accomplish the purposes which the lawmakers had in view

"The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the District Attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. * Power was conferred upon the commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel obedience by invoking the authority of the courts of the United States in the manner pointed out in the statute, prima facie effect in such courts being given to the findings of fact made by the commission. By the ninth section of that act it was provided as follows:

"'That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *'

"And by section 22, which we shall hereafter fully consider, existing appropriate common-law and statutory remedies were saved.

"When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. Parsons v. Chicago & Northwestern Ry., 167 U. S. 447.

455, 17 Sup. Ct. 887, 42 L. Ed. 231; Interstate Commerce Commission v. Baltimore & Ohio R. R., 145 U. S. 263, 275, 12 Sup. Ct. 844, 36 L. Ed. 699. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 491, 17 Sup. Ct. 896, 42 L. Ed. 243. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243.

"When the general scope of the act is enlightened by the considerations just stated, it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. preferences and discrimination. This follows because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to a prior action by the commission finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the

commission in the premises. This must be, because, if the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

"Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent rights of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

This clear analysis of the provisions of the act in question, and comprehensive and lucid exposition of its purposes and intent, would seem to leave nothing more to be said in order to show that, until prior action by the commission, no court is empowered, upon the complaint of a shipper, to determine or consider the reasonableness or unreasonableness of established rates. The court, in its opinion, expressly concedes that that pre-existing power in the courts was not expressly taken away by the interstate commerce act, but holds that such was the necessary effect of its provisions, and that, therefore, that result "was accomplished by implication." Nor, in my opinion, would there be any occasion for saying anything further upon the subject, but for the subsequent decision of the same court in the case of Southern Ry. Co. v. Tift, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124. I find it impossible to believe that the Supreme Court intended by its decision in the last-mentioned case to overrule or change or modify, without saying so, its interpretation of the act in question, and the consequent results of it, so clearly enunciated but a short time before in the elaborate opinion, delivered after a careful analysis of the various provisions of the act, and from which I have above quoted at length. Nor do I think the Tift Case, rightly and carefully considered, justifies any such contention. It is entirely true that that case, like the present one, was brought in a Circuit Court, prior to any action by or before the Interstate Commerce Commission, to obtain an injunction and a temporary restraining order enjoining the defendant carrier companies from advancing the rates theretofore established and in force to what the complainants there, as here, alleged would be unjust, unreasonable, and extortionate rates, and that the Circuit Court there first granted the temporary restraining order asked for, which it subsequently dissolved; but it retained the cause and annexed to its order dissolving the temporary restraining order this condition:

"In case the respondents shall enforce the rates complained of, and the complainants shall make proper application to the Interstate Commerce Commission to redress their alleged grievances, the court will entertain a renewed application on the record as made, and such appropriate additions thereto as may be proposed by either party, enjoining the enforcement of such rates, pending the investigation of the commission, unless otherwise dissolved, and on presentation to the court of the report of the commission such other action be taken as will be conformable to law and the principles of equity."

The Supreme Court, in its statement of the case, proceeded as follows:

"The appellants took the steps prescribed by the interstate commerce act to put the advanced rates into effect, and the appellees, on June 23, 1903, filed a petition before the Interstate Commerce Commission, charging that 'in promulgating said tariff of increased rates and maintaining and enforcing the same' the appellants were acting in 'concert with each other and with other lumber carrying roads,' who with them were 'co-members of the Southern Freight Association.' The petition also charged that the advance was 'arbitrary, unreasonable and unjust,' and prayed for an order commanding appellants, and each of them, to desist from enforcing the advance. All of the appellants except the Macon & Birmingham Railway Company filed a joint and several answer, in which they traversed the allegations of the petition and pleaded justification by the conditions affecting the roads and the traffic. They also alleged that the Georgia Sawmill Association, to which appellees belonged, was a combination in restraint of trade and commerce, and that, therefore, appellees did not 'come before the commission with clean hands. A great deal of testimony was taken on the issues presented, and the commission found and concluded that the advance in rates 'was not warranted by the testimony, and that the increased rates put in force June 22, 1903, were unreasonable and unjust.' The specific findings and conclusions of the commission are reported in 10 Interst. Com. R. 548. After the petition was filed before the Interstate Commerce Commission, but before final action, appellees filed an amended bill and again moved the Circuit Court for an injunction. In the amended bill it was alleged that appellants, after the dissolution of the restraining order, filed with the Interstate Commerce Commission and gave public notice that on June 22, 1903, the advance in sales on lumber would be established and put in effect, and such advance became effective June 22, 1903. The appellants in a joint and several answer admitted the averments of the amended bill, but reserved the benefit of their demurrer to the original bill. The motion for an injunction was dismissed. 123 Fed. 789.

"The commission made its order hereinbefore referred to on the 7th of February, 1905, and on March 17, 1905, the appellees presented a petition to the Circuit Court stating the substance of the findings of the commission and at-

taching a copy of its report and opinion.

"An order to show cause was issued. On June 3, 1905, appellants filed a joint and several answer, which was verified. The Southeastern Association answered separately. The appellees also filed a supplemental bill, the purpose of which was to obtain restitution of the excess of rates charged over those which it was alleged were unreasonable. To this bill a demurrer was filed.

"It was stipulated by counsel of the respective parties that the testimony, in-

cluding exhibits, taken before the Interstate Commerce Commission, should be filed in the case subject only to objections to its relevancy. In addition to such testimony other evidence was submitted to the Circuit Court, and that court rendered a decree July, 1905, that the advance in rates 'from lumber shipping points, within the state of Georgia to Cincinnati, Louisville, Evansville, Cairo, and other points on the Ohio river or crossings was and is excessive, unreasonable, and unjust, and in violation of the provisions of the act of Congress, known as the "Act to regulate commerce," and the amendments thereto, and that the rates and charges resulting from said advance are likewise excessive, unreasonable, and unjust, and in violation of the act to regulate commerce.' The appellants were enjoined, as we have already said, from enforcing the advance.

"The decree also directed an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum total of the increase in rates paid by each of the appellees and other members of the Georgia Sawmill Association to either or all of the appellants since the rate went into effect. This was done, the decree recited, in pursuance of a stipulation made by the respondents (appellants) in open court that, in case the complainants (appellees) prevailed, decree of restitution might be made. 138 Fed. 753. The decree was affirmed by the Circuit Court of Appeals without an opinion."

That was the record before the Supreme Court in the Tift Case. Now let us see what the court said:

"On the merits, as distinguished from the questions which concern the jurisdiction and procedure in the Circuit Court, this case is, though variant in some detail of facts, similar in principle and depends upon the same legal considerations as Illinois Central Railroad Company v. Interstate Commerce Commission, just decided. [206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128.] The advance here involved grew out of the same action by the railroads there considered, and is the advance there referred to as having been made west of the Mississippi. This case was argued and submitted with that, and depends on the same ultimate contentions. We need not repeat the discussion of those contentions nor trace out or dwell upon the many subsidiary considerations which the assignments of error and the elaborate briefs of counsel present.

"In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decision in Texas & Pacific Railroad Company v. Abilene Cotton Oil Company, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, upon a different record than that before us. We are not required to say, however, that, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates. The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the commission was stipulated into the case, and the opinion of the court recites that, 'with equal meritorious purpose, counsel for respective parties agreed that this would stand for and be the hearing for final decree in equity.'

"It was certainly competent for the appellees to proceed in the Circuit Court under section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3165]), and to apply by petition to the Circuit Court, 'sitting in equity,' for the court to hear and determine the matter 'as a court of equity,' and issue an injunction 'or other proper process, mandatory or otherwise,' to enforce the order of the commission. We think that under the broad powers conferred upon the Circuit Court by section 16 and the direction there given to the court to proceed with efficiency, but without

the formality of equity proceedings, but in such manner as to do justice in the premises,' and in view of the stipulation of the parties, recited in the decree of the court, the appellants are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed."

I have given to this language of the court attentive and careful consideration, and my conclusion is that the learned justice who wrote the opinion, and the justices who concurred with him, based their affirmance of the judgment of the Circuit Court entirely upon the findings and conclusions of the Interstate Commerce Commission, and upon the subsequent proceedings in the Circuit Court based thereon.

"The Circuit Court," said the Supreme Court, "granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these, in effect, the decree of the court was rendered. (Italics mine.) There was no demurrer to that petition (evidently the petition to the Circuit Court asking the enforcement of the findings and conclusions of the commission), and the testimony taken before the commission was stipulated into the case, and the opinion of the court recites that, 'with equal meritorious purpose, counsel for the respective parties agreed that this would stand for and be the hearing for final decree in equity.' It was certainly competent for the appellees to proceed in the Circuit Court under section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3165]). and to apply by petition to the Circuit Court, 'sitting in equity,' for the court to hear and determine the matter 'as a court of equity,' and issue an injunction 'or other proper process, mandatory or otherwise,' to enforce the order of the commission. We think that under the broad powers conferred upon the Circuit Court by section 16 and the direction there given to the court to proceed with efficiency, but without the formality of equity proceedings, 'but in such manner as to do justice in the premises,' and in view of the stipulation of the parties, recited in the decree of the court, the appellants are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed." (Italics mine.)

As already said, the court in the Tift Case evidently based its affirmance of the judgment appealed from entirely upon the findings and conclusions of the Interstate Commerce Commission and the subsequent proceedings in the Circuit Court for the enforcement of those findings and conclusions, ignoring the prior proceedings in the Circuit Court. I have not overlooked that clause in the opinion in that case where it was said:

"We are not required to say, however, that, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates."

This is certainly not saying that such a suit in equity may be brought prior to any action by the Interstate Commerce Commission. That the court did not intend by its decision in Southern Railway Co. v. Tift to overrule or in any way change or modify its opinion in the preceding case of Texas & Pacific Railway Co. v. Abilene Cotton Oil Company is, I think, also shown by the clause of its opinion immediately preceding that last quoted, which reads:

"In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decision in Texas & Pacific Railroad Company v. Abilene Cotton Oil Company, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, upon a different record than that before us."

And by the following clause near the end of the opinion in the Tift Case:

"In support of these contentions appellants rely on Texas & Pacific Railway v. Abilene Cotton Oil Company, supra. In that case the Abilene Cotton Oil Company sued in one of the courts in Texas to recover the excess of what it alleged to be an unjust and unreasonable charge on shipments of car loads of cotton seed. The defense was that the rates were charged according to the schedule of rates filed under the interstate commerce act, and that the court had no jurisdiction to grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission. The defense prevailed in the trial court, but did not prevail in the Court of Civil Appeals, where judgment was rendered in favor of the cotton oil company. The judgment was reversed by this court on the ground that the state courts had no jurisdiction to entertain a suit based on the unreasonableness of a rate as published in advance of the action of the Interstate Commerce Commission adjudging the rate unreasonable. And it was in effect held that reparation after such action for the excess above a reasonable rate must be by a proceeding before the commission, because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one.' There is nothing in that case, however, which precludes the parties, after action by the commission declaring rates unreasonable, from stipulating in the proceedings prosecuted under section 16 that the court adjudge the amount of reparation. By the action of the commission the foundation for reparation, as provided in the interstate commerce act, was established, and the inquiry submitted to the court was but of its amount, and had the natural and justifiable inducement to end all the controversies between the parties without carrying part of them to another tribunal."

For the reasons stated I think the judgment should be reversed and the case remanded, with directions to the court below to dismiss the bill at the complainants' cost.

GREAT NORTHERN RY. CO. v. KALISPELL LUMBER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 5, 1908.)

No. 1.552.

COMMERCE (§ 85*) — JURISDICTION OF FEDERAL COURTS — RAILROAD RATES — POWER TO DETERMINE REASONABLENESS.

Under Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154] as amended, including the amendatory act of June 29, 1906, c. 3591, 34 Stat, 584 [U. S. Comp. St. Supp. 1907, p. 892], the Interstate Commerce Commission has original and exclusive jurisdiction to determine the question of the reasonableness of an established rate for the interstate transportation of freight, and when a schedule of rates has been duly filed and has gone into effect the rates thereby prescribed are the only lawful rates until changed by the commission, and a court has no power to enjoin their enforcement.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 85.*

Jurisdiction of federal courts of suits under interstate commerce act, see note to Bailey v. Mosher, 11 C. C. A. 318.]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the District of Montana.

I. Parker Veazey, for appellant.

H. D. Folsom, Jr. (John Lind and A. Ueland, of counsel), for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This case differs from that of Northern Pacific Railway Company et al. v. Pacific Coast Lumber Manufacturers' Association et al. (just decided by this court) 165 Fed. 1, in that the bill was not filed until after the new rates had been established. The new schedule of rates went into operation on November 1, 1907, the bill was filed on November 9th, and the injunction order was made on December 4th. The bill alleges in substance that the appellees are lumber manufacturers in Flathead county, Mont., and have invested large sums of money in that business; that their said investments have been made and their business built up in the reliance on the permanency of reasonable freight rates for the transportation of their products to markets in the state of North Dakota; that the rates in force for many years prior to November 1, 1907, were reasonable and just, but that the appellant on November 1st established, and is now enforcing, a schedule of extortionate rates between points in Flathead county, Mont., and the markets in Dakota; that the said increase in rates is from 20 to 30 per cent., and will seriously injure, if not entirely destroy, the appellees' business; that the appellant owns the capital stock of the John O'Brien Lumber Company, a corporation engaged in the lumber business in Flathead county, on the appellant's railroad line, and possessed of large mills for the manufacture of lumber; that the lumber so manufactured by said corporation is shipped by the appellant and to a large extent is sold in the Dakota markets in competition with the appellees; that by means of the increased rates the appellant has sought to depress the business of the appellees, and to depress and lower the value of timber and stumpage in the Flathead district so as to acquire the same at less cost for its own manufacturing business; that it will be several months before relief can be had from the Interstate Commerce Commission, and that if the appellant is permitted to exact the rates prescribed by its tariff of November 1, 1907, until its reasonableness has been passed upon by the commission, the damage will be such that it cannot be established or recovered under the provisions of the act to regulate com-

By the injunction order the appellant was forbidden until the further order of the court to collect from the appellees the tariff of rates made effective on November 1, 1907, or any amount in excess of the rates of the old tariff which had been established for many years and was in force prior to and until November 1st.

The Circuit Court held that its jurisdiction was properly invoked as exclusive, for the reason that the suit was brought to enforce compliance with the terms of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and grant-

ed injunctive relief upon the clear showing that a great injustice would be done by requiring the appellees to submit to the newly adopted rates until the Interstate Commerce Commission could act, since the enforcement of that schedule of rates would be followed by the practically immediate destruction of the business of a large number of persons, and that said rates were extortionate and unreasonable.

The question which was before the Circuit Court was a new one, not directly affected by prior adjudications, unless it is to be held that its decision was indicated in a general way by the principles announced in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. Upon the case made in the bill, and the sustaining affidavits, it appears that the appellant is engaged in the commission of acts which, before the Interstate Commerce Commission shall have determined their legality, will have caused irreparable injury to the appellees, and for which there is no remedy unless it is to be found in a court of equity.

We are not insensible of the force of the argument that the existence of the power of the Circuit Court to afford such relief is not inconsistent with the decision in the Abilene Cotton Oil Case, and that it is not the necessary inference to be drawn from that decision that no court may enjoin the enforcement of a newly established unlawful schedule of rates until after the Interstate Commerce Commission shall have exercised its jurisdiction to pass upon the question of its lawfulness. In that case the court said:

"For if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced."

And the court, after adverting to the absolute destruction of the act and of the remedial provisions which it created, which would arise from the recognition of such a right, proceeded to say:

"For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission, and with the duty, which the statute casts upon that body, seeing to it that the statutory requirement as to uniformity and equality of rates is observed."

It is true that the question actually litigated and decided in that case concerned only the right of an individual shipper to recover excessive and unjust freight charges paid under protest on car loads of freight carried over the defendant's road, that it was to the inquiry whether such right of recovery existed prior to the action of the commission that the language of the opinion was addressed, and that

there was involved no question of the right of concerted action on the part of, or in behalf of, all shippers to restrain temporarily the enforcement of a schedule of rates affecting all persons similarly situated. And it may be conceded that while it is obvious, and it is clearly pointed out in the opinion, that if individual shippers may institute in divers courts each his own action at law to recover damages for alleged violation of the interstate commerce law in the making and collecting of excessive and extortionate freight charges, prior to judgment thereon by the commission, the actions will necessarily result in divergent conclusions, or, in other words, that a multitude of independent restraints would destroy all uniformity of rates, such result might not necessarily attend the exercise of jurisdiction as it was in-

voked in the present case.

But when we consider the scope and purpose of the act, enlightened by the observations of the court in the decision just referred to, and take into account all the provisions of the act, we are led to the conclusion that it was the intention of Congress that the jurisdiction of the Interstate Commerce Commission to decide the question of the reasonableness of an established rate for the interstate transportation of freight should be original and exclusive. Prior to the interstate commerce act, there was no regulation of the interstate carriage of freight. Under its power to regulate commerce, Congress has the exclusive power to establish the rates of such transportation of freight. the interstate commerce act it has delegated that power in the first instance to the interstate carriers, but has imposed upon them the obligation to establish reasonable rates. The carriers may not only establish rates, but they may change established rates. They may increase them or lower them, provided that at all times the rates are reasonable, and there can be no presumption that an increase in rates is unreasonable. It is given to the Interstate Commerce Commission to decide whether the rates so established by the carriers are reason-Thus the whole power to establish rates begins with the carrier and ends with the commission. Prior to the act, there was no power in any court to establish interstate rates, and it is certain that the act itself vests no such power in any court.

When a schedule of rates is once established in the mode prescribed by the statute, a former rate is superseded and is no longer in existence. There can be no question that to enjoin a rate already established and in operation and to require the carrier to observe a previously established rate no longer in effect is to make a rate. A court can have no more power to say that the carrier shall go back to a superseded rate than it has to fix a wholly new rate. In either case the court establishes a rate. It can make no difference that the newly established rate has been in existence but a short time before the application to a court for injunctive relief. If a court may enjoin the enforcement of a rate newly established, as in this case, it may on the same grounds enjoin any established rate, no matter how long it may have been in force, and may compel the carrier to observe either the former rate or a new rate. The result is to divest the Interstate Commerce Commission of its power, "which body alone," said the court in the Abilene Cotton Oil Case, "is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable."

The argument that the enforcement of the newly established rates will work irreparable injury, for which there is no remedy if injunctive relief is denied, loses its cogency when we take into view the fact that the Interstate Commerce Act requires all interstate commerce carriers to give 30 days' notice of a proposed change in the schedule, and thereby affords shippers ample opportunity to resort to equity to prevent the establishment of a proposed rate which may be so unreasonable as to work irreparable injury. Section 6 requires the carrier to keep open to the public inspection at all its stations and to file with the commission schedules of its established rates, and prohibits alike an advance or a reduction in such rates without prior public notice, and declares that it shall be unlawful for any carrier of interstate commerce to charge or receive from any shipper a greater or less compensation than that specified in such schedules. In brief, a carrier cannot lawfully charge or receive any rate other than that so established, and any departure therefrom will subject it to the penalty denounced by the act. We see no escape from the conclusion that the rate so established must be considered binding upon the carrier until corrected in the only manner pointed out by the act, and that any rate promulgated and adopted in practice in the manner required by law is a lawfully established rate, however exorbitant and unreasonable it may be, and that there is no power vested in any court to declare it unreasonable prior to the decision of the commission. Potlatch Lumber Co. v. Spokane Falls & N. Ry. Co. (C. C.) 157 Fed. 588.

The injunction order is reversed.

ROSS, Circuit Judge (concurring). I agree to the order of reversal—my views upon the subject being expressed in my dissenting opinion this day filed in the case entitled Union Pacific Railroad Company et el. v. Oregon & Washington Lumber Manufacturers' Association et al. (No. 1,525) 165 Fed. 13.

THOMAS & BARTON CO. et al. v. THOMAS et al.

(Circuit Court of Appeals, Fifth Circuit. November 10, 1908.)

No. 1,788.

1. Corporations (§ 47*)--Corporate Name-Power to Change.

The change of name of a private corporation is not material, and does not require the unanimous consent of the stockholders, but in the absence of fraud is merely a matter of business management,

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 134, 135; Dec. Dig. \S 47.*]

2. Corporations (§ 190*)—Rights of Stockholders—Action by Minority Stockholder Against Corporation.

A bill by a minority stockholder in a trading corporation, not shown to be insolvent, complaining of the management of the majority, in which no ultra vires nor prima facie fraudulent act is specifically al-

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

leged, but which contains merely general suggestions and allegations of fraud and conspiracy, and the gravamen of which is that the corporation has changed its name, as was authorized by law, and that a relative who specially represented complainant's interests has been removed as manager and a director, does not state facts authorizing a court of equity to require the corporation to purchase complainant's stock.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 190.*]

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

The bill in this case alleges as follows:

(1) That about the year 1880 the firm of Thomas & Barton, consisting of A. A. Thomas, the brother of your oratrix, and the defendant, J. E. Barton, was organized in the city of Augusta, for the purpose of engaging in the business of wholesale and retail dealers in pianos, organs, musical instruments, sewing machines, and all other articles usually dealt in by a business of that character.

(2) That from the time the said firm of Thomas & Barton was organized up to about the 17th day of January, 1899, the aforesaid business was carried on in the city of Augusta, county of Richmond, under the name of Thomas & Barton, and by a system of judicious advertising, at large expenditure, and by honest and fair dealing with the public, the said firm built up an enviable reputation under said name in the states of South Carolina and Georgia.

(3) That just prior to the 17th day of January, 1890, a corporation was organized for the purpose of taking over the assets and good will of said business of Thomas & Barton, and a charter was granted on the 17th day of January, A. D. 1899, by the superior court of Richmond county, Ga., to the Thomas

& Barton Company, with an authorized capital stock of \$35,000.

(4) That your oratrix having implicit confidence in the business ability, integrity and sagacity of her brother A. A. Thomas, who, up to that time, had been the senior member of the firm of Thomas & Barton, aforesaid, and believing that the capital stock of the said corporation, under the management of the said A. A. Thomas, would be a good business investment, subscribed for and paid for \$13,000.00 of the capital stock of the aforesaid corporation.

(5) That at the time the said Thomas & Barton Company began business there was about \$29,000 of its capital stock subscribed and paid for by the following stockholders, to wit: Your oratrix \$13,000.00 or 260 shares of the capital stock; Mrs. E. C. Barton, \$13,000, or 260 shares of the capital stock; Weber Piano

Company, \$3,000 or 60 shares of the capital stock.

(6) That upon the organization of said corporation as aforesaid, the brother of your oratrix, A. A. Thomas, who had been the senior member of the firm of Thomas & Barton, as aforesaid, was elected president and business manager of said corporation, and the business of said corporation was conducted in a profitable and successful manner to the 29th day of June, 1905, at which time the business showed a large surplus of accumulated profits, aggregating nearly \$50,000.

(7) That the business carried on by the aforesaid corporation consisted largely in selling pianos, organs and musical instruments on long time, or what is known as the instalment plan, and frequently required a large amount of capital; that on said 20th day of June, 1905, the said corporation desiring to borrow the sum of \$10,000.00 for the purpose of increasing its working capital, did have a resolution introduced and passed wherein it was agreed to increase the capital stock of said corporation from \$35,000 to \$45,000, making the \$10,000 increase preferred stock at a par value of \$50 per share with the guaranteed dividend of six per cent.

(8) That it was further stipulated that said preferred stock should be redeemed at any time after the expiration of one year by the payment of the

preferred stock with the accumulated six per cent. interest.

(9) That said \$10,000 in preferred stock was subscribed for by said Hugh A.

^{*}For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Alexander, T. R. Maxwell, and the National Exchange Bank, in the following proportions, to wit: \$2,500, or 50 shares, to Hugh H. Alexander; \$5,000, or 100 shares, to T. R. Maxwell; and \$2,500, or 50 shares, to the National Ex-

change Bank.

(10) That before the said Hugh H. Alexander, T. R. Maxwell, and the National Exchange Bank would advance the aforesaid sum of \$10,000 for said preferred stock, they required that an additional \$10,000 of the common stock of said corporation be donated to them as a bonus for said loan, and without any other consideration whatever, and, as this bonus was exacted as a condition precedent to the making of said loan by said Hugh H. Alexander, T. R. Maxwell, and the National Exchange Bank, the said \$10,000 of common stock was donated to the said Hugh H. Alexander, T. R. Maxwell, and the National Exchange Bank, in the following proportions, to wit: Your oratrix. \$4,500, or 90 shares of the capital stock; Mrs. E. C. Barton, \$4,500, or 90 shares of the capital stock; and the Weber Piano Company, \$1,000, or 20 shares of said capital stock.

(11) That under said resolution said preferred stock was given equal voting power with the common stock, and after the preferred was issued as aforesaid. and the common stock was donated as aforesaid, the capital stock of said corporation of Thomas & Barton Company stood as follows: Your oratrix, \$8,500, or 170 shares; Mrs. E. C. Barton, \$8,500, or 170 shares; Weber Piano Company, \$2,000, or 40 shares; Hugh H. Alexander, \$2,500, or 50 shares of the common stock, and \$2,500 or 50 shares of the preferred stock; T. R. Maxwell, \$5,000 or 100 shares of the common stock, and \$5,000 or 100 shares of the preferred stock; the said National Exchange Bank, \$2,500 or 50 shares of the common stock, and \$2,500 or 50 shares of the preferred stock; and a small amount of stock, the exact amount of which is not known to your oratrix, was held by A. A. Thomas, J. E. Barton, and W. H. Barrett.

(12) That less than 60 days after the acquisition of said \$10,000 of common stock, by the donation as aforesaid, and \$10,000 of preferred stock, the said Hugh H. Alexander, T. R. Maxwell, and said National Exchange Bank combined, conspired, and confederated and agreed together to assume the control and management of the business of said corporation, and, as your oratrix is informed and believes, by threats and intimidations, compelled the said J. E. Barton, the husband of Mrs. E. C. Barton, having control of her stock, and holding her proxies, to join in said combination and conspiracy as aforesaid, and a short time thereafter deposed the said A. A. Thomas from the office of president of said corporation, and reduced him to a common salesman; that a short time thereafter they demanded his resignation even as a common salesman, and entirely excluded him, although he held a power of attorney to vote and manage the stock of your oratrix, from any active participation in the conduct and management of said business.

(13) That said A. A. Thomas went to the said J. E. Barton, who had been his business partner for more than 25 years, and protested against his joining with the said Hugh H. Alexander, T. R. Maxwell, and the National Exchange Bank, in their desire to oust him from any participation in said business, and proposed to him that they join together and raise the \$10,000 advanced upon the preferred capital stock and pay the same, and thereby resume the management of their own business; that the said A. A. Thomas was informed by the said J. E. Barton that he was afraid, because the cashier of said National Exchange Bank, which said National Exchange Bank was a creditor of said corporation of Thomas & Barton Company, had threatened to place said corporation in bankruptcy in the event the said Thomas should have any voice

in the management or control of the said business.

(14) That at a meeting of the stockholders of said Thomas & Barton Company held on the 11th day of February, 1907, by a vote of the \$10,000 of preferred stock, and the \$10,000 common stock, donated as aforesaid, held by the said Hugh H. Alexander, Lula C. Maxwell, executrix of the estate of T. R. Maxwell, and the said National Exchange Bank, and the stock held by said J. E. Barton and Mrs. E. C. Barton, a new board of directors was elected and the said A. A. Thomas deposed as a director, and thereby your oratrix was deprived of any further participation in the management and control of said corporation.

(15) That on the 4th day of March, 1907, the stockholders of said corporation, at a meeting called for that purpose, introduced a resolution that an application to the superior court of Richmond county be made for the purpose of changing the name of the Thomas & Barton Company-which was the name of said corporation from the date of its organization, and which name was purchased from the said Thomas & Barton, and which had been used by the said Thomas & Barton for a quarter of a century-to the Barton Piano & Furniture Company.

(16) That, when said resolution was proposed at said meeting, your oratrix, through her representative, protested against this sacrifice of the corporate assets, contending that the good will and name of Thomas & Barton was too valuable an asset to be destroyed by the contemplated act of the incorporators, and notified the said stockholders that the courts would be appealed to to restrain the wrong that they were about to accomplish, the same being destructive of the value of your oratrix's property.

(17) That, notwithstanding the earnest protest made by your oratrix, the stockholders of said corporation adopted the resolution to change the name of said company as aforesaid by the vote of the donated stock as hereinabove set

(18) That your oratrix then contemplated and now contends that the amendment to the charter as contemplated by said resolution is a fundamental, radical, and vital amendment; that said amendment could not be adopted by a part of the stockholders of said corporation, but requires the unanimous consent of all the stockholders; that there has been expended in advertising the name under which said corporation was then conducting its business over \$100,000, and to nullify the effect of such expenditure was to act willfully oblivious of the best interest of said company, and to the great detriment of your oratrix.

(19) That your oratrix, in depositing her common stock with the holders of the preferred stock, as hereinabove set forth, only intended to deposit it as collateral for a debt; that this understanding is corroborated by the resolution which was adopted at the time said loan was made, wherein it was provided

that said stock was to be redeemable after the expiration of one year.

(20) Your oratrix further shows that by the financial statement issued by the Thomas & Barton Company on January 1, 1907, it appears that the total assets of said corporation are of the value of \$121,255.54; that the total outstanding indebtedness of said corporation, exclusive of the \$10,000 preferred stock above referred to, is \$38,642.70; and that counting the outstanding stock as liability, both common and preferred, there is a clear surplus of the assets of said corporation amounting to \$41,811.84, and that, therefore, the \$13,-000 invested by your oratrix in the corporation aforesaid should be of the value of at least \$26,000; that, notwithstanding this fact, the said Hugh H. Alexander, T. R. Maxwell, and the National Exchange Bank, by combining and agreeing with the said J. E. Barton, who controls the stock of Mrs. E. C. Barton, to vote their stocks together to the detriment and injury of your oratrix, have, by the investment of \$10,000, which was merely intended as a loan to said corporation, assumed the entire control and management of said corporation, and have excluded your oratrix from any participation therein, and have deprived her of all representation in the management and control of said corporation, and by attempting to change the name of said corporation which is one of its principal assets—threaten to completely destroy the business of said corporation and the property of your oratrix.

(21) And your oratrix further shows that said corporation has been under the management and control of the said A. A. Thomas as president and general manager from its inception to July, 1905, and that during that period, in addition to the expenses of the corporation, and the salaries of the officials, and the payment of all liabilities of the corporation, it has accumulated a sur-

plus profit of over \$41,000.

(22) Your oratrix further charges, for the reasons hereinabove set forth, that the deposition of said A. A. Thomas, as president and manager of said business, was not only unwise as a business proposition, but was prejudicial to the best interest of the corporation, and that the contemplated change of the name under which said corporation has been able to accumulate the surplus as above set out, in a comparatively short period, could only be inspired by a desire to injure your oratrix in the possession of her stock as aforesaid.

(23) That the arbitrary exercise of the voting power of the donated stock, as aforesaid, that was given to the said Alexander, Maxwell, and the National Exchange Bank, has been used to the great detriment of your oratrix, and to depose the said A. A. Thomas, upon whom your oratrix relied to look after her interest in the conduct and management of said business; that without said illegally issued stock the said A. A. Thomas would not have been deposed, nor the great wrong done to the value of your oratrix's stock.

Complainants prayed for an injunction restraining the defendants from attempting to change and changing the name of the corporation, restraining Alexander and others from voting the \$10,000 of the preferred stock, and adjudging that said parties have no right to the \$10,000 of donated stock, and for

an injunction and receiver.

The bill was demurred to on several grounds, mainly for want of equity. On hearing, the Circuit Court permitted an amendment suggesting generally a dissipation of assets, and then denied all relief except an injunction restraining the defendants from attempting to change the name of the corporation and from dissipating the assets, and ordering a reference to hear evidence and determine and report the actual value per share of the common stock of the corporation owned by Florence M. Thomas and A. A. Thomas, in order that suitable decree may be entered requiring the said Thomas & Barton Company to pay the said Florence M. Thomas and A. A. Thomas the true and actual value of the common stock owned by them in said company.

J. R. Lamar and E. H. Callaway, for appellants.

Alexander Akerman, Charles Akerman, and C. Henry Cohen, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). An inspection of the bill shows a minority stockholder of a trading corporation complaining of the management of the majority, in which no ultra vires nor prima facie fraudulent act is sufficiently and specifically alleged, the pleader dealing only in general suggestions and allegations of fraud and conspiracy. All the facts alleged relate to the ordinary business and management of the corporation, and the real gravamen of the bill appears to be that complainant's brother, A. A. Thomas, who was a leading partner in the old business of Thomas & Barton and one time manager of the corporation, is not by the present management permitted to be an active official, president, director, or clerk, and in such capacity to represent complainant's interests and to oversee and help carry on the business. The amendment permitted on the hearing in the Circuit Court is too general in its averments to in any wise enlarge the scope of the bill.

The law of Georgia permits amendments to charters of corporations by proper proceedings before the Superior Court. Civ. Code Ga. 1895, § 2350 (6); Acts 1897, p. 28. The change of the name of a private corporation is not material (1 Thomp. Corp. § 82; 10 Cyc. 211, and cases cited); and, whether the name be valuable or merely designative and ornamental, the change thereof under and pursuant to law does not require the unanimous consent of the stockholders; and, in the absence of fraud, it is a matter of business management. All the authorities brought to our attention by counsel or found on our own

search are in harmony with this conclusion.

There are neither averments in the bill nor evidence in the record warranting an injunction restraining the dissipation of assets. In our opinion, there is no showing by averment, evidence, or argument warranting the retention of the bill for the purpose of ascertaining the actual value of complainant's stock with a view to compel the corporation or the majority stockholders to buy or pay for the same. To carry out such purpose would be either to force a liquidation of the corporation (not alleged or shown to be insolvent), or the majority stockholders to buy or sell to protect their interests.

For these reasons the decree of the Circuit Court granting an injunction pendente lite is reversed, and the cause is remanded with instructions to dismiss the complainant's bill for want of equity.

AMERICAN TRUST & SAVINGS BANK v. ZEIGLER COAL CO. (two cases).

(Circuit Court of Appeals, Seventh Circuit. October 6, 1908.)

Nos. 1,451, 1,452.

1. ACTION (§ 56*)—CONSOLIDATION—DISCRETION OF COURT.

Under Rev. St. § 921 (U. S. Comp. St. 1901, p. 685), authorizing the court to consolidate causes when it appears reasonable to do so, a Circuit Court may in its discretion consolidate cross-actions between the same parties for breach of the same contracts.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 631; Dec. Dig. § 56.*]

2. SALES (§ 83*) -- CONTRACT FOR SALE OF COAL TO BE DELIVERED "F. O. B.

CARS"-DUTY TO FURNISH CARS.

Where, under a contract for the sale and shipment of coal by a coal company, which provided that deliveries should be made "f. o. b. cars" at the mine, during several months the seller obtained from the railroad companies all cars in which shipments were made, and excused delays to the purchaser on the ground of shortage of cars, without making any claim that the purchaser was bound to furnish the same, the contract must be construed as requiring the seller, and not the purchaser, to furnish cars

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 224-227; Dec. Dig. § 83.*]

3. EVIDENCE (§ 155*)—LETTERS OF ADVERSE PARTY—SELF-SERVING STATEMENTS. Self-serving statements of fact, made in letters written by one party, which are introduced in evidence by the adverse party for other purposes, are neither confessed by such introduction nor made competent evidence thereby.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 453; Dec. Dig. \S 155.*]

4. Trial (§ 170*) — Taking Question from Jury — Direction of Verdict in Consolidated Causes,

Where an action to recover the price of coal sold and delivered under a contract was consolidated for trial with an action by the purchaser against the seller to recover damages for breach of the contract, but the issues in each action were tried independently, the direction of a verdict for the plaintiff in the first action, on the admission by the defendant that the account was correct, was not error because of error committed on the trial of the other issue.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 170.*]

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Northern Division of the Eastern District of Illinois.

The plaintiff in error, as trustee in bankruptcy of Scott Coal & Coke Company (substitute for the bankrupt), brings for review under these writs two several judgments, entered in the Circuit Court against such bankrupt corporation. In No. 1,451, Scott Coal & Coke Company sued Zeigler Coal Company, defendant in error, in assumpsit to recover damages for alleged breach of contracts for delivery of coal, set out in various counts of the declaration, as amended. Issues were joined, and upon submission to a jury the trial court directed a verdict in favor of the defendant, resulting in the judgment complained of. No. 1,452 exhibits a suit by Zeigler Coal Company (commenced prior to the above-mentioned action) against Scott Coal & Coke Company to recover for coal actually delivered under contract, with plea of general issue and trial to a jury, wherein the court directed a verdict against the Scott Coal & Coke Company, assessing damages at \$3,927.68, and judgment was recovered accordingly. These actions were consolidated, under orders entered by the trial court, and proceeded to trial before a jury, with the issues in each treated as independent issues thereupon. The questions arising under each writ of error and such facts as are involved therein are stated in the opinion.

Charles E. Pope, for plaintiff in error. Horace Kent Tenney, for defendant in error. Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The reviewable questions which arise under either of these writs of error are free from complication, as we believe, either in law or fact, notwithstanding the extent of testimony (appearing in the transcript of record in No. 1,451) and numerous propositions, both of law and fact, discussed by counsel in the oral argument and submitted, respectively, in printed briefs. In each writ are involved the same agreements upon terms for deliveries of coal from the mines of Zeigler Coal Company (hereinafter referred to as the "Zeigler Company") at Zeigler, Ill., on shipping orders sent by Scott Coal & Coke Company (hereinafter mentioned as the "Scott Company") for consignment to various customers of the last-named corporation. The contracts in litigation were made in 1905, at various dates, for purchase and shipment by rail of two general classes of coal mined at Zeigler—one designated as "prepared coal" and the other as "screenings"—for periodical deliveries as stated up to March 31, 1906. Provisions for the amount of prepared coal to be shipped on orders, for proportional monthly shipments, and for the price of each grade are contained in a series of letters in evidence commencing with letters dated, respectively, June 6, 7, and 8, and renewed and confirmed in letter of the Zeigler Company, dated November 2, 1905—and such correspondence clearly establishes, as we believe, mutual understanding and obligation in each of these terms, with 25,-000 tons of prepared coal as the aggregate amount to be ordered and delivered under the entire contract. The agreements for screenings were several-oral in part, but mainly confirmed by letters-and the amounts, price, and terms of shipment are specified and uncontro-

Under the several contracts the Zeigler Company made shipments of prepared coal and screenings, commencing in June, 1905, and continu-

ing up to January 27, 1906, when it refused to make further deliveries, upon the alleged ground of failure on the part of the Scott Company to pay for prior shipments; and the facts are undisputed in reference to the amounts shipped and actual payments made. On the other hand, failures on the part of the Zeigler Company to make shipments at the times and in the quantities intended by the contracts appear from the testimony. Controversy thus arose between the contracting parties whether one or the other was in default under the terms of the several contracts, and each brought suit against the other, in assumpsit, to enforce its contentions. These actions were consolidated, pursuant to section 921 Rev. St. U. S. (U. S. Comp. St. 1901, p. 685), on motion of the Scott Company, and trial of the issues to a jury resulted in a verdict in favor of the Zeigler Company in each cause, as directed

by the trial court, and several judgments accordingly.

The method of trial so adopted, with the two cases treated as separate alleged causes of action, requiring separate verdicts and judgments, conforms to the purpose of the statute referred to, as upheld in Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285, 293, 12 Sup. Ct. 909, 36 L. Ed. 706, and recognized in American Window Glass Co. v. Noe (decided by this court during the current term) 158 Fed. 777, 86 C. C. A. 133. Several writs of error were needful, therefore, for review of such judgments as presented here in cases Nos. 1,451 and 1,452; but the questions arising under each are independent, and no ground appears for the preliminary motions submitted on behalf of plaintiff in error to consolidate writs or records for the purposes of review, although heard together and so embraced in this opinion. The contentions for reversal in each case hinge upon alleged error of the trial court in directing verdict in favor of the defendant in error, and they are determined in the cases severally as above entitled.

1. The issues in No. 1,451, suit of the Scott Company against the Zeigler Company, under the several counts of the declaration and general plea, are: (1) Whether the contracts were made between the parties for purchase and delivery of coal as averred; (2) whether the Zeigler Company was guilty of breach thereof; and, in such event, (3) what damages were incurred. As above stated, the making of the contracts is established by uncontroverted evidence, and no uncertainty appears in the terms agreed upon, unless it arises out of failure to specify which one of the parties was to provide the cars for shipment of the coal from the mines at Zeigler to destination as ordered. So all facts are settled in the first-mentioned issue, leaving only the meaning of the contracts, in reference to furnishing the cars, or the fact of agreement thereupon, to be ascertained upon the issue of breach.

The primary facts averred as breaches of the several contracts being undisputed—namely, repeated failures on the part of the Zeigler Company to fill the orders duly given for shipments of coal under such contracts within the times or in amounts stipulated therefor, both before and after the renewal contract made November 2, 1905—the contentions in support of the judgment are, substantially, that the Zeigler Company was not in default in such nonperformance, for these alleged causes: (a) That cars were not provided by the Scott Company to

make the required shipments; (b) that failures to make shipments were due to inability on the part of the Zeigler Company to obtain cars therefor in any view of its obligations in that behalf; (c) that the Scott Company is chargeable for delay or breach in cancellations and changes of shipping orders; and (d) that the Scott Company was in default for nonpayment of invoices, when the Zeigler Company, on Tanuary 27, 1906, refused to make further deliveries. The first two contentions only—in reference to car supply—appear to have been applied by the trial court for direction of the verdict in favor of the Zeigler Company, and we are not impressed with either of the others as meriting extended discussion. They are dismissed, therefore, with remark, in passing: While delay caused by the purchaser, in cancellation or change in orders, may well defeat recovery for such delay, no sufficient evidence to that end appears in the record to take the case from the jury. The assumed default of the Scott Company refers to payments withheld for December and January shipments of coal, for which it tendered offset of damages for delays claimed in shipments; but such offers were promptly made, in our view of the testimony, and any question of default therein on the part of the Scott Company rested alone on solution of the primary issue whether its claim of damages was then well founded.

The propositions on which submission to the jury was denied, and a verdict directed, are thus stated, substantially, in the instructions: (1) That the contract for delivery of "prepared coal," making no express stipulation for providing the cars for such deliveries, imposes such duty on the purchaser (under authorities cited), and, failing to supply the cars for shipments thereunder, the Scott Company, as purchaser, was not entitled to recover for nondeliveries; (2) that the several contracts for "screenings" expressly exempted the seller from obligation to deliver "in case of short car supply," and letters in evidence establish that "the failure to deliver" thereunder "was because of a shortage in the car supply," not disproved by plaintiff in the suit, so that the Zeigler Company was relieved from liability for the nonperformance charged in the declaration. Both of these propositions are urged in support of the judgment, as alike applicable to all the contracts in suit, and we have considered them in reference to either theory.

(1) The question whether the Scott Company, as purchaser of the coal for shipment from Zeigler, became obligated under any of the contracts to provide cars for its delivery, arises (as before stated) with all express contract terms undisputed, and the fact conceded that no cars were so furnished by this purchaser for any delivery made or ordered in the course of the transactions. Although each contract plainly requires all deliveries of coal to be made on cars for shipment by rail, no undertaking on the part of either seller or purchaser to place orders for such cars is expressed in any of the letters in evidence, making up the several contract terms, nor mentioned in the testimony, oral or written, as expressly agreed upon. The only provision contained in the contract for "prepared coal" in reference to delivery requires the seller to deliver at Zeigler, "f. o. b. cars"—the well-known

commercial term which relieves the seller from expense or risk after shipment—while like terms in the several contracts for "screenings" are thus supplemented: "Subject to strikes, short car supply, and unavoidable accidents." Upon these distinctions in the contract terms, respectively, the trial court appears to have placed its several interpretations of duty thereunder, concluding with an instruction against recovery under either contract.

For the construction adopted of the express terms referred to in the contract for delivery of prepared coal, support appears in the line of authorities relied upon as precedents for a general rule applicable to these terms of delivery "f. o. b." (and like provisions between purchaser and seller) for shipment by rail, that the purchaser thereby assumes the duty to furnish cars for such delivery, alike with the established rule in reference to "f. o. b." contracts for shipment by vessel. Hocking v. Hamilton, 158 Pa. 107, 115, 27 Atl. 836, and cases cited; Chicago Lumber Co. v. Comstock (in this court) 71 Fed. 477, 18 C. C. A. 207; Davis v. Columbia Coal Min. Co., 170 Mass. 391, 49 N. E. 629, and cases cited. Another line of authorities (John O'Brien Lumber Co. v. Wilkinson, 117 Wis. 468, 470, 94 N. W. 337; Vogt v. Schienebeck, 122 Wis. 491, 496, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989) adopts a general rule for interpretation of such contracts for delivery on cars, but reverses the implied obligation, as resting on the seller to obtain the cars. In Illinois, however—where these contracts were entered into and made performable—the Supreme Court has rejected both of the foregoing views of a general rule for ascertaining the obligation, under like contracts for delivery at a mine, and, resorting to evidence of subsequent conduct in performance, has uniformly "adopted the construction placed upon the contract by the parties themselves" as the test, and so charged the seller with duty to furnish the cars, in each instance. Consolidated Coal Co. v. Jones & Adams Co., 232 Ill. 326, 328, 83 N. E. 851, and prior cases reviewed. With precedents thus conflicting, not only on the import of the general rule, but as to any prima facie force of the terms of delivery referred to, the issue of contract duty to provide the cars would appear difficult of solution, in the absence of other evidence to establish the understanding of the contracting parties. We are of opinion, however, that the proof to that end is sufficient in this record, within the well-settled rule of interpretation under which the above-cited Illinois cases are decided, and that neither the above-mentioned question of any general rule of implied duty under the phrase "f. o. b. cars," nor the further question whether the Illinois definition of their effect is controlling, as variously discussed in the briefs, is involved for determination.

The express provision in each contract for delivery of the coal on cars, to be shipped to various points necessarily implies an agreement or understanding, between the parties for its performance, that such cars were to be obtained from the railroad companies upon timely orders to be given by one of the parties, such requirement for the service being patent to both; and the utmost effect of the assumed general rule, upon which the trial court directed the verdict, is to raise the

prima facie inference that the parties intended the purchaser to make such orders, when not otherwise agreed upon—while the rule cited contra infers the seller to be intended—so that neither rule is applicable to set aside any arrangement they make for this incidental requirement. It cannot, of course, affect their contract right to provide therefor as they may agree upon, and, when the evidence shows their mutual understanding of the duty, any conflicting inference under the assumed rule is without force; and such arrangement between the parties, construing or fixing such duty not otherwise specified in the terms of sale, is provable as well by circumstantial evidence (in settled course of conduct or like incidents and assent in performance) as by express stipulation.

Under each contract in suit deliveries were constantly made during the several months of performance, on cars which were uniformly obtained by the Zeigler Company, through its requisitions upon the railroads, and the voluminous correspondence between the parties throughout the course of the transactions discloses no intimation of duty or neglect on the part of the Scott Company to provide cars; nor is there any testimony in the record which tends to support that view. These letters in evidence (making up most of the testimony) abound in complaints made by the Scott Company of failures to ship the coal promptly on their contract orders, and in various excuses stated by the Zeigler Company for such delays—with alleged failure of the railroad companies to supply cars on their orders as one of the causes and instances appear of aid offered by and suggested to the Scott Company to urge the railroad officials to "remove restrictions" and supply the needful cars. Each instance, however, relates to orders given by the Zeigler Company for such cars, and authorizes no inference that the Scott Company was intended or expected to perform the duty of placing orders. Indeed, under the proof that extensive shipments of coal to other purchasers from the Zeigler Company were carried on meantime, for which car supply was constantly required, no method would seem feasible for the numerous purchasers, or either of them, to make the requisitions upon the railroads for the cars, under the well-known and needful regulations demanded for apportionment of such service. The fact, therefore, of agreement, express or implied, that the Zeigler Company were to obtain the cars for all these deliveries in suit, is clearly established, as we believe, by the evidence, and the direction of verdict was unauthorized under the general rule referred to, were such rule otherwise applicable to either contract.

(2) The contention that verdict was rightly directed in favor of the Zeigler Company, under "undisputed proof" of car shortage as the cause of each failure to make timely delivery of coal, would impress us with force—not only in reference to the contracts for screenings, as pointed out in the instructions, but for delays as well so caused in shipments of prepared coal—were the evidence upon which such contention rests both competent and decisive that inability to obtain cars was the sole cause of each alleged default in delivery. Whatever the fact may be, however, we are of opinion that no sufficient evidence to that end is of record. The so-called "undisputed proof" is comprised

in repeated statements by the Zeigler Company (in letters to the Scott Company excusing delays) that the railroad companies refused or neglected to furnish the cars, and in references to such difficulty which

appear in letters written by the Scott Company.

As these letters were introduced by the Scott Company, with all the correspondence between the parties, in the course of its direct evidence, without objection or reservation, it is contended, in substance, that statements so appearing in letters offered by it, though written by the adverse party, thus become evidence of facts therein stated, and (saying the least) required the Scott Company to disprove such excuses for delay to make out its prima facie case. This view we believe to be untenable under the well-settled rules of evidence, which recognize the admissibility of correspondence between the parties for various purposes, but impose no such burden upon its introduction by either party. Self-serving statements of fact, thus appearing in a letter introduced by the adverse party, are neither confessed by such offer, nor made competent proof of facts so stated. Moreover, evidence appears in the record, offered on behalf of the Scott Company, of the supply of cars at the mines during the period in controversy, tending to disprove car shortage as an excuse for nondeliveries under either contract; and, if any issue of fact arose under the excuses, it was for determination by the jury.

We are satisfied, therefore, that error is well assigned in No. 1,451, upon the instruction to find against the plaintiff in error under the

issues.

2. In No. 1,452, however—the suit by the Zeigler Company to recover on account of coal actually delivered under the several contracts, the first issue submitted under the consolidation for trial—we are of opinion that no reviewable error appears in the record. The bill of exceptions shows that trial of the issue joined therein was in progress when the Scott Company (defendant) entered its admission that the account as stated was correct and that the plaintiff's "prima facie case" was established, although counsel for the Scott Company had previously stated: "We claim that we have offset it [the amount thus due] against the damages which we have sustained." Thereupon the plaintiff rested its case, and the court ruled the defendant to "proceed with the defense." Instead of such course, however, counsel for the Scott Company thus stated their election to waive such defense and proceed independently in their above-mentioned suit No. 1,451, viz.: "We are not starting in on the defense, but we are starting in on the affirmative in our case" and the trial so proceeded to a conclusion with no offer of the testimony, at any stage, by way of defense or offset in the prior issue; nor does any request or motion appear for submission to the jury in that view. Whatever of benefit was sought by the plaintiff in error in this course, the way was clearly open under the consolidation to preserve any claim of offset against the account; but its election to pursue its claim for damages alone in its suit (No. 1,451) left no issue for submission to the jury on the account as confessed, and the separate judgment therein, entered upon verdict directed accordingly, cannot be disturbed for the erroneous direction in the subsequent

issue thus tried independently.

The judgment, therefore, against the plaintiff in error in No. 1,451, is reversed, and such cause remanded to the Circuit Court for a new trial. In No. 1,452 the judgment against the plaintiff is affirmed.

CORLL v. MASURITE EXPLOSIVE CO.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1908.)

No. 1,798.

MASTER AND SERVANT (§ 285*)—ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

Evidence considered, in an action by an employé against the master for a personal injury, and *held* sufficient to entitle the plaintiff to have submitted to the jury the question whether or not the injury was proximately caused by a defective appliance, for the condition of which defendant was responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1011–1014; Dec. Dig. § 285.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Charles Fillius, for plaintiff in error.

J. C. Brooks, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The defendant is a corporation engaged in manufacturing and selling masurite, a high explosive, and detonating caps to explode it. The caps are each 1¼ inches long and one-quarter of an inch in diameter. Each cap contains two copper wires, 8 feet long, which pass through the priming charge and are connected at the ends by a piece of platinum wire. The priming charge is sealed into the cap by a mixture composed largely of sulphur. The detonating cap, or, as it is commonly called, the exploder, is placed within the explosive, and the ends of the copper wires are attached to longer wires connected with a powerful electric battery. A heavy current passing from this battery through the detonater would explode it, and with it the explosive itself.

Before selling detonators, the Masurite Company tested them, using for the purpose a delicately constructed instrument, called an "ohmmeter." By the movement of an indicator on a dial (covered with glass) this device measures and shows the force of the current of electricity which is produced by the battery and passed through the resistance coil. In testing a detonator, the exposed ends of its wires were at the same time placed upon the two posts of the ohmmeter, thus sending a current of electricity from the battery of the ohmmeter through the platinum wire of the detonator, which is used to explode the detonator when a powerful current is applied later for that purpose. If the ohmmeter, used as described, should register on the dial

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a certain number of ohms, it would show a complete electric connection between the two copper wires in the detonator, through the platinum wire which joins them. But the current, passing from the ohmmeter through the detonator, would not be sufficient, if normal, to heat the platinum wire so as to explode the charge in the detonator, and the detonator would be accepted as good. On the other hand, if the indicator on the dial did not register any electric current, it would show there was, for some reason, an incomplete electric connection, and the detonator would be rejected as not good.

The plaintiff had been at the work of testing detonators for three or four weeks when the accident occurred. Before that she had been employed at the factory for something over a year, working at making, gluing, and rolling paper shells, and then packing them with masurite. She had only been working three or four weeks in testing detonators, for which an ohmmeter was used. Her knowledge of the ohmmeter, its method of construction and operation, and the dangers

incident to its use, were necessarily limited.

The accident grew out of the explosion of a detonator shortly after an ohmmeter had been used. This ohmmeter had been knocked off a table and fallen so hard that the glass over the dial was broken, and there appeared to be a question whether it had not been injured and was unfitted for use. There was, however, an attempt to use it, and when the dial did not show any current from the ohmmeter, and the plaintiff, in the belief that the ohmmeter was not working, but needed examination by the foreman or superintendent in charge, laid the detonator, or several of them, on the table, there was an explosion, and she was seriously injured.

In handling this situation, the court below in its charge called attention to the fact that the explosion was either instantaneous or delayed. If instantaneous, the plaintiff was guilty of contributory negligence, because she had not placed the detonator in a bomb proof, used to protect those near from an explosion, as she had been told to do, and

it was this negligence which caused the injury.

On the other hand, the court charged the jury that there was no testimony justifying the submission to them of the question whether there was a delayed explosion, and, since there was no substantial testimony to support the claim that the explosion was a delayed one, the court could not leave the decision of that fact to the jury, and could not base a verdict on the jury's finding that the explosion was delayed. The court charged the jury, in addition, that the question could not be left to them whether a broken ohmmeter was not the proximate cause of the explosion, and accordingly directed a verdict for the defendant.

We think the court failed to take a proper view of the part the ohmmeter played in the accident and should have played in the case. It was a delicate electrical instrument, designed and employed to regulate and measure the current of electricity which was produced by its battery and permitted to pass through its resistance coil. When used to test a detonator, a very light current was allowed to pass, so light as not to heat the platinum wire, so there was no danger in using it, but heavy enough to show that the current passed, so as to demon-

strate that there was sufficient electrical connection, and when the detonator should be subsequently put in use, and a heavy current applied, it would pass through the platinum wire and explode the detonator, and along with it the charge of high explosives intended to be set off. In order that an ohmmeter should perform its service in testing detonators, it was necessary, in the first place, that its parts should be properly adjusted and in perfect order, so that only a limited current should be produced and allowed to flow through, and, in the next place, that the force of the current should be measured and exhibited with accuracy. The testimony shows that the ohmmeter was defective in both requirements. The delicate instrument had had a heavy fall, and it had not been examined or repaired, although the plaintiff was insisting on something being done before using it. It seems she understood the situation better than the defendant company and its officers. The attempt to use the unrepaired ohmmeter was unavailing. The indicator, which was expected to show the force of the current passing through the detonator, either did not move at all or moved in such an uncertain way as to show the ohmmeter was out of order. The young women who were engaged in testing, or trying to test, the detonators, concluded that they had not been tested, and that the ohmmeter would first have to be repaired, so the detonators, after an attempt had been made to test them, were laid aside on the table until the ohmmeter could be examined, and, if necessary, repaired. There was testimony tending to show that, when the attempt was made to test the detonators by the use of the ohmmeter. they were placed in a bomb proof, and were only laid upon the table after the conclusion had been reached that the ohmmeter was not working and would have to be repaired. Two or three seconds after the detonators were laid on the table, the explosion occurred, and the plaintiff was badly hurt. In its charge to the jury, the court below stated there was no testimony showing that a delayed explosion had ever taken place, although Prof. Maberry thought it might take place and explained why; but it seems to us that the testimony is clear and positive upon the point that the explosion which caused the injury was a delayed explosion. It seems, however, that the court below demanded that there be proof of a certain kind of explosion, and was not satisfied that there was any evidence that the kind of explosion described by Prof. Maberry had taken place. The professor went to the trouble of withdrawing and examining charges in certain detonators which he got from the Masurite Company, and he was of opinion that such charges might be gradually heated and ultimately exploded by the passage of a current of electricity through the platinum wire.

It is to be noticed that under normal conditions, with the use of an ohmmeter in order and accurate, the platinum wire would not be heated so as to have any effect upon the charge in detonator. To heat the wire to a point which would affect the charge and gradually cause combustion and explosion—in other words, bring about a delayed explosion—it would be necessary to reduce the resistance in the ohmmeter, and thus permit a heavier current to pass through the platinum wire in the detonator; and it would be necessary to do this at a time when for some reason the current had been increased, at a time when

the ohmmeter would not disclose it. Under the circumstances, we cannot escape the conclusion that the plaintiff was not permitted to present her full case to the jury, and have the jury pass upon the question whether the use of the broken ohmmeter was not the proximate cause of the explosion and the resulting injury. We think she was entitled to be provided with an ohmmeter in good order, and, when the instrument was knocked off the table and broken, she was entitled to have it examined by a competent person, and, if injured, repaired, so that she could rely upon its accuracy, both in restraining and reducing the force of the current which passed through it and in measuring and recording its force. The current created and allowed to pass through the detonator before the time came to explode it was regulated by the ohmmeter. It was limited in strength to a perfectly safe current. But the trouble in this case was that the injury to the ohmmeter let the current loose and altered it so it was able to bring about a delayed explosion without in any way indicating the fact. This is not a case where proper steps could not have been taken to protect the employé. If the only explosion, or apprehended explosion, was one produced solely by an unknown priming charge, for which it alone was responsible, it might be impossible to guard the employé by a bomb proof; but in this case it was the broken ohmmeter which brought about the trouble, or at least there was evidence to submit to the jury upon that point. If it did, that was the proximate cause, which might be grounds for a recovery.

Judgment reversed, and the case remanded for a new trial.

KENTUCKY BLOCK CANNEL COAL CO. v. NANCE.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1908.)

No. 1,803.

1. Master and Servant (§ 101*) — Master's Liability for Injuries to Servant—Safe Place to Work.

The duty of a master to provide a reasonably safe place for employes to work, having regard to the kind of work, is a continuing one, and includes the maintenance of the place in such reasonably safe condition, although such duty of maintenance is not so absolute as to charge the master with liability for injuries to servants resulting from the place becoming unsafe through the work there carried on.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 171; Dec. Dig. § 101.*]

2. MASTER AND SERVANT (§ 190*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—SAFE PLACE TO WORK.

Plaintiff was employed in mining coal in an entry in defendant's mine. Along the entry, about six feet from the floor, ran a drain pipe supported on wooden props. The mine boss directed an employé to disconnect and remove such pipe, first notifying the men at work in the entry. He neglected to notify plaintiff, however, and in the first place negligently disconnected the pipe from the pump on the outside, leaving both ends unsupported, when the whole line fell over and struck and injured plaintiff. Held, that the employé engaged in removing the pipe was not a fellow servant of plaintiff in the mining operations, but was performing a work

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of construction or alteration, and his duty of exercising care to maintain the place where the miners were working in a reasonably safe condition while doing such work, and to warn them of the danger therefrom, were duties of the master, which was responsible for their nonperformance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 449; Dec. Dig. § 190.*]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

Action in tort. Thomas Nance, the plaintiff below, while mining coal in the service of the plaintiff in error, was injured by the sudden and unexpected falling of a long line of drainage pipe which was carried on a line of wooden props at the top of the main entry over the place where he was mining. The inner end of this line of pipe lay on the floor of a dip or sag in the floor of the entry in which water collected. From that point it inclined upwards, and was carried on the top of a line of wooden props, some six feet high and about six feet apart, to a point outside the mouth of the entry. There this outer and elevated end was securely attached to a stationary pump by means of which water was drawn from the mine. The pipe was in sections a few feet in length, being coupled together by threaded screws. This pipe had been in place about three months, and had stood safely enough until the accident to Nance. The particular entry in which it had been used for drainage had been about worked out, and the coal in the "stumps" or "pillars" supporting the roof of the mine were being robbed, and Nance was so engaged when hurt.

On the morning of Nance's injury, Henry Vaughn, the mine boss, directed Jasper Belcher, who had charge of the work of putting in and taking out both compressed air and drainage piping, to disconnect and remove this pipe. Belcher, upon this point, testified that Vaughn, the mine boss, "met me on the outside and told me to go in and remove the pipe, disconnect the pipe and pump. He wanted it for another place. He said, 'Now, Jasper, go in there and notify those boys that you are going to remove this pipe.' "Belcher went into the entry, saw Nance moving one of the heavy cutting machines, and himself assisted, as he says, in "cutting a few licks." Unfortunately he forgot to warn Nance of what he was going to do, though he left him at his work under the pipe with the observation that he "must get to work or the captain (meaning Vaughn, the mine boss) will get after me." Thereupon he went outside the entry and detached the pipe connection at the pump. The witness then \$ays:

"I uncoupled the pipe, and about that time a dread kind of struck me that it might give way; I held to this end and laid it down on the bottom careful. I stayed then to see if it was going to give way, so I could give notice, but it didn't seem to be going to give way, and I turned around and went to

work, and it all came down sudden."

These are the only essential facts of the case. The court denied a request for a peremptory instruction for the coal company, and submitted the case to the jury upon the single proposition that, if the jury should find that Nance was not notified of Belcher's purpose to remove this pipe, they should find for him such damage as would compensate him.

There was a judgment for Nance, and the coal company has sued out this

writ of error.

John Hagar, for plaintiff in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). That it was the general duty of the coal company to provide a reasonably safe place, having regard to the kind of work involved, in which Nance

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and his fellows could carry on the work for which they were employed, is incontestable. That it is also the duty of the master to keep the place reasonably safe is equally clear, for the duty of furnishing a safe place to work is a continuing duty. Santa Fé Railroad v. Holmes, 202 U. S. 438, 26 Sup. Ct. 676, 50 L. Ed. 1094.

Manifestly, this duty of providing a safe place is dependent upon the character of the work to be done there. Hence, when that work is one of construction, reconstruction, destruction, or repair, the risks which are incident to such places and kinds of work are assumed by the servants there employed. Chesapeake & Ohio R. Co. v. Hennessey, 96 Fed. 713, 38 C. Ĉ. A. 307, 314; American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440. Neither is the duty of maintaining a safe place so absolute as to charge the master with injuries to servants resulting from the place becoming unsafe through the negligent performance of the work there to be done. Deye v. Lodge & Shipley Mach. Tool Co., 137 Fed. 480, 70 C. C. A. 64; American Bridge Co. v. Seeds, 144 Fed. 605, 613, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; Baird v. Reilly, 92 Fed. 884, 35 C. C. A.

78; Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021.

The entry in which Nance was working was safe enough before Belcher uncoupled the attachment of this elevated line of pipe to the stationary pump outside. It then became an unsafe and dangerous place for one working under or near this line of pipe. Belcher's alarm that the uncoupling of the attached outer section would leave both ends "in the air" and cause a strain upon the line of insecure props likely to topple them over with disastrous results to miners working under or near them was not groundless. This danger was plain to anybody; Vaughn, the mine boss, knew it. Hence his direction that "the boys" should be warned to look out. Belcher, we have seen, realized it, and then foolishly recovered from his alarm and went on with the work. To say that such a structure could not be taken down without danger, if true, is inconsequential, for in such case it was negligent to take it down at all without full warning, if its fall was likely to injure employés engaged in work so near as to be hurt if it should fall. But it cannot be said that there was no safe way to remove it. If the work of uncoupling had been begun at the unsupported end in the entry, there would have been no danger, for the uncoupling of section after section from that end would leave the standing sections as secure as before. Adopting a dangerous method of removing this fixture, it was plainly incumbent upon somebody that Nance and his fellows, whose place of work was thereby made dangerous, should be warned, that they might either refuse to work in so dangerous a place while the removal was going on or assume the risk of the new danger, relying upon watchfulness to escape in case the props should begin to fall. In the latter case the effect of notice would have been to put Nance to an election as to whether he would take the risk or quit. But he was given no election, nor did he have any reason to suspect this danger, and that a safe place was to be converted into a dangerous place by this change in the security of this line of pipe. But it is said that the failure to give warning was the fault of

Belcher, and that Belcher was the fellow servant of Nance. There are a line of cases in which it is held that, where the master has provided competent co-servants, exercised due care in providing a reasonably safe place to work and safe appliances, and, where the work is complicated, provided suitable rules and regulations for the general operation of the plant or machines, the duty of warning against perils incident to the operation of the plant, or conduct or character of the work being carried on, is not one of those personal duties of the master which may not be delegated. Where the master has exercised reasonable care in respect to the matters referred to, the supervision, control, and management of the details may be left to the judgment and discretion of those superior servants who are intrusted with the management. The general rule is illustrated and stated in many cases by the Supreme Court and this court. Some of the cases we cite: Central Railroad Co. v. Keegan, 160 U. S. 259, 267, 16 Sup. Ct. 269, 40 L. Ed. 418; Northern Pacific Railroad Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006; Martin v. Atchison, Topeka & Santa Fé Ry. Co., 166 U. S. 399, 463, 17 Sup. Ct. 603, 41 L. Ed. 1051; Grady v. Southern Railway Co., 92 Fed. 491, 34 C. C. A. 494; Deye v. Lodge & Shipley Mach. Tool Co., 137 Fed. 480, 70 C. C. A. 64; Penn. Railroad Co. v. Fishack, 123 Fed. 465, 59 C. C. A. 269; Kinnear Mfg. Co. v. Carlisle, 152 Fed. 933, 82 C. C. A. 81.

But the principle appealed to has no proper application here. The removal of the drainage pipe was, in no legitimate sense, one of the details or incidents of the work of operating the mine, regarding it, for the purpose, as a unitary plant or great machine. The drainage pipe was a fixture, an appliance essential to the proper drainage of the mine. If it had fallen because proper care had not been used in its construction or maintenance, and injured servants whose duties called them to pass or work under or near it, there could be no doubt of the master's liability, for it was a part of the place where they were to work. By the direction of the master, acting by the mine boss, the section outside is uncoupled for the purpose of removing the pipe in sections, and the whole structure comes tumbling down upon the heads of men having nothing to do with the construction, removal, or maintenance of the pipe and no knowledge of what was going on. Upon what principle can we distinguish between liability with or without the active intervention of the master in producing the catastrophe? The duty of exercising due care in taking this structure down, so as not to injure men working under it, was just as much a personal, nondelegable duty of the master as the original duty of care of construction and maintenance. Belcher's work was not a work of operation; Nance's work was. Nance was not engaged with Belcher in his work of construction or demolition. If he had been, as respects that work, he would have been his fellow servant. A factory chimney is built so carelessly that it falls and injures men at work in the factory. Or such a chimney is being taken down by servants of the master, and it falls, because of their lack of due care, upon the other servants at work in the factory. The cases are parallel in principle. In both illustrations the work is the personal work of the master, for in neither instance was it a work of operation. The case, upon its facts, is nearer to Northwestern Fuel Co. v. Danielson, 57 Fed. 915, 6 C. C. A. 636 (C. C. A., 8th Circuit, opinion by Sanborn, Circuit Judge). Certain men were employed to shovel coal from a pier into a train alongside a coal track. Above them was a trestle work which was being taken down by another gang of men. Through the want of due care by the men engaged in removing the trestle work, a bent fell and injured one of the gang of coal shovelers below. There was a judgment against the common master. The judgment was affirmed both upon the ground that the men taking down the bents of the trestle were doing the personal work of the master in discharge of the duty of using due care to keep safe the place where the work of the coal shovelers was being done, as well as upon the ground that the latter were ignorant that the work was going on and had not, therefore, assumed the new risk incident thereto.

Judgment affirmed.

GRIESA et al. v. MUTUAL LIFE INS. CO. OF NEW YORK. (Circuit Court of Appeals, Eighth Circuit. November 19, 1908.)

No. 2,922.

APPEAL AND ERROR (§ 71*)—INTERLOCUTORY ORDER IN EQUITY "STAYING" PROCEEDINGS AT LAW—APPEAL TO CIRCUIT COURT OF APPEALS.

When, upon a hearing in equity in the Circuit Court, in a suit the parties to which include all the parties to an action at law pending in that court, an interlocutory order is granted "staying" further proceedings in the law action, on the theory that the two cases embrace a controversy which should be litigated to a final and complete determination in the suit in equity, to the exclusion of any proceedings at law, the order, although not using the technical words "restrain and enjoin," and not in terms directed against the plaintiffs in the action at law, is in purpose and effect an order granting an injunction, within the meaning of section 7 of the act creating the Circuit Court of Appeals (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]), as amended by Act April 14, 1906, c. 1627, 34 Stat. 116 (U. S. Comp. St. Supp. 1907, p. 208), and an appeal from such order lies to that court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 394; Dec. Dig. § 71.*]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Kansas.

C. F. Hutchings and George J. Barker (Samuel A. Riggs, on the brief), for appellants.

A. C. Mitchell and John S. Dean (Leonard S. Ferry, Thomas F. Doran, and S. D. Bishop, on the brief), for appellee.

Before VAN DEVANTER, Circuit Judge, and PURDY, District Judge.

VAN DEVANTER, Circuit Judge. Briefly stated, the facts material to the decision of the question here under consideration are these: By a policy of insurance issued upon the life of Lucius H. Perkins,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of Lawrence, Kan., the Mutual Life Insurance Company of New York promised that upon his death it would issue to his executors 100 interest-bearing gold coin bonds, each of the denomination of \$1,000 and payable in 20 years, or, if the executors should so elect, would pay to them the cash value of the bonds, to be computed at \$1,305 for each bond. Within six months after the issuance of the policy, the insured died intestate, leaving a widow and three sons, for whose benefit his will contained certain special instructions respecting the bonds named in the policy. After his death the insurance company brought a suit in equity in the Circuit Court against the executors, widow and sons to obtain, inter alia, a cancellation of the policy; it being alleged in the bill that the issuance of the policy was fraudulently procured by the insured, that death by suicide within one year after the issuance of the policy was not within the risk covered thereby, that the insured died by suicide, that indisputable evidence of such suicide could be procured through an exhumation of his body and an autopsy thereon, and that these could be obtained only through the exercise of the powers of a court of equity. Thereafter the executors began an action at law in the Circuit Court against the insurance company to recover the cash value of the bonds, predicating the right to do so upon the company's denial of all liability under the policy, and also upon an election by the executors to take cash in lieu of bonds. In the suit in equity the defendants demurred to the bill upon the ground that the complainant had a plain, adequate, and complete remedy at law, and they also interposed a plea to the bill, alleging therein the pendency of the action at law and that, in the defense of that action, the complainant could obtain the full benefit of all the matters stated in the bill. The complainant then made in the suit in equity an application for "an order staying all further proceedings" in the action at law, "for the reason that the exact issues involved" in that action "are involved in and will be determined in this suit in equity, and because this court of equity, having rightfully acquired jurisdiction of the parties and the subject-matter of the controversy, for the purpose of granting a certain necessary and indispensable equitable relief, will retain such jurisdiction to do complete justice between the parties and grant full relief." This application, the demurrer, and the plea were heard at the same time, and the hearing resulted in the following interlocutory order or decree:

"The demurrer and plea to the bill of complaint herein, and also the application of the complainant for an order staying proceedings in action at law No. 8,603 on the records of this court, having been heretofore argued and submitted to the court with leave to the respective parties to file briefs, now, on this 25th day of June, 1908; the court having carefully considered the same, and being well advised in the premises, doth order, adjudge, and decree that the defendants' demurrer and plea to the bill heretofore filed herein be, and they are each overruled and denied. It is further ordered, adjudged, and decreed that the motion of complainant to stay further proceedings in law action No. 8,603 on the records of this court be, and the same is, sustained."

From this order or decree the defendants appealed, and the insurance company now moves to dismiss the appeal, claiming that such an order or decree is not appealable. The controlling statute is section 7 of the act creating the Circuit Courts of Appeals (Act March

3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]), as amended by Act April 14, 1906, c. 1627, 34 Stat. 116 (U. S. Comp. St. Supp. 1907, p. 208), which reads as follows:

"That where, upon a hearing in equity in a District or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, in any cause an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the Circuit Court of Appeals: Provided, that the appeal must be taken within thirty days from entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or by the appellate court, or a judge thereof, during the pendency of such appeal: Provided, further, that the court below may, in its discretion, require as a condition of the appeal an additional bond."

As the order or decree in question was made upon a hearing in equity and was interlocutory, the decisive question is. Did it grant an injunction? To us the answer does not seem doubtful. A court of equity possesses no power to stay proceedings in a court of law, save by granting an injunction against the litigant actors therein, and this is so well recognized that when, in a court of equity, a stay of proceedings in an action at law is sought or ordered, it is understood that it is this injunctive power that is invoked or exercised, although the technical terms "restrain and enjoin" be not used. Plainly the insurance company intended to seek, and the Circuit Court intended to grant, in the suit in equity, an order staying proceedings in the action at law, and the record furnishes no reason for believing that either intended that the order should be other than an authorized exertion of the injunctive power. Possibly the application and the order would have conformed more nearly to technical usage if the one had prayed and the other had directed, in so many words, that the executors, the actors in the action at law, be restrained and enjoined from taking any further proceedings therein; but the language used was essentially the same in its purpose and effect. The purpose of the order was also reflected in a written opinion which accompanied it, and is found in the record, because it there appears that the court proceeded upon the theory, advanced in the insurance company's application, that the peculiar state of affairs shown in the suit in equity demonstrated the propriety of proceeding to a complete determination of the entire controversy in that suit to the exclusion of any proceedings at law. If that theory was correct—as to which we express no opinion—an injunctive order against further proceedings in the action at law followed almost as a matter of course.

The principal argument advanced to sustain the contention that the order or decree did not grant an injunction is this: All courts, whether of law or equity, possess inherent power to stay proceedings before them, to the end that abuse, oppression, and injustice may be prevented; and, as courts of law possess no power to grant injunctions, it necessarily must be that a stay of proceedings is not an injunction. The argument is sound when applied to a stay of proceedings granted by the court, and in the cause, in which the stay is to be operative, but beyond that it is fallacious. A court of law, when not exercising an

appellate or supervisory jurisdiction, possesses no power to stay proceedings in another court. Purdy v. Baker, 92 App. Div. 242, 86 N. Y. Supp. 1065; Deyo v. Morss, 60 Hun, 580, 14 N. Y. Supp. 841. But not so of a court of equity. One of its most firmly established powers is that of staying proceedings at law when according to the principles of equity there is occasion to do so, and this power arises only from the authority to grant injunctions. 2 Story, Eq. Jur. (13th Ed.) §

874 et seq.; 4 Pomeroy, Eq. Jur. (3d Ed.) § 1360 et seq.

It is also said that we are not here concerned with an order or decree of one court staying proceedings in another, because both cases were pending in the same court. But there is no force in the attempted distinction. For all purposes material to the present discussion, it is as if the two cases were pending in distinct tribunals, each acting independently of the other. This is so because of the separation or distinction which is carefully preserved and maintained by the laws of the United States between proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity. Jones v. McMasters, 20 How. 8, 22, 15 L. Ed. 805; Thompson v. Railroad Companies, 6 Wall. 134, 18 L. Ed. 765; Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569; Northern Pacific Railroad v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513; Highland Boy Gold Mining Co. v. Strickley, 54 C. C. A. 186, 116 Fed. 852; Files v. Brown, 59 C. C. A. 403, 124 Fed. 133; Hatcher v. Hendrie & Bolthoff Mfg. Co., 68 C. C. A. 19, 133 Fed. 267; Anglo-American Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 721; Lombard v. Anglo-American Co., 196 U. S. 638, 25 Sup. Ct. 793, 49 L. Ed. 630; Cook v. Foley, 81 C. C. A. 237, 152 Fed. 41; Id., 209 U. S. 543, 28 Sup. Ct. 570, 52 L. Ed. 919.

We think the order or decree granted an injunction, and is within the statute before quoted, a manifest purpose of which is to enable a defendant to seek immediate appellate relief from an injunction, the continuance of which throughout the progress of the suit in which it is granted might seriously affect his interests. Smith v. Vulcan Iron Works, 165 U. S. 518, 525, 17 Sup. Ct. 407, 41 L. Ed. 810.

The motion to dismiss the appeal is accordingly denied.

MacFADDEN v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 9, 1908.)

No. 15.

1. Post Office (§ 49*) — Offenses Against Postal Laws — Malling Obscene Matter.

A conviction for sending an obscene, lewd, and lascivious publication through the mails, in violation of Rev. St. \$ 3893 (U. S. Comp. St. 1901, p. 2658), held sustained by the evidence submitted to the jury by proper instruction. The test is the tendency to corrupt and deprave the minds of those who are open to such influences.

IEd. Note.—For other cases, see Post Office, Dec. Dig. § 49.*1

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CRIMINAL LAW (§ 826*)—REQUESTS TO CHARGE—WHERE PRESENTED TOO LATE OR COVERED BY THE GENERAL CHARGE—REFUSAL OF.

Where requests to charge are many in number and presented so late that they cannot be properly examined by the trial judge, it justifies the refusal of them as a whole; and this is particularly the case when the instructions asked, with one or two exceptions, fully covered by the general charge, were such as the court could not be expected to give.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2008; Dec. Dig. § 826.*]

In Error to District Court of the United States for the District of New Jersey.

Henry M. Earle, for plaintiff in error.

Walter H. Bacon, Asst. U. S. Atty., opposed.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

PER CURIAM. The defendant was convicted upon sufficient evidence, after a correct and adequate charge, which is practically all that we need to know or say. The story on which the conviction is based, if not the magazine in which it appears, of which the defendant is the editor in chief and responsible head, is suggestively lewd and bad; none the less so, because of the alleged reforming and corrective purpose overlaying it, which is speciously advanced. It plainly, and in our judgment intentionally, caters to a prurient taste, which it is the thinly disguised object of the author to incite; and associated, as it is, in the periodical where it appears, with certain articles on physical culture to which no objection perhaps can be made—although no such clean bill can be given to many things, articles as well as advertisements, which are there found—it is capable of doing incalculable harm; all the more so because it is intended to circulate among and attract the young, to whom the magazine is particularly addressed. We are clear that the publication-story, if not magazine-is of the obscene, lewd, and lascivious character which it was the object of Congress by the legislation in question to suppress. The standard is not the publications to which we are referred, which are said to be just as bad, but pass muster with some. The test is the tendency to deprave and corrupt the minds of those who are open to such influence, into whose hands the publication may come (Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606), of the existence of which corrupting tendency we have no doubt here.

Complaint is made that the defendant's requests were denied, to some of which, at least, it is said, no objection can be raised. But there were 22 of them, and they were presented so late, according to the record, that they could not be examined properly, which itself justifies the refusal of them as a whole, in addition to which they asked for instructions which, with perhaps one or two exceptions, which were fully covered in the general charge, the court could not under any circumstances be expected to give. In any view there was thus no error in the disposition of them which was made.

The judgment is affirmed.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

OBERLE & HENRY V. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 10, 1908.)

No. 1,770 (1,936).

CUSTOMS DUTIES (§ 34*)—CLASSIFICATION—PRESS CLOTH—CAMEL'S-HAIR—"MANUFACTURES OF WOOL"—"HAIR PRESS CLOTH."

Camel's-hair press cloth is dutiable as manufactures of "wool" under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, pars. 366, 383, 30 Stat. 184, 185 (U. S. Comp. St. 1901, pp. 1666, 1668), rather than as "hair press cloth" under Schedule N, par. 431, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 34.* For other definitions, see Words and Phrases, vol. 5, pp. 4363, 4364.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

There was no opinion below. The case relates to an importation at the port of New Orleans, which the importers contended had been subjected to an excessive rate of duty. The Board of United States General Appraisers affirmed the assessment, and the court below affirmed the board. In these proceedings the importers contend for a reversal of the decisions of the Circuit Court and the Board of General Appraisers.

The case involves consideration of the following provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 383, 30 Stat. 185 (U. S. Comp. St. 1901, p. 1668):

"383. Whenever, in any schedule of this act, the word 'wool' is used in connection with a manufactured article of which it is a component material, it shall be held to include wool or hair of the * * * camel. * * * "

The prevailing and dissenting opinions filed by the Board of General Appraisers read as follows:

McCLELLAND. General Appraiser. The merchandise which is the subject of this protest is invoiced as "hair press cloth." It was returned for duty at 44 cents per pound and 50 per cent. ad valorem, and accordingly assessed by the collector under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 366, 30 Stat. 184 (U. S. Comp. St. 1901, p. 1666). It is claimed that duty should have been assessed at the rate of 20 cents per square yard under the provisions of Schedule N, par. 431, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), of said act.

The question involved has been tried out at great length; but the extensive record fails to show any material difference between the question involved and that which was presented to and fully discussed by the board in its decision G. A. 4,448 (T. D. 21,200). In that case the protest was overruled, the contention on behalf of the protestant being the same as made by the protestants in this case. No appeal was taken from said decision, however. Later, the board made a further decision (Abstract 4,605, T. D. 26.035), on the protest of E. & H. Caldwell, which, so far as shown thereby, covered practically the same issue. Said Abstract 4,605 reads as follows:

"The merchandise consisted of cloth made from camel and goat hair, used in presses for the manufacture of stearin and otherwise. It was classified as woolen cloth under paragraph 366, tariff act of 1897, and is claimed to be dutiable under paragraph 431 as 'hair press cloth.' Protests overruled on the authority of G. A. 4,448 (T. D. 21,200)."

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

From this latter decision an appeal was taken to the United States Circuit Court, and the decision of the board was reversed, Judge Townsend writing the decision as follows (Caldwell v. United States, 141 Fed. 487, T. D. 26,489):

"The merchandise in question consists of cloth made of hair adapted to be used in hydraulic presses. It is in fact a hair press cloth. It is so known commercially, and was so invoiced and sold. The Board of General Appraisers, however, apparently basing its decision upon evidence taken in another case as to other merchandise, adopted the language of their opinion therein and assessed the article at 33 cents per pound and 50 per cent. ad valorem, under paragraph 366 of the act of 1897, as a manufacture of wool not specially provided for. The importers protested on the ground that the cloth was dutiable eo nomine as hair press cloth, at 20 cents per yard, under paragraph 431 of said act.

"The government introduced no testimony in this case before the board. Paragraph 366 provides only for manufactures of wool not specially provided for. Paragraph 431 provides specifically for hair press cloth eo nomine. The construction given to these words by the board would seem to deprive this specific provision of all effect, inasmuch as the mats made of horsehair and cattle hair appear to be included under a separate designation. The assessment by the board would operate to impose an ad valorem duty on this cloth of between 300 and 400 per cent. The decision of the Board of General Appraisers is reversed."

The board in said Abstract 4,605 made specific finding that the cloth was "made from camel and goat hair"; and, if it were equally clear that in reviewing said decision Judge Townsend considered the question as one involving in whole or in part the rate of duty to which press cloth made from the hair of the camel is subject, we would readily accept the court's conclusion of law asgoverning in this case. But we note that the learned judge in his opinion makes no mention of camel's-hair, and states that the board apparently based "its decision [Abstract 4,605, supra] upon evidence taken in another case as to other merchandise." The other case referred to was G. A. 4,448 (supra), and the "other merchandise" was that involved in that case, which was concededly made of camel's-hair.

We have examined the testimony which was taken by the board in the Caldwell Case (Abstract 4,605), and find nothing in it to show that the press cloth there involved was made either in whole or in part of camel's-hair. It appears that at the close of the hearing request was made that the evidence which was the basis of G. A. 4.448 be incorporated in the Caldwell Case, "in so far as it is relative." Objection was made to the receipt of said record in evidence; and, while it does not appear from the record whether it was received, the board evidently considered the issue in the two cases identical, for the protests in the Caldwell Case were overruled on the authority of G. A. 4.448.

Samples before the courts in the Caldwell Case are in evidence in this case, and, while there is an apparent lack of identity of such samples, there is uncontradicted evidence that there is no camel's-hair in any of them. We therefore feel that the court's decision in the Caldwell Case may not be accepted as a guide to our determination here, and, unless we are to follow G. A. 4,448, the question must be considered practically as an original proposition. And to so consider it would seem inevitably to lead to the same conclusion; for we are confronted with the unmistakable fact that Congress has provided that for all tariff purposes camel's-hair shall be considered as wool (paragraphs 348, 351, and 383, Schedule K, 30 Stat. 182, 185 [U. S. Comp. St. 1901, pp. 1664, 1668]).

We do not overlook the words of Judge Townsend in deciding the Caldwell Case, supra, as follows:

"Paragraph 431 provides specifically for hair press cloth eo nomine. The construction given to these words by the board would seem to deprive this specific provision of all effect."

But to exclude camel's-hair press cloth from that special provision does not necessarily make it of no effect; for if it be assumed that the Caldwell hair press cloth was made of horsehair, it was without doubt subject to duty under that provision; and so, in Abstract 11,846 (T. D. 27,445), the board sustained

the importers' claim that horsehair press cloth was dutiable under that provision.

The generally accepted theory is that the congressional policy in constructing tariff acts has always been to place upon raw materials lower rates of duty than those fixed for the finished product or manufactured article. In other words, rates of duty, with practical uniformity, have been increased in

proportion to the amount of labor expended on the article imported.

If the camel's-hair of which this article is manufactured had been imported in the raw state, there could be no question but that the wool duty would attach, for the reason, as already stated, that for all tariff purposes the word "wool" shall be held to include the hair of the camel; and it is equally clear that, in the absence of the provision for "hair press cloth" relied upon by protestants, any article made of camel's-hair would be subject to duty as a manufacture of wool; and the question therefore narrows itself down to whether the provision for "hair press cloth" is such as to make an article concededly made of wool subject to a rate of duty so low as to be entirely inconsistent with that to which the raw material out of which it is made is subject. We cannot believe that such was the congressional intent. And this is the more manifest when we consider the articles with which hair press cloth is grouped in paragraphs 429, 430, and 431, Schedule N, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), which read as follows:

"429. Hair, human, if cleaned or drawn but not manufactured, twenty per

centum ad valorem.

"430. Hair curled, suitable for beds or mattresses, ten per centum ad valorem.

"431. Hair cloth, known as 'crinoline' cloth, ten cents per square yard; hair cloth known as 'hair seating' and hair press cloth, twenty cents per square yard."

To hold otherwise would be practically to nullify, to an extent at least, the

purpose of Congress in declaring the hair of the camel to be wool.

We find the merchandise involved to be a manufacture of wool, and hold it to be subject to duty as assessed. The protest is overruled, and the decision of the collector is affirmed.

SHARRETTS, General Appraiser (dissenting). This board, in Abstract 4.605 (T. D. 26,035), covering the protests of E. & H. Caldwell, found that the merchandise consisted of cloth made from camel and goat hair, and held it to be dutiable as woolen cloth, under paragraph 366 of the tariff act of 1897. The Circuit Court for the Southern District of New York reversed that decision; and it is manifest from the language used by Judge Townsend, who decided the case, that the board's finding relative to the materials entering into the fabrication of the goods was unchallenged. The learned judge, conceding that the disputed merchandise was a manufacture of wool, said in part:

"Paragraph 366 provides only for manufactures of wool not specially provided for. Paragraph 431 provides specifically for hair press cloth eo nomine. And the merchandise is in fact a hair press cloth. It is so known commercial-

ly, and was so invoiced and sold."

The argument that paragraph 431 provides only for fabrics composed of horse, cattle, or common goat hair apparently conflicts with the principle enunciated by the United States Supreme Court in Arthur v. Butterfield, 125 U. S. 70, 8 Sup. Ct. 714, 31 L. Ed. 643. In deference to the decision cited, I think the protest should have been sustained in the present case.

Walden & Webster and Hall & Monroe (Henry J. Webster, of

counsel), for importers.

Albert G. McDonald, Special Asst. U. S. Atty., and Joseph W. Carroll (Rufus E. Foster, U. S. Atty., Charles D. Lawrence, Asst. Treasury Counsel, and Carroll, Henderson & Carroll, on the brief), for the United States.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that the decree of the Circuit Court was correct, and it is therefore affirmed.

BRUNSWICK-BALKE-COLLENDER CO. v. ROSATTO.

(Circuit Court of Appeals, Third Circuit, November 12, 1908.)

No. 12.

1. PATENTS (§ 328*)—INVENTION—BOWLING ALLEY.

The Wiggins patent. No. 623,933, for a bowling alley, in which a concave side gutter is substituted for the square form in previous use, is void for lack of patentable invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 328*)—INVENTION—RUNWAY FOR BOWLING ALLEY.

The Wiggins patent, No. 554,611, for a ball runway for bowling alleys, is void for lack of patentable invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 159 Fed. 729.

M. B. Philipp and James Q. Rice, for appellant.

E. Hayward Fairbanks, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

BUFFINGTON, Circuit Judge. In the court below the Brunswick-Balke-Collender Company, owner of patent No. 623,933, for a bowling alley, granted April 25, 1899, to William H. Wiggins, filed a bill against Frank Rosatto, charging infringement thereof. On final hearing that court, in an opinion reported at 159 Fed. 729, held the patent void. From a decree dismissing the bill the Brunswick Company appealed. The object of the patentee was to improve the construction of bowling alleys with reference to the "ball-gutters" or troughlike conduits alongside the alleyway. These gutters serve to carry to the pit end of the alley the balls thrown off the alley-bed by a player. Prior to this device the side gutters of bowling alleybeds were rectangular in cross-section, and when misplayed balls entered them they could rebound and strike the side of the alley-bed. This impact sometimes slivered the outer edge of such alleyway and scaled off the balls around the finger holes. By making the gutter of suitable circular proportion, a misplayed ball was more apt to follow the central line of the gutter. Having no angular corner, the curved gutter was more easily kept clean. On this device a single claim, to wit:

"The combination, with the bed, or ball-way A, of a bowling alley; and a suitable stringer, or strip, running parallel with the edge of the alley-bed at a suitable distance therefrom, of a bottom piece C, the top surface or which is concave, in cross-section, and operates to cause a ball rolling thereon to travel centrally thereof; all in substantially the manner and for the purposes hereinbefore set forth"—

was granted. The sphere of invention here involved is very narrow, for it consists in substituting a circular for a square gutter alongside

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^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1937 to date, & Rep'r Indexes

an alley-bed. The use as a runway for balls of a circular trough of proper proportions was known in game construction. Thus, not as anticipatory of Wiggins' particular combination of circular troughs, but as showing their use generally in game devices, we may refer to the patent of Arff, No. 279,313, where a circular side-trough was used as a suitable form of gutter ball return in a game played on something like a billiard table.

"The outer walls of these troughs," says Arff, "extend up above the level of the table surface, so as to prevent any ball from being driven entirely off the table and onto the floor; or they constitute, in other words, both a guardrail and a return trough."

Indeed, Arff suggested the adaptation of his device to bowling alleys, saying:

"In making use of our invention, we do not confine it to any particular game, and we may arrange it to be played with balls and a cue, after the manner of billiards; or we may use it on a very much larger scale, to be used in the place of a bowling alley."

In the Patent Office, Wiggins' application was rejected by the primary examiner, and on appeal his action was affirmed by the board of examiners in chief. In doing so that board said:

"The old ball gutters were rectangular in cross-section and had flat bottoms. This permitted the balls, after they had left the alley, to bump from side to side. This difficulty the applicant remedies by making the bottom of the gutter curved. This construction would remedy the difficulty somewhat in that a central path is provided for the balls, though they would still, if traveling with any speed, butt against the stringer. It is of course obvious that a gutter with a curved bottom will to some extent prevent the ball from rolling from side to side, and the only question that remains is whether it required anything more than ordinary observation to determine the cause of the previously existing difficulty. The patent to Arff et al. describes a device primarily intended for a game to be played on a table, but is stated to be intended also for use on a large scale as a bowling alley. * * * While the conditions of use of this game are hardly such as to suggest the remedy for the difficulty which the applicant states exists, the patent has a gutter with means for causing the balls to roll centrally therein. Even without this patent we regard the device claimed as lacking in new invention."

On appeal to the commissioner, the application was granted, not because, as shown by his opinion, the commissioner was convinced the device involved patentability, but to give the applicant an opportunity to test the question in the courts. Thus he says:

"That the improvement is new and useful has not been decided by either of the lower tribunals, and although it is simple, from the showing made by appellant at the hearing before me, I am not willing to say that the improvement made by him is obvious to one skilled in the art. At any rate, I am willing to give the benefit of the doubt as to the patentability to the applicant, in order that he may have an opportunity to defend his invention in court, should it be infringed."

The question of patentability has had the painstaking attention characteristic of the judge below. In his opinion he says:

"Nor, as bearing on the question of invention, was the adoption of this device attended by any of the circumstances which are sometimes relied on to make that out. There was no preceding and insistent demand, for instance, for a new character of gutter to take the place of the old one, the defects of which were recognized and remained unsupplied. Neither were other in-

ventors striving unsuccessfully to attain the same end. Nor was the advance made by the concave over the square gutter so marked, nor has it gone into such immediate and unquestioned use, as to show that it met an expectant need. * * It is to be observed as to this that a concave gutter is a common and not at all complicated construction, which any ordinary workman possessed of the usual mechanical skill could produce, if the necessity for and the desirability of it was seen. And it would no doubt surprise most of them to learn that it had been monopolized by a patent, which prevented its use, if for any reason they were called to put one in. It is also a most natural one for a ball, conforming, as it does, to its shape, and is found in the patents referred to above in a cognate and suggestive, if not a directly anticipating, use. The patentee thus invented nothing new in this regard, but simply took that which was at hand, in general use, and applied it without change of function in place of another common form, because of its supposed superiority for the purpose."

In these conclusions we agree. Moreover, it seems clear that the originality here involved was the recognition of a hitherto overlooked evil, and not a finding of means to overcome it. Thus an expert bowler, speaking of the chipping of balls and splintering the alley-bed sides, said:

"Although a close observer of these conditions and effects, it never occurred to my mind exactly what were the causes thereof, until the introduction into use of the Wiggins improved form or construction of ball gutters, which I knew to have practically overcome wholly the evil effects which existed when the same alley-beds and the same sort of balls were previously used in connection with the old-fashioned ball gutters on either side of the ball-way."

And the patentee himself says:

"No bowling alley builder, or alley keeper, or bowler, ever discovered, until I found it out, that a fruitful, if not the main, cause of the rapid wear of the balls (especially the larger ones) was the impingement and chafing of the balls' surface against the sharp, hard edge of the alley-bed whenever a ball happened to be misplayed and rolled down in the 'ball-gutter' to the alley pit (without striking a pin), especially in cases in which a twisting roll was made by the expert bowler. Nor was it at all obvious to those skilled in the art of building alleys, or that of rolling tenpins, that this abrasion of the balls misplayed down the gutter was the cause of a very apparent wearing away, each season, of the edges of the playing surface or 'ball-way' of the alley, and that this evil was aggravated in the case of expert bowlers, who mostly play the twisting stroke or roll, because the ball played with a twist that leaves the ball-way and travels to the pit in the 'ball-gutter' of the alley will hug the edge of the ball-way, so to speak, and the impingement, with a grinding action, of such ball against the edge of the playing surface will not only effect more injury to the ball than arises in the case of a misplayed plain stroke, but will more injuriously affect the edge of the playing surface of the alley."

Now when Wiggins recognized the evil, he did not have to invent anything to overcome it. There were no experiments or tentative efforts. He did not invent circular pathways for balls, nor invest them with any new function when they were used as ball-troughs along an alley-bed. As an experienced builder, he was able to remedy the evil as soon as he recognized it, for it was the recognition of the evil, and not the means of overcoming it, that characterized what he did. It was one of those mechanical problems which, as soon as an evil was recognized, one skilled in the art was able to meet. We recognize the fact that this patent was sustained in the Second Circuit in 145 Fed. 353, and that decision affirmed in 146 Fed. 1022, 76 C. C. A. 678. In neither case was there any discussion of the question of patentability.

On the other hand, the reasoning of Judge Lacombe on that question in 124 Fed. 554, where he denied a preliminary injunction on the patent, and of Judge Archbald in the present case, satisfy us that no such inventive disclosure has been here made as warrants the monopoly for years in bowling alley construction of a circular side-trough.

As to the other patent to Wiggins, No. 554,611, issued February 11. 1896, of which infringement is also charged, little need be said. The patent concerns the prior-used return-troughs of bowling alleys in which both the pit and player ends were elevated. The elevation at the pit end served to impart, and that at the players' to impede, ball impetus. In this way chipping of the balls and injuries to players' fingers were avoided; the small balls dropped through a hole in the gutter as soon as they reached the top of the players' incline, while the larger passed on to the stop post. Wiggins sought to improve this construction by locating the small ball drop-hole at the foot of or part way up the incline, instead of at the top, where it was in the prior devices. We are of opinion this involved no patentability, and we avoid needless repetition by adopting as the opinion of this court the satisfactory discussion of that question by the court below.

Finding no error, the decree below is affirmed.

THE WILLIAM H. CLIFFORD.

(District Court, E. D. Pennsylvania. November 9, 1908.)

No. 28.

1. SEAMEN (§ 5*)—CONTRACT OF SERVICE—VALIDITY.

Under Rev. St. § 4504 (U. S. Comp. St. 1901, p. 3063), the master of a vessel making a coastwise voyage between Atlantic ports of the United States may act as shipping commissioner for the purpose of signing his own crew, and the contract so signed is valid and binding.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. § 5; Dec. Dig.

2. SEAMEN (§ 21*)—RIGHT TO WAGES—DESERTION.

Where the shipping articles signed by seamen required them to "load and discharge cargoes," their refusal to assist in discharging in an emergency was a breach of contract, although it was not construed by the ship to require them to do all of such work; and their leaving the ship on the refusal of the master to furnish them food, which order was rescinded after a short time, was desertion which forfeited their right to wages.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. § 104; Dec. Dig. § 21.*]

In Admiralty. Suit by seamen for wages.

Lionel T. Schlesinger, for libelant. Howard M. Long, for respondent.

J. B. McPHERSON, District Judge. This is an action in rem brought by James MacIntosh and Thomas Williams, each claiming to recover wages as a seaman from the schooner William H. Clifford.

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On March 4, 1907, the libelants signed articles with the schooner for a coasting voyage from Philadelphia to Mayport, Fla., and return to a port of discharge north of Cape Hatteras. On March 28th they left the vessel at Mayport, made their way back to Philadelphia, and afterwards brought this action for their wages. The defense is that they deserted the ship, and have therefore lost their right to compensation. Rev. St. § 4596 (U. S. Comp. St. 1901, p. 3113). The articles were not signed before a shipping commissioner, but before the master of the schooner; and in reply to the vessel's defense the libelants take the legal position that the articles were void because the federal statutes were not complied with, and, as a further consequence of this violation of law, that the libelants were expressly permitted by section 4523 (U. S. Comp. St. 1901, p. 3075) to leave the service of the vessel at any time and to recover thereafter the wages agreed upon at the time of shipment. As it seems to me, however, section 4523 does not apply in the present controversy. The Clifford was engaged in the coasting trade when the articles were signed, and it has been decided by the Supreme Court that the act of 1872 (Act June 7, 1872, c. 322, § 12, 17 Stat. 264), which is substantially repeated in section 4511 et seq. of the Revised Statutes (U. S. Comp. St. 1901, p. 3069), does not govern the shipment of seamen who are engaged for a voyage coastwise between Atlantic ports of the United States, but that in such a case the owner, consignee, or master may himself perform the duties of a shipping commissioner. United States v. Smith, 95 U. S. 536, 24 L. Ed. 517. Of course, the master of a coasting vessel is not obliged to avail himself of this permission—which will be found in section 4504 of the Revised Statutes (U. S. Comp. St. 1901, p. 3663)—and, if he takes the seamen before a commissioner to sign the articles, the provisions of the statutes concerning shipment of seamen before such an official will then apply (Act Aug. 19, 1890, c. 801, 26 Stat. 320). But when he does take advantage of the permission, the articles cannot be successfully attacked on the ground now relied upon.

Turning, then, to the questions of fact in dispute, the first of these concerns the validity of a clause that the "crew shall load and discharge cargoes," the libelants averring that they are not bound by this provision, because, although one of them could not read at all and the other could not read English, the existence of the clause was not only not made known to them when the articles were signed, but was deliberately concealed by the master. The testimony upon this point is conflicting, but if the rule is borne in mind that such an assault upon a writing by one who has signed it must be supported by clear and convincing evidence (Ramirez v. Steamship Co. [D. C.] 107 Fed. 530), the conclusion can hardly be avoided that the libelants' averments have not been satisfactorily proved. But, while I am therefore of opinion that the libelants knew they were signing articles that contained the clause in question, I also think it clear that the clause was not understood by the ship to impose upon the crew an unqualified obligation to discharge the cargo; for, when the vessel reached Mayport, the master employed a stevedore to unload, and the latter set his own men to work, and had been engaged in this business for three days before the situation arose which has given rise to the present dispute. After these three days, for some reason that does not appear, the stevedore was short of men, and in this emergency the master directed the libelants, with the rest of the crew, to help in discharging the cargo. They all refused on the ground that they had not signed for such work, whereupon the master entered their refusal in the log and announced his intention of going to Jacksonville to ask for advice from the United States commissioner. These events took place in the afternoon of March 27th, and there is some dispute concerning what happened further on that day. The libelants contend that, while the master said that the crew might have supper on board and might stay on the vessel if they chose, he declared also that they should not have breakfast or any other food, and gave them the option to accept these conditions or to go ashore. They aver that they were refused breakfast the next morning, and were obliged by hunger to leave the ship. The evidence does not satisfy me that the option of doing without food or of going ashore was offered to the men, but it is no doubt true that breakfast was denied them, and I agree that this was by the master's order, which ought not to have been given. His mistake in this respect was pointed out to him as soon as he consulted the commissioner in Jacksonville, and he telegraphed at once to the mate that food should be furnished. When the telegram reached the ship, however, about 10 or 11 o'clock, the men had already taken their clothes and gone away. Was this conduct desertion on the part of the libelants, or did the master agree in effect that their contract of service should then come to an end? As I think, the libelants must be held to have deserted the ship. Their agreement to discharge the cargo—while it may not have bound them to do all the work, since the practical interpretation of it by the ship apparently modifies its unqualified language to some extent—cannot be wholly disregarded, and it seems to me that it bound them this far, at least, that they ought to have rendered assistance in the emergency that had arisen. Their refusal to do this was not justified, and the master acted with prudence in seeking to be advised concerning his right and duty in a somewhat perplexing situation. He was wrong in refusing to feed the crew while they were allowed to remain on board, but this mistake would have been set right with no more than a slight inconvenience to the men, if they had not acted with precipitation and left the vessel without waiting to hear the result of the master's visit to the commissioner. The dispute was no doubt irritating to both parties, and it is easy to believe that angry feelings were aroused; but, if I am correct in holding that the crew were bound to some extent by their agreement to unload the cargo, they were first in the wrong and persisted in maintaining this attitude. To refuse to perform a duty, and to leave the ship rather than yield, can only be described as desertion, for which sufficient justification is not found in the master's error concerning

their food. The evidence does not establish such a mutual rescission of the articles as the libelants' counsel thinks has been made out.

A decree may be entered dismissing the libel.

G. M. THURNAUER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York, May 12, 1908.)

No. 4,259.

CUSTOMS DUTIES (§ 25*) — CLASSIFICATION — CARMELITE WARE — "COMMON BROWN EARTHENWARE."

So-called "carmelite ware," consisting of earthen cooking ware of a dark brown color, some of the articles having a white lining and some no lining, are not within the provision for "common * * * brown * * * earthenware," in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 94, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 25.*]

On Application for Review of a Decision by the Board of United

States General Appraisers.

In the decision below, which is reported as G. A. 6,359 (T. D. 27,327), the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York. The articles in controversy consisted of so-called "carmelite earthenware," being in the form of egg dishes, pitchers or jugs, custard cups, etc. They were dark brown in color, and glazed. Some had a white lining, and some were unlined.

The opinion of the Board of General Appraisers is as follows:

HAY, General Appraiser. The merchandise which is the subject of these protests is described upon the invoices as earthenware. It was assessed for duty by the collector under the provisions of paragraph 95, Schedule B, Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626). Several different claims are made in the protests, but at the hearing all were practically abandoned, except that it should have been assessed as "common * * * brown * * * earthenware," under the provisions of paragraph 94, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633).

There seems to be no question of law involved, but purely one of fact, and the testimony overwhelmingly sustains the correctness of the collector's classification. From this testimony we are led to believe that the merchandise is very similar to, if not identical with, that which was the subject of the board's decision in Woolworth's Case, G. A. 5,696 (T. D. 25,354). It was held that the ware which was the subject of the protest in that case was not common brown earthenware within the meaning and intent of paragraph 94, act

of 1897, but was dutiable under paragraph 96.

The protests in this case are overruled, and the action of the collector afirmed.

Walden & Webster (Henry J. Webster, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. Decision affirmed.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

UNITED STATES v. INDEPENDENT IMPORTING CO.

(Circuit Court, S. D. New York. May 22, 1908.)

No. 4.975.

CUSTOMS DUTIES (§ 77*)—APPRAISEMENT-NOTICE OF ADVANCE.

Customs officers sent to the address given by the importer in his entry a notice of an advance on the invoice value as made by the appraiser. Held, that due diligence had been shown in this regard, and that the importer could not object to the assessment of duty on the basis of the advance, on the ground that he had not received the notice by reason of an error in the address.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 77.*]

For decision below, see G. A. 6,621 (T. D. 28,250), in which the Board of General Appraisers reversed the assessment of duty by the collector of customs at the port of New York.

J. Osgood Nichols, Asst. U. S. Atty. Edward Fillmore, for importers.

PLATT, District Judge. In this case the appraiser made certain additions to the invoice value of the merchandise, and the collector assessed additional duty. The importer protested, claiming that no notice of this advance was received. It appears from the record that such notice was deposited for mailing in a duly franked envelope addressed to the Independent Importing Company, at 335 Broadway, New York. The Board of General Appraisers sustained the protest of the importer, from which decision the government appeals to this court. Since the board's decision, additional testimony has been taken in this court in behalf of the government.

While Mr. Kopstein, a member of the importing firm, states that he did not make the entry of this merchandise, never authorized the entry to be made, and did not receive the notice of the advance made by the appraiser, it appears that he ordered the said merchandise from a Mr. Horwitz. The sworn declaration of owner, attached to the entry herein, states that Mr. Horwitz is the owner of the goods, and that he is also a member of the firm of the Independent Importing Company. Witness Graham testifies that the firm by which he is employed, Henry Bischoff & Co., customhouse brokers, was duly authorized by the importers to make the entry in this case, and produced a letter purporting to be such authority. This letter is as follows:

"Telephone Connection,

"Corner Longfellow Avenue and 172d Street,

"New York, October 27, 1906.

"Gentlemen: By advice of Mr. A. Horwitz we inclose you herewith b/L for cases of pasteboard cigar cases and would ask you to get these for us as soon as possible.

"For any further information call up M. A. Horwitz and greatly oblige. "Respectfully yours, Independent Importing Company.

"Messrs. Bischoff & Co."

This witness also produced the envelope in which the above letter He also states that his firm made the entry of this was received.

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

merchandise, that it received certain papers and notices from Mr. Horwitz in connection therewith, and that the latter also furnished the address 335 Broadway.

It is evident from the whole case the importers must have understood the situation. The address, 335 Broadway, appearing upon the entry following the signature of the "Independent Importing Company," it was proper that any official notice should be forwarded to that address. From the fact that Mr. Horwitz signed the owner's declaration, as well as signed the entry, taken in connection with the letter of authorization above quoted, in which he (Horwitz) is mentioned, it appears that the government officials exercised due diligence in the matter of sending the notice of the advance by the appraiser.

The decision of the Board of General Appraisers is reversed.

MORIMURA BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. May 18, 1908.)

No. 4.973.

Customs Duties (§ 26*)—Classification—Bone Swords—"Swords."

The provision for "swords" in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 154, 30 Stat. 163 (U. S. Comp. St. 1901, p. 1641), relating to "swords, sword-blades, and side-arms," does not include so-called "bone swords," used as curios, ornaments, etc.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

On Application for Review of a Decision by the Board of United

States General Appraisers.

The decision below, which is reported as G. A. 6,612 (T. D. 28,229), affirmed the assessment of duty by the collector of customs at the port of New York.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in question consists of articles known as "bone swords." They were assessed for duty by the collector under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 154, 30 Stat. 163 (U. S. Comp. St. 1901, p. 1641), the importers claiming the same properly dutiable, among other provisions, under Schedule N, par. 449, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678), of said act. Said paragraphs are as follows:

"154. Swords, sword-blades, and side-arms, thirty-five per centum ad valorem.

"449. Manufactures of bone * * * or of which the substances or either of them is the component material of chief value, not specially provided for in this act, thirty per centum ad valorem."

These articles are curios, and are used as ornaments or for purposes of decoration. The evidence shows they are known as "bone swords" to distinguish them from regular swords. I do not think they are

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the swords which Congress had in mind when it enacted paragraph 154. They are properly described by paragraph 449.

The decision of the Board of Appraisers is reversed on the author-

ity of Downing v. U. S. (C. C.) 141 Fed. 490.

UNDERFEED STOKER CO. OF AMERICA V. AMERICAN SHIP WIND-LASS CO. et al.

(Circuit Court, D. Rhode Island. October 3, 1908.)

No. 2,669.

1. Attorney and Client (§ 72*)—Authority—Appearance—Evidence—Presumption of Authority.

Ordinarily a record showing the appearance of a defendant by an attorney at law constitutes prima facie evidence of the authority of the attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 102–105; Dec. Dig. § 72.*]

2. Judicial Sales (§ 47*)—Jurisdiction of Court—Foreign Corporation.

The acquiescence of a corporation during a number of years in a sale of property of the corporation by order of a court in another state, made after notice to its stockholders, including four out of its five directors, in a suit in which appearance had been entered for the corporation, is evidence tending to show that such appearance was authorized, and is sufficient proof of ratification, if original authority was lacking; and the title of the purchaser to the property cannot be questioned by a stranger not in privity with the stockholders or creditors of the corporation.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 47.*]

3. JUDICIAL SALES (§ 61*)—PATENTS—CONVEYANCE BY MASTER.

A court having jurisdiction of a corporation defendant by its consent had authority to order a sale of patents owned by the corporation to satisfy a decree against it, and an assignment of the patents so sold is not invalid to convey title because, pursuant to order of the court, it was made by the master, instead of by the officers of the corporation.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. $\$ 120; Dec. Dig. $\$ 61.*]

4. Patents (§ 328*)-Validity and Infringement-Underfeed Stokers.

The Jones patent, No. 470,052, for an underfeed furnace, the principal features of which are a fuel magazine of considerable size below the combustion chamber in which the coal is coked before being fed to the fire, a powerful ram operating horizontally to force fresh fuel into the magazine and that which has been coked to the surface of the fire, and an air supply forced under pressure over the magazine and under and through the burning coal, was not anticipated by anything in the prior art, including the Worthington patent, No. 310,110, but covers an invention of great merit and is entitled to a correspondingly broad construction. Claim 6 and claim 9, the latter of which is limited to an "upwardly expanding" fuel chamber, also held infringed by the device of the Taylor patent, No. 792,862.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

5. Patents (§ 328*)—Infringement.

The Roe patent, No. 566,871, for improvements on the underfeed stoker of the Jones patent, No. 470,052, consisting of an auxiliary feed mechanism, claim 1, held infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.--5

6. PATENTS (§ 328*)—ANTICIPATION.

The Roe patent No. 595,837 for improvements in underfeed stokers, claim 1, is void for anticipation by patent No. 566,871 to the same patentee.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

7. PATENTS (§ 328*)—INFRINGEMENT.

The Daley patent, No. 644,664, for improvements on the underfeed stoker of the Jones patent, No. 470,052, held infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Charles A. Brown and Frederick P. Fish, for complainant. William R. Tillinghast, and Gifford & Bull, for respondents.

BROWN, District Judge. The bill charges infringement of four patents relating to underfeed stokers:

No. 470,052, issued March 1, 1892, to E. W. Jones, claims 6 and 9;

No. 566.871, issued September 1, 1896, to John M. Roe, claim 1; No. 595,837, issued December 21, 1897, to John M. Roe, claim 1;

No. 644,664, issued March 6, 1900, to F. A. Daley, claims 1 to 6, inclusive.

The defendant questions the sufficiency of complainant's proof of title to the Jones and Roe patents. Title to these patents was formerly in the Jogada Furnace Company, a corporation organized under the laws of Oregon. By stipulation defendant admits that the complainant has acquired title to the patents in suit—

"except so far as the title to said patents, or any of them, is derived under the transfer from Tallmadge Hamilton, as special master for the Jogada Furnace Company, to M. S. Klauber, as to which the defendants require the complainant to produce its proofs, and reserve to themselves the right to make any legal objection they may be advised."

The special master, by order of the United States Circuit Court for the Eastern District of Wisconsin, in a creditors' suit in equity, Benjamin M. Weil v. Jogada Furnace Company, was authorized to sell at public auction the patents and patent rights of the Jogada Furnace Company, with directions to report the sale to the court for confirmation. It appears that prior to the sale copies of the notice of sale were sent by post to all the stockholders of record. In the list of stockholders were the names of four out of five of the directors of the Jogada Furnace Company.

The sale having been confirmed by the court, the special master executed an assignment of the various letters patent, including the Jones and Roe patents now in suit. This assignment was recorded in

the Patent Office on May 14, 1900.

The defendant contends that the Wisconsin court was without jurisdiction to authorize this assignment of intangible property, for the reason that the appearance and assent of the Jogada Furnace Company to the appointment of a receiver was not authorized by the corporation. The defendants urge that there was no jurisdiction of the court sitting in Wisconsin, without a valid consent of the Jogada Furnace Company to be sued there, and that it now appears that the consent was not authorized, but was the act of a committee of management having no such power.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The record in the case of Weil v. Jogada Furnace Company shows an appearance for the Jogada Furnace Company, and an assent to the appointment of a receiver according to the prayer of the bill, by Philip S. Abbott, its attorney.

In the deposition of Fred A. Daley appears the following:

"The management of the company, whose authority was based upon a resolution passed by the board of directors at their regular annual meeting February 13, 1895, appointed Philip S. Abbott as solicitor for the company, with authority to assent to the appointment of a receiver as prayed for by the creditors." etc.

The resolution of the board of directors referred to is in the record. This resolution contains very broad language authorizing three agents of the company, one of whom was a director, to—

"do all and every matter and thing which it is within the power of this board to lawfully confer upon them the right to do in the conduct of business for and on behalf of this company; it being intended to confer upon them the amplest powers possible."

The complainant contends that by the terms of the resolution this authority is limited to the conduct of business in a specific territory. The proper interpretation of the resolution is somewhat doubtful, since the circumstances which might aid in interpretation are not in evidence. Conceding, however, for the purposes of the case, that it should be so limited, it does not follow of necessity that the Circuit Court of the Eastern District of Wisconsin was without jurisdiction. Ordinarily a record showing the appearance of an attorney at law constitutes prima facie evidence of the authority of the attorney. Osborn v. United States Bank, 9 Wheat. 830, 6 L. Ed. 204; Hill v. Mendenhall, 21 Wall. 453, 22 L. Ed. 616; Ritchie v. McMullen, 159 U. S. 235–241, 16 Sup. Ct. 171, 40 L. Ed. 133.

It was not necessary to the complainant's case to offer any other evidence of the consent of the Jogada Furnace Company to the jurisdiction of the court than evidence afforded by the record. Strictly speaking the testimony of Daley that the attorney was authorized by particular agents does not negative other authority. The long-continued acquiescence of the corporation in a sale which was made after notice to all of the stockholders, including four out of five of the directors of the corporation, is evidence tending to show original authority, and is sufficient proof of ratification, if original authority was lacking.

The assumption is justified that notice to four out of five of the governing body of the company must have resulted in notice to the company itself (see Lumbermen's Insurance Company v. Meyer, 197 U. S. 407–418, 25 Sup. Ct. 483, 49 L. Ed. 810), and that a sale and assignment made after such notice was in conformity with the interests of the stockholders and of the corporation. If neither the creditors of the corporation, its stockholders, nor its directors have seen fit to question the validity of the decree of the Wisconsin court, this court should make every presumption in favor of the regularity of the decree.

In raising this objection to complainant's title the defendant is in no privity with creditors, stockholders, or directors of the Jogada Furnace Company. The court, having acquired jurisdiction by consent

of the corporation, had authority to subject the patent rights to the payment of judgment debts (Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942), and to order the execution of an assignment. The decree in the Wisconsin case omitted to direct the Jogada Furnace Company to make the assignment, but directed the master to execute and deliver to the purchaser a good and sufficient deed of conveyance. This omission is formal, and insufficient to constitute a substantial defect in the complainant's title. It was clearly within the chancery powers of the court to compel an assignment, even against the will of the defendant, and a deed of assignment executed by the master of a court having jurisdiction would have in every other jurisdiction the same force as a deed executed by the officials of the corporation. The Wisconsin court having made an order that the assignment of the patents should be made by a special master, it might be assumed, were it necessary, that the proper conditions for the exercise of that power were shown to the court before the entry of the decree. There seems to be no substantial reason why the decree should be regarded as invalid because it does not in terms provide for the execution of the deed by officers of the corporation, when such execution would be merely in obedience to the decree of a court, not involving any voluntary choice of the corporation.

The Jones Patent.

The complainant's fundamental patent is the Jones patent No. 470,052. The other patents are for improvements upon a special type of furnace described in that patent. The patentee says:

"My invention consists in a novel construction, combination, and arrangement of means in furnaces in which the fuel is forced into the mass of burning coals from a point below said mass, instead of being discharged on top of said mass of burning fuel, said means serving to force the supply of air directly over the fresh or green fuel and at the same time under the mass of burning coal, thereby causing the gases from the green fuel and the air supplied to become thoroughly mixed before they pass through the burning fuel and off into the flue or flues, said means also serving to regulate this supply of air, and thus insure complete combustion, said means also serving to prevent inconvenience from the formation of clinkers and avoid the waste of fine coal," etc.

Claim 6 is as follows:

"A furnace provided with a fuel chamber or magazine, and provided with perforated pipes or tuyeres connected with a pipe of an air-supplying apparatus whereby air is forced under pressure directly over said fuel chamber and under and through the burning coal, and with a device for forcing the fresh coal up into the fire, substantially as described."

1-1-1-5-6-6-6-6

The proof of the great practical and commercial value of the combination described in this claim is very clear. The type of furnace covered by the claim has, in fact, played a most important part, if not the chief part, in the improvement of what may be termed the art of underfeed stoking, and in securing the complete and smokeless combustion of bituminous coal.

It is conceded by the complainant that the scientific principles upon which a proper combustion of bituminous coal might be obtained were well known. The prior patent to Worthington, No. 310,110, December 30, 1884, refers to a former practice in hand firing, of depositing

coal at the side or in front of the fire, and thus permitting the hydrocarbon gases to distill, or partially distill, from it before spreading it over the fire. Various devices of the prior art show a knowledge of the desirability of distilling the hydrocarbon gases from bituminous coal and thoroughly consuming them, as well as the fixed carbon. By the distillation of the hydrocarbons coal is converted into coke, and smokeless combustion of bituminous coal is obtained by distilling and burning the volatile hydrocarbons and then burning the fixed carbons in the form of coke.

The Jones patent is the first in the art to show a structure well adapted to handle large quantities of coal, to secure its most perfect combustion, and to provide for the efficient application of its heat to the requirements of modern boiler practice. After a careful consideration of the case I am of the opinion that it should be regarded as a

primary patent of great merit.

Jones provided a fuel magazine of considerable size and of a design capable of adaptation to any length or size of furnace required. His means of feeding was a powerful ram thrusting coal horizontally into one end of a fuel chamber or magazine, and at each stroke of the plunger forcing the coal previously fed up towards the fire; the ram being of a character well adapted to move large quantities of coal against resistance, and to co-operate with a fuel magazine of considerable dimensions and of oblong shape. His fuel magazine or chamber, when filled with coal, served as a support for a large mass of burning fuel above it; a large part of the burning fuel not being grate-supported, but supported by the underlying mass of green fuel.

Although Jones shows side grates, he distinctly states that they are not depended upon for the supply of air to carry on combustion, and therefore the ashes and other débris may be allowed to pile over them to any reasonable depth. The fuel chamber is closed save at the top, and the sole air supply is forced under pressure directly over the fuel chamber and under and through the burning coal. Nothing in the prior art anticipates the Jones invention in this feature; that is, the introduction of the entire air supply under pressure at the top of the

fuel chamber.

The Jones structure is well adapted to be made in large sizes and to handle and consume large quantities of coal, an important consideration, since it was thus enabled to supply a practical demand for a furnace adequate to the increased boiler surface demanded by modern development and practice. The capability of increase in size is not to be regarded merely from the mechanical standpoint. The proof is strong that with increased size results a more efficient and practical application of the scientific principles of combustion. The term "magazine," in the claim, as applied to a coal receptacle, seems to be an appropriate expression for a receptacle designed to hold a considerable body of fuel for a considerable time before it is brought to the surface to be burned.

The magazine of Jones is an efficient coking chamber. Its size provides for the retention of the coal for the proper period for coking. The exclusion of air from the magazine while the mass of green coal is subjected to the intense heat from the superincumbent mass of burn-

ing coals gives most favorable conditions for completely extracting all the hydrocarbons and reducing the coal to coke before it is supplied with air for combustion.

The size and power of the feeding means contemplated by Jones have relation to another feature of combustion. Upon the formation of coke the fuel expands into a spongy mass, which would have a tendency to retard the feeding of coal, were it not driven up with such power as to break up the mass of coke and distribute it properly in the zone of combustion. While the prior art shows many attempts to construct an underfeed stoker, and while it contains evidence of the knowledge of the scientific principles involved in the smokeless consumption of coal, there is but one device of the prior art which deserves special consideration. The only one of the prior devices which contains an approximation to Jones' feature of an air supply at the top of the fuel chamber is that described in the patent to Worthington above referred to. Worthington's purpose was to produce— "an automatically-feeding, smokeless furnace, preferably adapted to the use, without direct loss, of bituminous coals of varying grades of fineness, said furnace being arranged to so distribute said coals that combustion may be uniform in its progress and intensity, and that the principal heat-producing elements of the coal, viz., the hydrocarbons and fixed carbons, may be so treated therein that the combustion of one may assist that of the other, each receiving the required proportion of oxygen at the proper time and in the proper place to support combustion."

Worthington provided mechanism for—

"feeding coal from beneath the grate into a bowl-shaped receptacle situated at or near the center of the grate, which is preferably round, and the bars of which radiate from the periphery of said bowl."

The coal is fed upwards by means of an Archimedean screw conveyer, which Worthington says he prefers to place at an angle of about 45° from the plane of the horizon. The Worthington specification says:

"* * * The top or periphery of the bowl is provided with slots or openings, preferably made in a radial form, which communicate with a chamber underneath the bowl, into which a volume of air is forced, either by means of the blower or a jet of steam. Said slots are so constructed as to direct the jets of air, or air and steam, therefrom into and through the fresh coal at the earliest stage of combustion, in order to drive out the hydrocarbon and other volatile gases and reduce it to coke as rapidly as it is forced up into the furnace and before it begins to spread out on the grate bars, and to thus maintain the incandescence of the fire at the point on the surface from which the hydrogen gases must escape, thereby reducing them to a thorough state of combustion as they leave the surface."

Elsewhere the operation of his furnace is described:

"The hopper, G, being supplied with coal of a sufficient degree of fineness to pass readily through the pipe, F, the same is carried upward by said conveyer, filling the bowl, D, which soon overflows, when the coals are deposited upon the grate, the bars, e, of which are preferably slanted downward as shown, until the whole mass is formed in a kind of oval or dome shape, the greatest depth being above the bowl. The jet of steam from the pipe, k, forces a hot-air blast into the chamber, I, the shape of which, in conjunction with the funnel-shaped orifice, i, tends more or less to compress the air and steam in said chamber, from which it issues with great force through openings, d, thereby being generally distributed through the fresh coal at the earliest

stages of combustion or distillation. A sufficient amount of oxygen is thus brought into contact with the fresh fuel to unite with and wholly consume the hydrocarbon gases first given off, and I aim thereby to produce a sufficient heat to decompose the superheated steam and by adding its hydrogen to that simultaneously evolved from the coal a flame of the utmost intensity is produced at the outset, and the coals passing up from the bowl, D, are rendered incandescent before reaching the top or surface of the fire, at or near which point the second stage of combustion, viz., that of the fixed carbons, commences, the arch, L, in the meantime serving to accumulate the heat and reflect the same back upon the mass of coals, which are thus uniformly retained in their incandescent state."

Elsewhere he says of the coal:

"As the same will have reached an incandescent state before passing over the edge of the bowl onto the grate bars."

Upon a fair construction of the Worthington patent it must be held that Worthington was familiar with the scientific principles of combustion, and that he intended to coke his coal in his bowl-shaped receptacle before it was spread out on the grate bars, and to use a top supply of air under pressure to assist in coking the coal. It is quite evident, however, that Worthington did not rely solely upon the air supply at the top of the bowl for combustion. He says:

"Openings above the grate in the usual way admit air which, with that ordinarily passing through the grate, serves to complete the combustion of the coke by combining with the carbonic oxide that might otherwise escape and converting it into carbonic acid."

The drawings, moreover, show this.

Comparing the Jones and Worthington devices, important differences will be noticed. The fuel magazine of Jones is a receptacle of substantial size, well adapted to serve as a coking chamber, and to contain a considerable body of coal, covered for a considerable time by a hot fire, which raises the temperature of the coal gradually so as to distil the hydrocarbon gases. Worthington's fuel-receiving bowl is of small size, and not a "magazine" in the sense of the term as used by Jones, adapted to a slow coking process. Jones' air supply is forced under pressure directly over the fuel chamber and under and through the burning coal. So far as can be judged from the Worthington patent, it was intended to direct a blast of air through all the coal in the bowl, as well as through a dome-shaped mass of coal which rests partially upon the grate and partially upon the bowl-shaped receptacle.

The burden is upon the defendant to anticipate the Jones patent by clear evidence, and any ambiguity or indefiniteness in the Worthing-

ton patent must, of course, be taken against the defendant.

The third feature for comparison is the device for forcing the fresh coal up into the fire. Jones uses a powerful ram, well adapted to cooperate with enlarged coal receptacles or magazines, and which both feeds and raises the coal to the surface by a horizontal and endwise thrust, while Worthington's Archimedean screw, placed underneath at an angle of 45°, necessarily serves as a limitation upon the size, and shows that he did not have Jones' conception that the coal could be both fed and raised by a horizontal thrust. There is no evidence to show that the Worthington device was ever constructed for commer-

cial purposes, or that it ever had any effect upon the practical art. While, as we have said, the Worthington patent discloses a knowledge of the principles involved in the complete combustion of coal, it fails to show that Worthington appreciated the advantages of Jones' method of reducing fresh coal to coke by excluding air from a coking chamber during practically all the process of distillation of the hydrocarbons. He says concerning the slots in his bowl:

. "Said slots are so constructed as to direct the jets of air, or air and steam, therefrom into and through the fresh coal at the earliest stage of combustion, in order to drive out the hydrocarbons and other volatile gases and reduce it to coke as rapidly as it is forced up into the furnace."

Again he says, of his compressed air supply, that it-

"issues with great force through the openings, thereby being generally distributed through the fresh coal at the earliest stages of combustion or distillation."

In claim 5 of the Worthington patent this idea is expressed as follows:

"And means, substantially as described, for injecting a blast of air, or air and steam, into said fresh coal at or near the periphery of said bowl, whereby the volatile gases may be liberated and consumed and the coal coked before spreading upon the grate bars," etc.

It seems to be a fair construction of the Worthington patent to say that Worthington intended to introduce compressed air while the coal was still in process of distillation, and at an early stage of distillation, to aid in coking the coal.

The Worthington patent contains suggestions as to an increase of size.

"It is clearly apparent that, when a large grate surface is required, two or more conveyers placed side by side with corresponding receptacles may be used, either with a like number of revolving grates or a stationary grate, in which latter case, instead of two or more circular receptacles, a single oblong trough may be used, with which several conveyers may connect."

This is insufficient to show a conception that by an increase of the size of his receptacle he could obtain a more efficient distillation of the underlying mass of coal.

In connection with the small size of the bowl of the Worthington patent it should be observed that in his specification he remarks:

"It is uniformly admitted by many furnace builders and users that to obtain the best results from coal as a fuel it should be supplied in small charges, or, better still, fed into the furnace continuously in quantities or at a rate corresponding to the rate of combustion."

It is apparent from the mechanical structure of Worthington that he was concerned with supplying small charges of coal. His furnace was a grate furnace, and the air supply in his bowl was designed to co-operate with the ordinary draft through the grates and through the door of the furnace.

Evidence has been introduced upon both sides as to experiments with a stoker made in accordance with the Worthington patent. The defendant's evidence seems to show the possibility of the smokeless consumption of coal by the Worthington device. Giving due weight

to the evidence as to the experiments, I am of the opinion that the Worthington patent does not clearly show the same mode of operation in respect to the combustion of coal as is inherent in the structure of the Jones patent. The slow distillation of all the gases in the large fuel chamber, and the reduction of the coal to coke before it is subjected to the action of air, the air supply solely at the top and not aided by the ordinary draft through grates or doors, is substantially different from the Worthington operation of distilling the gases from a small quantity of coal in a small receptacle and supplying air under pressure, during the early stages of distillation, to assist in distillation, while also supplying air through grates and doors in the ordinary way to aid combustion.

But it is not necessary to the complainant's case to find a difference from Worthington's method of burning coal, since the structural features of the Jones device are so distinctly superior as to make it patentable over Worthington in respect to features new with Jones and which are embodied in the defendant's stoker. The horizontal feed by a ram into one end of the elongated retort with the air supply at the sides, and the raising of the coal to the surface of the fire by the horizontal thrust of the ram, removes the limitation as to size inherent in Worthington's device, and makes a structure which can be conveniently and practically located with relation to the boilers with which it is designed to co-operate. The photographs in evidence of plants in actual operation show clearly the practicability of the Jones' construction and the impracticability of the Worthington construction.

Worthington suggests the possibility of enlargement by duplication of conveyers and grates, or by using a single oblong trough with which several conveyers may connect. He does not show, however, how to apply his oblong trough with several conveyers, and his suggestion of a way of increasing the capacity of his stoker emphasizes the inventive character of the changes made by Jones, and of a horizontal endwise feed lifting the coal to the surface of a retort which is capable of indefinite extension in size according to the demands of practice without rendering the top surface of the coal in the retort less accessible to the air supply.

The difference in size is a material difference. The Jones structure is capable of growth and of adaptation to practical needs by mere enlargement of parts. The Worthington structure is incapable of enlargement without entire reconstruction.

In this connection should be noticed the language of Justice Burbridge in the Exchequer Court of Canada, quoted in the record:

"By adopting an oblong, or bathtub-shaped, fuel chamber, Jones succeeded in producing a mechanical stoker in which the requisite area of fire was obtained, and at the same time every part of the fuel within the zone of combustion was within reach of, and in effective contact with, the air supply of the furnace."

I am of the opinion that the sixth claim of the Jones patent is for an invention of great merit, that it is entitled to a breadth of construction commensurate with its merit, and that it is not so limited by any disclosures of the prior art, including those of Worthington, that the defendants can escape infringement.

Claim 9 is as follows:

"A furnace provided with an upwardly-expanding chamber, closed at bottom and sides, having connection with an air-supplying apparatus at or near its top whereby the fresh or green fuel is confined while air is being forced first over the top of the fresh fuel below the mass of burning fuel and through the burning fuel, in combination with a device for forcing fresh fuel up into the burning fuel, substantially as described."

The fuel magazine described in this claim has an upwardly-expanding chamber and is thus described in the specification:

"Said magazine being provided with an upwardly-curved bottom, B1, upwardly-flared, closed sides, B2, and an inwardly and upwardly extending hood, or overhanging top portion, B3."

It is also said:

"The bottom of the fuel magazine can be of iron or brick, and it can be curved on a slight incline or the incline may be straight, and of any angle suitable for insuring the free gliding up of the fresh fuel which is being forced in by the ram."

Apparently this upwardly-expanding chamber was designed to relieve friction, and to assist the passage of coal from the bottom to the top of the chamber. The chamber or magazine of the defendant, which lies beneath the tuyeres, or air supply, does not have expanding walls. Nevertheless there is an expansion at the top of the defendant's structure which permits the expansion of the coke under heat as it approaches the surface. The similarity between the complainant's and the defendant's structures in respect to an expansible chamber, if any, is in this feature, which permits expansion of the coke near the surface.

Complainant contends that defendant has an upwardly-expanding chamber at the point where the upwardly-expanding chamber is required, in order to take care of the expanding coke. I confess to some doubt upon the question of infringement of this claim. Nevertheless, claim 9 is for a combination containing a limitation which distinguishes it from claim 6. Although the defendant does not infringe, unless brought within this limitation as to the character of the chamber, as well as within the general combination, yet he cannot escape infringement by so varying his structure as to avoid the use of some of the advantages of the upwardly-expanding chamber, provided he still uses any of its advantages. Conceding that the chief advantage, and perhaps the only contemplated advantage, of this upward expansion, was to assist the raising of the coal by the ram, the structure nevertheless did involve an advantage at the period of the expansion of the coke under heat, and the defendant doubtless has this feature. This claim must be considered, not as a claim for an upwardly-expanding chamber, but as a combination claim, which differs from claim 6 only in the specific character of one of the elements. I am of the opinion that this claim is infringed, for the reason already given to show infringement of claim 6, with the additional reason that a specific feature of the more limited claim is also employed.

The defendant contends that this claim can be distinguished from the Worthington patent only by the word "expanding"; but this is too narrow a view, and is met by what we have said concerning the Worthington patent as an anticipation of claim 6. The contention that this claim does not contain patentable subject-matter in view of Worthington is met by our conclusion that the Jones combination is substantially distinct from that of Worthington. I do not find, upon an examination of the file wrapper of the Jones patent, that it affords any sound basis for the defendant's contention that Jones was content to accept claims closely limited to specific details.

The First Roe Patent.

The first Roe patent, No. 566,871, granted September 1, 1896, relates primarily to improvements upon the Jones underfeed stoker. It is said:

"Owing to the considerable length of said fire box and to the fact that the fuel is delivered thereto by being forced through an admission opening located at the extreme front end of the fire box, it is found in practice that the resistance offered to the passage of the fuel along said retort, due principally to the friction between the fuel and the retort and to the weight of the fuel, is so great that almost the entire bulk of said fuel is discharged into the fire box at the extreme front end thereof, very greatly decreasing the fire area and leaving a large portion of the grate surface exposed, and also causing clinkers to form at the back end of said retort, which, increasing gradually in size, finally necessitate that the fires be drawn in order to clean out said retort. These undesirable features are further increased by the fact that as commonly constructed the bottom of the retort inclines upwardly from the admission opening," etc.

To remedy said defects Roe provided feed mechanism auxiliary to the feed ram, consisting of a rod, located at the bottom of the retort, with projections adapted to engage the coal and push it throughout the entire length of the retort. Claim 1 is as follows:

"In a mechanical stoker, the combination with a retort and a primary feed mechanism, of an auxiliary feed mechanism located in said retort, and a connection between said primary and auxiliary feed mechanisms, substantially as described."

Increased size of the retort having been shown to result in more effective coking and more effective combustion of the coal, it is fair to say that Roe, by supplementing the heavy ram of Jones with the pusher-rod, took an important step in the making of mechanism which would carry out more perfectly than the mechanism of Jones the fundamental ideas to which are due the large and efficient coal consumption of the complainant's underfeed stoker. Roe was engaged with the problem of enlarging the capacity of the Jones furnace. His perception of the desirability of doing this seems to involve a knowledge of the superior efficiency of the Jones type of retort, and of the principles of combustion and the mechanical principles to which this superiority is due. The defendants contend that this claim should be limited to a specific kind of auxiliary feed mechanism, namely, a rod extending longitudinally of the retort. It is conceded that this construction is novel; but the defendant contends that, if the claim be given a broader construction, no invention is involved, in view of the prior patents to Hall and Muller.

The Hall English patent, of July, 1868, related to feeding furnaces

with fuel by mechanical appliances. It shows a series of descending steps upon which the coal falls from a top coal supply, from which steps it is pushed by successive pushers with which each step is provided. The specification says:

"When charging or feeding the furnace the pushers are drawn back and the coal or other fuel in the hopper falls upon the upper plate or block, and is thence pushed off from block to block, or from step to step, in succession or simultaneously (falling partially upon and partially behind the clear fire next below), the smoke or other crude products of combustion having thus to pass over or through the clear fire or incandescent heat, and are more perfectly consumed or intensely rarefied, and thus increase the heating power of the fuel or furnace."

The Muller patent, of January, 1894, shows a similar steplike arrangement, with plungers. In the Muller patent it is said in the specification:

"In the grate shown in Figure 3, which is especially adapted for use with fuels that smoke badly, the fresh or green fuel is pushed underneath the heated mass of fuel and the gases arising therefrom are compelled to pass through this heated mass, which results in complete combustion of the gases and in the prevention of smoke."

The series of pushers in the Hall and Muller patents are designed merely to push off coal from successive steps; the push aiding the force of gravity to carry the coal down. None of them contemplates a forcible action against the resistance of a compacted body of coal in a large retort, and neither of these patentees was concerned with the problem of carrying coal throughout the entire length of a long retort against a strong resistance. It is quite obvious that the screw devices of the Smith patent, No. 199,000, and the English patent to Erskine, No. 3,877, have no relevancy. To contend that each flight of a screw within the retort is an independent and auxiliary feed

mechanism is an oversubtlety of argument.

The question of infringement of this claim requires reference to specific features of the defendant's device. The defendant's stoker is shown and described in letters patent to E. E. Taylor, No. 792.862, issued June 20, 1905. In this structure is shown the large and elongated fuel magazine which is characteristic of the Jones patent. In this device the top of the retort or fuel magazine is not horizontal, but inclined, and the primary plunger is located, not at the bottom of the retort, but near the top. Connected with this primary plunger is a secondary plunger, located at the bottom. The incline enables Taylor to avail himself to some extent of a gravity feed. Nevertheless, the coal is brought to the surface of the fire by the horizontal thrust of a ram, aided by the horizontal thrust of an auxiliary ram, though at a different level. The result attained is the underfeeding of the coal throughout the entire length of an elongated magazine, by means which are the mechanical equivalent of those shown in the combination of the Roe patent.

The defendant contends that the adoption of the gravity feed principle, which in itself partially solves the problem of moving the fuel downward and rearward, distinguishes its device from that of the Roe patent. I am of the opinion, however, that the variation which

admits some use of the gravity feed principle is insufficient to avoid infringement. Although the gravity feed is used to some extent, it is used in addition to substantially the same mode of feeding employed by Roe, namely, the end feed by the primary ram, for the first supply of coal, and the auxiliary feed mechanism thrusting the coal first supplied forward toward the extremity of the fuel chamber. The auxiliary feed mechanism of the defendant is the same in function and permits the same enlargement of the fuel chamber as was achieved by the invention of the Roe patent. I am of the opinion that the defendants infringe this claim.

The Second Roe Patent.

In the second Roe patent, No. 595,837, the first claim is as follows: "In a mechanical stoker, the combination of a retort or fuel magazine, provided with twyers adjacent to its upper inner edges, means to supply air to said twyers, a primary feed mechanism and an auxiliary feed mechanism, substantially as described."

I am of the opinion that this claim is substantially for the same invention covered by the earlier Roe patent, and is therefore void. It was conceded upon argument that there is one invention stated in two different forms in the first claim of each patent. Having protection under the first patent for this device, to support the second patent also would unlawfully prolong the complainant's patent right.

The Daley Patent.

The Daley patent, No. 644,664, is dated March 6, 1900. Like Roe, Daley was an improver upon the specific type of stoker covered by the Jones patent in suit. Daley states that the object of his invention is:

"First, the provision of improved means for conveying air under pressure to the twyer openings, whereby the expensive twyer-boxes heretofore employed for this purpose may be dispensed with, and second in so constructing furnaces employing dead plates that the dead plates may be cooled by the incoming air under pressure before the air is directed upon the burning fuel, so that the life of the dead plates may be greatly increased; and it is in connection with furnaces employing dead plates that my invention has its greatest utility."

Six claims of the Daley patent are in suit. It will be sufficient to consider the second:

"In a furnace, an imperforate fuel-bearing surface, and a retort dividing the furnace into a fire box and an air chamber, the retort being provided with twyer openings or passages for establishing communication between the air chamber and the fire box, and means for conveying air under pressure to the air chamber, substantially as described."

Daley substituted, for the open grates at the sides of the Jones furnace, closed plates; removed the tuyere boxes, or rather removed the bottoms of the tuyere boxes, so that the space beneath the grates of Jones, which served as an ash pit, was converted into an air chamber. The result of this was that all portions of the furnace subjected to heat were also subjected to the cooling of the air under pressure, thereby extracting the heat from the metal and thereby warming the air before it was forced through the tuyere openings to the fire.

Complainant in argument fairly described the Daley improvement as follows:

"The furnace is divided into two parts, one of which is for air and the other of which is for the burning fuel. When the air is let in it does one thing with two results: First, in passing through the air chamber it extracts the heat from the iron, thereby prolonging the life of the iron; second, by extracting the heat from the iron it becomes itself hotter, and goes into the furnace so heated as not to cool off the fuel, but so that increased combustion and heat result from the operation. The heat taken from the combustion chamber by the iron is taken up by the air and restored to the combustion chamber."

It is said:

"His idea involves an air chamber practically coextensive with the entire fuel-bearing surface, which is filled with compressed air brought into contact with practically all the heated iron; * * * that is, Daley delivers every particle of air that is used in his machine up against all the heated portion of the machine. That is his invention; that, his idea."

In the defendant's device, as described in the patent to Taylor, No. 792,862, there is shown a division of the furnace into a combustion chamber and an air chamber, which substantially corresponds with the arrangement described in the Daley patent. In the Taylor patent it is said:

"Air is fed through a pipe, 43, to an air trunk, 44, extending across the furnace beneath the retorts, and communicating with the air boxes, 45, between the retorts."

At each side of the retort of Taylor is an air chamber, and underneath the retort is also an "air trunk," as Daley calls it, communicating with the air boxes at the side. The defendants deny infringement of the claims of the Daley patent, contending that dead plates are an essential element of the claims of the Daley patent, and that they are not used by the defendants for the purpose of dividing the furnace into air chamber and combustion chamber.

Defendant contends that, as a consequence of the employment of a gravity feed, he locates his dead plates at the bottom of his inclined retort, where they simply serve the function of dumping grates. The term "dead plates," however, is not used in all the claims of the Daley patent. The element is described in the various claims as "dead plates," "an imperforate fuel-bearing surface," "fuel-supporting means," and "fuel-bearing plates."

In the defendant's furnace the retorts are arranged in pairs, which are divided by a portion of the air chamber. At the top of the air chamber there are tuyere blocks of a triangular shape, arranged on an incline from the top to the bottom of the retorts. Each of these tuyere boxes has a chamber in its apex, provided for the purpose of admitting cool air to the point of the tuyere to prevent its being burned off, as is stated in the specification of the Taylor patent. The specification also states:

"By constructing the twyer-blocks with the shape hereinbefore described the fuel is permitted to spread out from each of the retorts and come in contact with that fed through the other retorts to form a single wide bed of fuel, extending across the whole extent of the furnace." The tops of the tuyere boxes support to some extent the fuel, and like the dead plates of Jones, are cooled by the admission of air to the air chamber. I am of the opinion that there is the adoption by the defendant of the same general division of the furnace into the combustion chamber and air chamber for the same purpose for which Daley adopted it.

The defendants contend that giving to the claims of the Daley patent a construction broad enough to cover defendant's device, they are anticipated by the Jones patent in suit, by Brown's patent, 57,987, the Shinners patent, 552,335, figure 1 of the Worthington patent, and

figure 4 of the Roe patent in suit.

The contention as to the Worthington patent requires careful consideration. The fire bowl or receptacle of this device is surrounded by a large air chamber, into which is forced compressed air, which escapes through perforations at the top of the bowl; and Worthington describes this arrangement as designed to permit the air to become thoroughly heated before its introduction into the combustion chamber. Undoubtedly the heat would be extracted from the iron and the iron preserved; and the bowl, whose perforated top constitutes the tuyeres, would be preserved from the heat, as in the Daley and the Taylor structures. As has been said in relation to the Worthington patent, the Worthington forced draft was designed to co-operate with the ordinary draft, and his bowl to occupy a central portion of a very considerable amount of grate surface. Although we can find in the Worthington patent a surrounding chamber filled with air under pressure which serves to cool the tuyere blocks and the fire bowl, I do not think that claim 2 of the Daley patent can be read upon the Worthington device: for if the periphery of Worthington's bowl above his tuyere openings should be regarded as an imperforate fuelbearing device, yet it does not, with the retort, divide the furnace simply into a fire box and an air chamber, as in the Daley patent and in the Taylor patent. While all the air supplied by Worthington under pressure would cool the bowl and be heated, the air supply from natural draft would pass above the fire and through the grate bars. Daley's conception of the complete division into air chamber and combustion chamber, and the direction of his entire supply of air against the heated parts of the furnace, is not anticipated by Worthington.

Reference is made to the file wrapper and to various discussions in the Patent Office; but upon a careful reading of this file wrapper I find no concession made by Daley which precludes him from contending that the substance of his invention is to be found in the Taylor device, and that the variations are not substantial.

Concerning the Taylor patent it may be said that it contains features of a novel character, that it makes some use of the gravity feed principle, and that in the prior art may be found various structures which more or less resemble the device of the Taylor patent, and which do not resemble the Jones device.

I am of the opinion, however, that in designing the Taylor device the patentee has followed closely the fundamental principles of the Jones patent, the Roe patent, and the Daley patent, and that the chief merit of his structure is in its adoption of these features, rather than

in its adoption of inclined fire boxes.

The decree will be for the complainant, for infringement of claims 6 and 9 of the Jones patent, claim 1 of the first Roe patent, and all claims of the Daley patent. Claim 1 of the second Roe patent is held void, in view of the first Roe patent.

A draft decree may be presented accordingly.

UNITED STATES V. LAMSON.

(Circuit Court, D. Rhode Island. November 5, 1908.)

No. 2,624.

1. Perjury (§ 5*)—Offense under Federal Statute—False Oath to Return under Oleomargarine Act.

Section 6 of the oleomargarine act (Act May 2, 1902, c. 784, 32 Stat. 197 [U. S. Comp. St. Supp. 1907, p. 641]), in requiring wholesale dealers to keep such books and render such returns as the Commissioner of Internal Revenue may by regulation require under prescribed penalties for its violation, has no relation to the tax to be assessed on such dealer, and the regulations made thereunder and in force prior to their revision in 1907, in requiring an oath to the returns, do not have the force of law in such sense that a false oath to a return subjects the maker to prosecution for perjury under Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3653).

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 5.*]

2. Internal Revenue (§ 16*)—OLEOMARGABINE ACT—REGULATIONS RESPECT-ING RETURNS BY DEALERS.

Under the regulations made by the Commissioner of Internal Revenue pursuant to Oleomargarine Act May 2, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641), and in force prior to 1907, which require wholesale dealers to make returns showing, among other things, the names and addresses of all persons to whom sales have been made, and that "the recapitulation should be signed by the firm name * * * and the person swearing to the return should sign on the dotted lines below the right hand of the printed affidavit," the oath required is to the recapitulation only, and not to the list of customers contained in the return.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 16.*]

On Motion to Quash Indictment.

Charles A. Wilson, U. S. Atty., and George H. Huddy, Jr., Asst. U. S. Atty.

Walter H. Barney, for defendant.

BROWN, District Judge. This is a motion to quash an indictment under section 5392, Rev. St. (U. S. Comp. St. 1901, p. 3653), for perjury in making false returns under the oleomargarine law.

By Act of May 9, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641), it is provided:

"Sec. 6. That wholesale dealers in oleomargarine, process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; and such books shall be open at all times to the inspection of any internal revenue officer or agent.

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

And any person who willfully violates any of the provisions of this section shall for each offense be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months."

Regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, in force at the date of the alleged offenses, now superseded by the revised regulations of 1907, relate to returns of wholesale dealers in oleomargarine:

"Wholesale dealers in oleomargarine will make monthly returns on form 217 (with inside sheets when needed to complete detailed statements), showing in detail the number of packages and number of pounds of oleomargarine received direct from the manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or consigned. * * * "

The regulations further provide:

"The recapitulation should be signed by the firm name immediately under totals on line 10, and the person swearing to the return should sign on the dotted lines below the right hand of the printed affidavit. Reports sworn to before persons other than internal revenue officers must have the seal of the attesting officer, as well as his signature, properly affixed thereto. * * * Collectors will refuse to accept returns from wholesale dealers in oleomargarine which are not signed and sworn to as herein required."

The regulations do not in specific terms require of the wholesale dealer that he should make a personal oath. The oath of other persons may be received. The indictment in this case charges that the wholesale dealer did make an oath to a return which contained items relating to sales by the wholesale dealer and to the names and addresses of the persons to whom sold or consigned. It is charged that three of those items were "wholly false and fictitious," etc.

The punishment provided under section 6 of the act of May 9, 1902, is a fine of not less than \$50 and not more than \$500 and imprisonment not less than 30 days nor more than 6 months. The provision for punishment under section 5392, Rev. St. (U. S. Comp. St. 1901, p. 3653), is:

"A fine of not more than two thousand dollars and imprisonment at hard labor not more than five years; and shall moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

It is this latter statute, and not the specific provision of the oleomargarine law, which the United States attorney contends is applicable.

The question before us is of considerable importance. Section 5392 is contained in chapter 4 of title 70. The title of chapter 4 is "Crimes against Justice." Section 5392, however, is broad in scope, and includes offenses which are not perjury at common law. U. S. v. Ambrose, 108 U. S. 336, 2 Sup. Ct. 682, 27 L. Ed. 746; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; U. S. v. Hardison (D. C.) 135 Fed. 419.

The sworn return of a wholesale dealer in oleomargarine relates neither to a pending controversy nor to a claim or contest in one of the departments. The return required from the wholesale dealer is not a return which is to be the basis of the assessment of a tax. The wholesale dealer's tax is not dependent upon the amount of his sales, but upon his character as a wholesale dealer. It is quite obvious that the principal object of the department in requiring the returns to contain the names of persons to whom oleomargarine is sold is the detection of violations of law by third persons. See In re Kinney, Collector (D. C.) 102 Fed. 468–471; In re Kearns (D. C.) 64 Fed. 481–482.

There is a substantial distinction between a false oath made for use in a judicial proceeding, or in a quasi judicial proceeding in an administrative department, where a disputed question and right is involved and is to be determined upon sworn proofs, and a false oath which is not for use in a claim or contest, but which is made to aid in the collection of taxes from third persons or in the detection of violations of law. It certainly is not obvious that a failure to comply with a requirement imposed, not by statute, but by regulation, and relating to a duty of giving information to the government to enable it to detect violations of law, was intended by Congress to stand upon the same level and be subject to the same punishment as a crime against justice. In U. S. v. Eaton, 144 U. S. 677-688, 12 Sup. Ct. 764, 767, 36 L. Ed. 591, it was said:

"It would be a very dangerous principle to hold that a thing prescribed by the collector of internal revenue as a needful regulation under the oleomargarine act, for carrying it into effect, would be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine in such manner as to become a criminal offense, punishable under section 18 of the act (Act Aug. 2, 1886, c. 840, 24 Stat. 212 [U. S. Comp. St. 1901, p. 2234]), particularly when the same act in section 5 (24 Stat. 210 [U. S. Comp. St. 1901, p. 2230]) requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require, and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article."

Subsequent to the decision in that case amendment was made and punishment was prescribed for a violation of the requirement to "render such returns in relation thereto as the collector of internal revenue, with the approval of the Secretary of the Treasury, may by regulation

require.''

Congress has not required an oath to returns. The word "returns" does not necessarily import a statement under oath. Congress has left it to the Commissioner of Internal Revenue and to the Secretary of the Treasury to determine whether any returns shall be made by a wholesale dealer in oleomargarine, and what such returns shall be. Whether it has further conferred the right to require an oath to returns of this character, and thereby, in case of a false oath, to put the wholesale dealer under the perils and penalties of perjury, I have grave doubt. To leave it to the department to say whether returns of this character shall be made under the pains and penalties of perjury, subjecting the offender to a punishment greatly in excess of that specifically provided in the oleomargarine law, would seem to approach the conferring of legislative power upon the department. False swearing, whether in a court of justice or in a nonjudicial proceeding, may be equally reprehensible morally; but from a legal point of view

the difference between that false swearing which is a crime against justice and that false swearing which deprives a collector of internal revenue of information to assist his investigations is most important. In U. S. v. Eaton it was said:

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have in a proper sense the force of law; but it does not follow that a thing required by them is a thing so required by law, as to make neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

Congress has not spoken in specific terms as to the requirement of an oath on the returns of a wholesale dealer. The requirement of an oath by regulations can only be supported on the ground that it is within the plain purview of the statute. It seems difficult to believe that it was within the purview of Congress that through a regulation of this kind an offender should be made liable to punishment so greatly exceeding that which Congress specified in the act. In Grier v. Tucker (C. C.) 150 Fed. 658, in Schafer v. Craft (D. C.) 144 Fed. 907, and in Craft v. Shafer, 153 Fed. 175, 82 C. C. A. 349, and Id., 154 Fed. 1002, 83 C. C. A. 677, the oleomargarine acts were spoken of as complete in themselves, containing provisions for all the punishments that Congress intended for violations of that act. There is good reason for viewing these acts as constituting a complete and comprehensive system of rights, remedies, and punishments.

In U. S. v. Bailey, 9 Pet. 238, 253, 9 L. Ed. 113, it appeared that the Secretary of the Treasury had established a regulation authorizing affidavits made before a justice of the peace, to be received and considered in proof of claims, and inquiry arose whether the Secretary of the Treasury had an implied power to require, authorize, allow, or admit any affidavits sworn before state magistrates in proof and support of any claim under the act of 1832 (Act July 5, 1832, c. 173, 4 Stat. 563). It was said:

"It is a general principle of law, in construction of all powers of this sort, that where the end is required the appropriate means are given. It is the duty of the Secretary to adjust and settle these claims, and in order to do so he must have authority to require suitable vouchers and evidence of the facts which are to establish the claim. No one can well doubt the propriety of requiring the facts which are to support a claim and rest on testimony to be established under the sanction of an oath. * * *"

The requirement by regulation that proof of claims against the United States should be made under oath could not be deemed usurpation of authority. Evidence is ordinarily under oath.

It may be proper to include within the scope of section 5392 false swearing in all cases where an oath is required by the rules of a department in support of any claims against the United States, or in support of any right, or in controverted matters wherein officers of the department act in a quasi judicial capacity; but, when section 5392 has been thus liberally and extensively applied, an attempt to extend it to a matter substantially different in character should be regarded with great caution. Doubts arise whether the reason of the law does

in fact run with and support this extension, and whether the matter was ever brought to the attention of Congress.

In U. S. v. United Verde Copper Company, 196 U. S. 207-215, 25

Sup. Ct. 222, 225, 49 L. Ed. 449, it was said:

"If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can cularge. Such power is not regulation. It is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

In all cases where proof of right is required, it is reasonable to require an oath. A department official, authorized to determine a contest upon evidence, is within the scope of his authority and within the scope of legislative intention when he requires an oath. To extend this authority by implication to nonanalogous cases, like the present, is to lose sight entirely of the nature of the crime of perjury and to subject a defendant to a severe punishment and forfeiture of civil rights by an accidental collocation of statutes and regulations and rules of law, which collocation was probably never seriously considered, either by Congress or by the department, which was limited to consider merely the enforcement of the oleomargarine law.

The United States attorney refers to section 3165, Rev. St. (U. S. Comp. St. 1907, p. 2057), which gives authority to the collector and deputy collector to administer oaths; but this does not, in my opinion, touch the question before us. The statute establishes the authority of a deputy collector to administer oaths, but not the authority of the de-

partment to require them in a proceeding of this character.

I have examined the decision in U. S. v. Hardison (D. C.) 135 Fed. 419. Upon page 423 are cited many cases in which convictions have been upheld for perjury when the oaths were not taken in judicial trials; but each case cited differs substantially from the present case. Each case involved some question of right of the affiant or other person, and was false swearing directly affecting some issue or proceeding. Such oaths were within the provisions of section 5392, in that they related to a "material matter." The present oath was not material to the amount of tax which the wholesaler was to pay, or to any issue or claim. It can hardly be said to be "material," unless we give that term a very wide extension.

It is possible to say that the giving of the names of customers might be "material" to inquiries or investigations which the government might choose to make; but it is more reasonable to hold that the words "material matter," if applicable to nonjudicial matters, are applicable in the same general sense as in judicial matters, and import some issue or right to which the oath relates, rather than a mere inquiry or investigation to be made for the detection of violations of law by third persons.

The substance of the offense seems to be the giving of wrong information, and thus depriving the department of means of tracing the goods after they have left the wholesaler's hand. Assuming that the information required is useful in detecting violations of law, and serves as a basis of inquiry, it does not become "material" in any proper

sense until an inquiry is actually instituted.

I am unable to believe that Congress when it enacted the perjury statute (§ 5392 [U. S. Comp. St. 1901, p. 3653]), considered that the words "material matter" had a significance broad enough to include mere information of this character, or that Congress, in passing the oleomargarine laws and providing for regulations, meant to place it in the power of a department to say whether or not a man who sold oleomargarine and gave the wrong addresses of his customers should be regarded as a perjurer. It seems much more reasonable to hold that as Congress has fully expressed itself on the punishment of a failure to make returns, and as there is no substantial difference between the failure to make any returns and the making of erroneous returns, so far as the tracing of the goods is concerned, both cases are within the oleomargarine act and are subject to the same punishment.

Counsel for defendant cite U. S. v. Manion (D. C.) 44 Fed. 800, U. S. v. Bedgood (D. C.) 49 Fed. 54, and U. S. v. Maid (D. C.) 116 Fed. 650 (see, also, U. S. v. Keitel [D. C.] 157 Fed. 401; U. S. v. Matthews [D. C.] 146 Fed. 306), and call attention to the fact that in the matter of internal revenue returns the statute itself in some cases requires returns to be made under oath, and cite sections 3307, 3308, Rev. St. (U. S. Comp. St. 1901, p. 2157), returns by distillers; sections 3337, 3338, Rev. St. (U. S. Comp. St. 1901, pp. 2185, 2186), by brewers; sections 3358, 3359, Rev. St. (U. S. Comp. St. 1901, pp. 2198, 2199), by manufacturers of tobacco and snuff; section 3413, Rev. St. (U. S. Comp. St. 1901, p. 2249), by banks and bankers; sections 5210-5215, Rev. St. (U. S. Comp. St. 1901, pp. 3498-3501), returns by national banks. Counsel also cite the following as instances in which no oath is required by statute: Act Oct. 1, 1890, c. 1244, 26 Stat. 620 (U. S. Comp. St. 1901, p. 2226), manufacturers of opium; Act June 6, 1896, c. 337, § 5, 29 Stat. 254 (U. S. Comp. St. 1901, p. 2237), manufacturers of filled cheese; Act May 9, 1902, c. 784, 32 Stat. 193 (U. S. Comp. St. Supp. 1907, p. 636), manufacturers of process or renovated butter; Act May 9, 1902, c. 784, 32 Stat. 193 (U.S. Comp. St. Supp. 1907, p. 636), manufacturers of oleomargarine, Act May 9, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641), wholesale dealers in oleomargarine; Act June 7, 1906, c. 3047, 34 Stat. 217 (U. S. Comp. St. Supp. 1907, p. 625), dealers in denatured alcohol.

It is argued that, because in some cases the statute has expressly required sworn returns, the omission of the word "sworn" in this statute indicates an intentional distinction. This, however, is not conclusive. If a statute authorizes the department to require statements or returns which are to serve as evidence to substantiate a claim or a right, the requirement by regulation of a sworn return, in view of the purpose of the statute, might well be held to be within the statute, though the statute itself did not mention an oath; but it may well be doubted if a statute which authorizes a department to require returns from a wholesale dealer in oleomargarine discloses an intention of Congress to authorize a requirement of a return under oath of such matters as the names and addresses of customers of the wholesale dealer. In fact, there is a most serious question whether the reg-

ulations by their terms require an oath as to such details as the names and addresses of customers. It is provided:

"The recapitulation should be signed by the firm name under totals on line 10, and the person swearing to the return should sign on the dotted lines below the right hand of the printed affidavit."

One would suppose that the thing to be sworn to was the thing to be signed. Paragraph 7 in the recapitulation is as follows: "Quantity disposed of during the months to persons not known to be wholesale dealers"—and there is an omission of any reference in this paragraph 7 to any of the detailed statements, which is significant in view of the fact that such reference is made in paragraphs 2, 3, and 6.

In the revised regulations of July, 1907, this paragraph is amended to read:

"The name of the person swearing to the recapitulation, together with official title and name of firm rendering report, must be entered in the blanks for that purpose immediately below line 10, and also be signed on the dotted lines below the right hand of the printed affidavit."

The amendment may be considered merely as an attempt to put into clearer language the requirement of the former regulation, and this tends to support the defendant's contention that the regulation requires an oath only to the recapitulation.

As the counts of the indictment each charge perjury in the making of a false oath as to the names and addresses of customers, as well as to the amount of goods sold to such customers, and do not charge perjury in the making of a false oath to the recapitulation, there is much force in the defendant's contention that the false oath with which he is charged is one which is authorized neither by a law of the United States nor by any regulation having the force of law. Criminal offenses are not to be created by forced construction of indefinite language contained in regulations.

The motion to quash should be granted for the following reasons:

The oath which is alleged to be false is not an oath authorized or required by a law of the United States, or by any regulation having the force of law.

Like the present amended regulations, the former regulations here involved provide for an oath only to the recapitulation, and not to such matters of detail as the names of customers.

Motion to quash granted.

McGAHEY et al. v. OREGON KING MINING CO.

(Circuit Court, D. Oregon. November 9, 1908.)

No. 3,035.

MINES AND MINERALS (§ 98*)—MINING PARTNERSHIP—CONSTRUCTION AND SCOPE OF AGREEMENT.

Complainants and other persons, who subsequently became the grantors of defendant corporation, formed a mining partnership for the purpose of prospecting and locating mining claims in a vicinity where one of the number had previously discovered a piece of gold-bearing quartz.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The members made two expeditions to the vicinity, and there located a number of claims and did some work thereon. While going on the last expedition, at a place where they stopped several miles from their claims, one of the number was given a piece of rock, picked up as float, and was told where it was found, which information was imparted to all. The rock was thrown with other samples, and no attention was paid to it until after the expedition, when the person to whom it had been given had it assayed, and, finding it to contain mineral in paying quantities, he and two others of the partners went to the place where it had been found, and after prospecting in the vicinity located a number of claims which they afterward conveyed to defendant corporation. Held, that the purpose of the partnership was accomplished at the end of the second expedition; that, since no mineral bearing rock in place was found by the partners during that time in the vicinity where defendant's claims were subsequently located, there was no discovery which brought such claims within the scope of the partnership or entitled the other members to any interest therein when the claims were subsequently discovered and located by defendant's grantors.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 223; Dec. Dig. § 98.*

Mining partnerships, see note to G. V. B. Min. Co. v. First Nat. Bank of Hailey, 35 C. C. A. 515.]

In Equity.

Stephen A. Lowell, Oscar Cain, and J. C. Hurspool, for plaintiffs. Bennett & Sinnott, for defendant.

WOLVERTON, District Judge. Some eight or ten years prior to 1897. Victor Wilson, who was then engaged in herding sheep in the locality of Trout creek, Crook county, Ore., discovered a piece of gold-bearing quartz of light color. He did not know its value. It was shown to an attorney from St. Louis, Mo., who desired to take it away with him and have it assayed. He was allowed to do so, and the rock was found to contain gold in considerable quantities. Without returning the quartz left after using sufficient for the assay, the attorney requested Wilson to take him to the locality in which it was discovered, and endeavored to make some arrangement with Wilson whereby they together might prospect for the lode out of which the quartz came, but all without avail. In 1897 Wilson became instrumental in forming an association of five persons, including himself, for the purpose of prospecting for the ledge. He related how he came to discover the quartz: That he picked up a rock which he supposed contained rubies in crystallized form, and, in endeavoring to break it open, struck it upon a rock jutting above the ground, and in doing so broke off the piece of quartz in question. He expressed confidence in his ability to return to the locality and identify the place where it was broken off.

The parties who became associated with him were G. M. Wilson (a distant relative), A. J. Tash, Richard McGahey, and John F. Kirby. There is much dispute in the testimony as to what agreement was reached between the parties, but a careful study thereof has brought me to the conclusion that it was agreed that an expedition should be made to the locality in question for the purpose of exploration,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

and especially for the discovery of the supposed ledge from which the quartz obtained by Victor Wilson was broken, and that, when discovered, the five parties composing the association should share equally in the mine. This was undoubtedly the specific purpose of the agreement, but, believing that other ledges or mines might be discovered in the same vicinity, it was further agreed that the association should share equally in all mining properties discovered or located while upon the expedition. I think these are the limitations of the agreement: First, and especially, to discover the ledge from which Victor Wilson obtained the quartz, and to locate a mine or mining claims thereon; and, second, to make such other discoveries of mines within the vicinity as the parties might be able, to locate them accordingly, and to share equally in all such discoveries and mining properties thus acquired. It is immaterial what were the contributions of the respective parties towards defraying the expenses of the expedition. It is sufficient that it was understood and agreed that all of the associates were to contribute about equally towards the outlay attending the enterprise of discovery and the development of mining properties, and the agreement, although not in writing, may be considered to have been valid and binding upon

the parties concerned.

During the month of June, or early in July, 1897, all the persons thus associated, except McGahey, entered upon the contemplated expedition, making a journey from Walla Walla, Wash., where the parties resided and the agreement was entered into, to Trout creek, in Crook county, Ore. In the vicinity of the junction of Amity creek with Trout creek, they made a discovery of a quartz ledge, which Victor Wilson thought to be the ledge from which the piece of quartz was formerly broken by him, although the rock did not appear to be the same in color, being of a bluish cast. Possibly some other ledges were discovered, but, at any rate, several claims were located by the individual members for the benefit of all. Nothing further was done at this time, except a little development work, and all the parties returned to Walla Walla. Later, about August or September of the same year, John F. Hubbard and A. M. Kelso were admitted as members of the association upon the same terms and conditions as the original members, and the agreement for exploration, discovery, and development of mining properties in and about the same locality was continued between all the parties so aggregated. thus increasing the membership of the association to seven instead of five. All the members of the association except McGahey and Kirby entered upon a second expedition to Trout creek. While on the way to the locality in view, and some 12 miles distant therefrom, a rancher by the name of Fernall, learning that the party was exploring for mines, gave to G. M. Wilson a piece of red colored quartz, at the same time telling him that he came across it up in Friend's field and waving his hand up towards the hillside in that direction. It was not taken from any ledge, but picked up as float. Wilson showed the rock to those of his associates then in his immediate company, and threw it in the wagon bed, where other

specimens of quartz were subsequently deposited; and all were taken to Walla Walla when the expedition returned. Some other discoveries were made in the vicinity of the prior locations, and other locations of claims were noticed and some development work done, but within a few weeks all the persons returned home. A disagreement arose between G. M. Wilson and John Hubbard and the other members of the expedition while about the claims, the result of which is involved in dispute. Wilson and Hubbard say that they renounced all relationship or connection with the association, thus putting an end to any further co-operation under the expedition agreement then subsisting; while others of the party assert that, while there was some controversy, it did not terminate in Wilson and Hubbard withdrawing from the association. All agree, however, that Wilson and Hubbard started home two or three days before any of the other members of the expedition, leaving the others there on the ground prosecuting their exploration and development work. This circumstance is significant, and lends plausible support to the assertion of Wilson and Hubbard.

Later in the year, and in the early part of 1898, assays were procured to be made by the members of the expedition of different pieces of rock brought home with them, and, among others, Wilson had an assay made in Spokane of the red colored rock handed him by Fernall. which showed it to carry gold in amount above \$100 per ton. It is not clear whether the result of this assay was disclosed to all the other members of the association. It was undoubtedly made known to Hubbard and Kirby, but whether it was made known to the remaining four is questionable. It is quite probable that it was not. In the meanwhile there was much talk among the associates touching the organization of a third expedition, in which all the parties engaged more or less, Victor Wilson and G. M. Wilson appearing to be the most active. On January 22, 1898, Victor Wilson had an agreement in writing prepared looking to the development of the prospects theretofore discovered and located, describing the properties as follows:

"What has been described as the principal ledge, on which a twelve foot excavation has been made; the prospect about a mile and a half above said ledge, where the quartz is described as standing in pyramids above the ground, a sample from which assayed about \$2.50, and which surrounds the head of the cove where the placer prospect was found, including said placer; the quartz prospect found by John Hubbard and Maurice Wilson, three or four miles down Trout creek from said principal ledge; the prospect on Little Trout, and the prospective ledge that we are to receive information in regard to from the man at Antelone."

The instrument was presented to several, if not all, of the associates, but no one ratified it by his signature. Kirby wrote Victor Wilson on February 10, 1898:

"I do not agree with your plan. However, if all of the old members agree to it, it will be all right with me. I do not have any objections to you or any of the boys taking in one or two or even three persons on their interest and make any agreement with them they see fit, provided they grant me the same privilege."

The unsigned agreement, while not binding upon any one, serves unmistakably to show the object and purposes for which the further and more definite arrangement was sought, and the letter of Kirby voices the antagonistic views entertained, although he expresses himself willing to sign if all the old members would likewise sign. It is significant that none of them did sign. The purpose was to develop mines then thought to be discovered, not to prospect for others or extend the exploration further than such as had formerly been made.

Later than this, the parties not being able to agree among themselves touching the further development of the mines discovered and in prospect, G. M. Wilson, John Hubbard, and Kirby, together with John Knight and O. W. Harkness, organized an expedition from Walla Walla for further exploration for mining prospects. Having the red quartz in mind because of its value as shown by the Spokane assay, they went directly to the Fernall place, and procured further directions from Fernall respecting the locality in which he discovered the rock. They were directed to a side hill in Mr. Friend's field. The prospectors were unsuccessful in their search in Friend's field, but, on extending it without some distance, they came upon a prospect that manifestly had been previously discovered, and which was subsequently claimed by one Brown, effectively so, as he later succeeded in establishing his prior right in court. Upon this prospect they located a claim, designating it the "Silver King." At the same time other claims, some nine or ten in number, were located upon the same ledge and within the immediate vicinity. Development work was prosecuted upon the "Silver King," and the ore found to be valuable. In the course of the following year the defendant corporation, the Oregon King Mining Company, was organized and took over the property, including all the claim locations that these parties made save one. While Wilson and his associates were prosecuting their development work upon the Silver King, Victor Wilson came into the country and claimed that he should have some interest in the claims located, and, by reason of the fact that he had been the original discoverer of mines in that section of the country, they withdrew their notice from one of their claims, the Le Roy, being an extension of another that was designated "The Bird," and posted a notice for Wilson, thus locating the same in his name and right. Victor Wilson subsequently treated this claim as his individual property, contracting with W. R. Baker to do and keep up the assessment work, for which service he agreed to give Baker a half interest in the mine. This was in July or August of 1898. Later, in the fall of 1899, or early in the year 1900, however, Victor Wilson began to set up a claim to an interest in the Silver King and the group of claims located with and about it. In August of 1900, notice of claim and interest in the property of the Oregon King Mining Company was posted, and on the 22d day of that month was filed with the county clerk of Crook county. This notice was subscribed by Victor Wilson, A. M. Kelso. A. J. Tash, and R. McGahey. In September, 1903, another notice was posted and filed by the same parties, claiming a four-sevenths

interest in the mine by right of association and understanding with the parties composing the Oregon King Mining Company in the prospecting which led to the location of the claim composing said company's property. The basis of their claim, therefore, as plaintiffs now insist, is the association agreement between the parties, entered into prior to entering upon the first expedition, as modified by the alleged agreement whereby Kelso and Hubbard were admitted new members of the association when entering upon the second expedition.

The entire controversy centers about the incident of Fernall's handing to G. M. Wilson the piece of red quartz rock, the information given by Fernall as to the locality in which he discovered it, and the further disclosure resulting from the Spokane assay that the rock was rich in gold. It is stoutly claimed that all this was information to which the entire association was entitled, and, having led to the discovery of the Oregon King mine, that all the members of the association should have their relative shares in the mine, along with other prospects that were discovered while on their expeditions in the year 1897.

Recurring to the agreement, the parties to the association were to share in all discoveries made. The expedition being prosecuted for the purpose of prospecting for mines, quartz in place was what they were hoping to find, although they came upon a placer prospect. That the mere coming into the possession of the red quartz rock, with the information received as to the locality in which it was picked up by the discoverer, was not a discovery of a mining prospect, is perhaps conceded by all. It required something more to amount to such a discovery as was within the intendment of the association agreement—some finding of the rock in place, or a ledge carrying the precious metals, valuable for mining purposes; so that the information obtained from Fernall was not a discovery.

It is charged that G. M. Wilson concealed his information relative to the red quartz rock from his associates, and what was subsequently obtained as to its value. I do not believe he concealed anything as to how he came into possession of the rock or what was told him by Fernall. The incident occurred while the party were on their way, upon their second expedition, to the place of their prior discoveries. The rock was thrown into the wagon, along with other specimens that had been and were being gathered as they extended their search, and was evidently seen and inspected by all then with the expedition. There had been no misunderstanding at the time, and Wilson had no apparent motive whatever in withholding any information that he might have gained. Indeed, it was not known, or even supposed, at the time that the rock was of any value, being of different appearance from anything that had previously been discovered, and in all likelihood the incident was remarked generally and all became possessed of whatever knowledge G. M. Wilson had on the subject. If there was any concealing of discovery and information, it must have occurred later. Wilson had an assay made of the rock, and thereby ascertained its value. Whether he disclosed this information to all of his associates, as previously remarked, is a matter in dispute.

There was an effort made to effect a reorganization of the associates for the purpose of developing the prospects previously discovered, but it was not thereby contemplated that there would be further prospecting done, save for a ledge of which information had been obtained from a man at Antelope. No agreement could be brought about for this purpose. Other rocks gathered on the expedition were assayed, and their values became common knowledge. Wilson claims that he talked with several of the parties about the assay he had made, and that there was no effort on his part at any concealment, but that in due time a new association was formed, having no connection with the old. It is probable that Wilson made no effort to have any member of the old association join the new save Hubbard and Kirby, as that would have been inconsistent with his act of withdrawing from the old association while upon the second expedition. He, Hubbard, and Kirby were more congenial than he and the other members of the association. But let it be conceded that Wilson did not make known to the other members the result of his assay, was that a matter of knowledge which, by legal intendment, should have inured to the benefit of all?

It is "well settled," says the court in Latta v. Kilbourn, 150 U. S. 524, 541, 14 Sup. Ct. 201, 207, 37 L. Ed. 1169, "that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity, without being accountable to his copartners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information, which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business."

And it is further said in the same case, upon the authority of Lord Justice Lindley:

"That if a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefits."

Now, allowing the association agreement the broadest scope that is possible under the terms claimed for it by the plaintiffs, which was to share and share alike in all discoveries of mining properties made upon the first and the following expedition (the agreement as to the latter having been modified only to allow of the admission of two additional members into the association), it could not include discoveries subsequently made by any one of the members of the association, or any different combination of some of such members. The scope of the agreement was necessarily limited to the two expeditions

that were to be and were subsequently made. It was a time limit, so that, when the expeditions were at an end, the right of all the members to share in the new discoveries of any member thereof, or of any new aggregation of part of its membership with others, was also at an end. The finding of this piece of red quartz which was picked up as float was not, as has been shown, a discovery of a prospect. The rock, being a float, did not indicate by the place where found the location of the ledge whence it came. The incident imparted at the furthest some information only that a ledge probably existed in that vicinity, but there was no discovery of a ledge. All the members of the association were put into possession of the knowledge of the finding of the piece of red quartz, and in all probability were informed of what Fernall said to Wilson as to the place or locality in which it was found, so that none were at a disadvantage by lack of knowledge pertaining to the incident during the prosecution of the two expeditions. No one of the members of the association was impressed with the value of the red rock, and it was by accident that an assay was suggested. The information came after the expeditions contemplated by the association agreement, both in its original and modified form, were at an end. The purposes of the expeditions being at an end, it is difficult to discover upon what ground the new information became association or partnership property. Furthermore, the use made of such information and knowledge for the purpose of further discovery was wholly without the scope, that is, beyond the time limit of the partnership or association business, and was not in competition with such business. The information was not even acquired upon a partnership transaction, nor from connection with the association, nor is its character such, in any view of the law, as belongs to the partnership in the sense of property which was valuable to the association and in which it had a vested right. If the information had come to light before the purposes of the association agreement had come to an end, a different question might have been presented, but, having come subsequently thereto, it cannot, in legal contemplation, be considered an asset of the association. Much less, therefore, can any developments proceeding therefrom by reason of further explorations and discoveries be considered such an asset.

It follows that the bill of complaint should be dismissed, and such will be the order of the court.

THE BROOKBY.

(District Court, E. D. Pennsylvania. November 20, 1908.)

No. 9.

 SHIPPING (§ 84*) — FELLOW SERVANTS — WINCHMAN AND STEVEDORE'S EM-PLOYÉS.

A winchman furnished by a vessel from its crew to operate a winch while the vessel was being discharged by a stevedore employed by a charterer, and who while engaged in such work was subject to the orders

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the stevedore, was a fellow servant with the latter's employes engaged in the work.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 84;* Master and Servant, Cent. Dig. §§ 485-492.]

2 Shipping (§ 84*) — Injuby to Stevedore—Liability of Vessel—Incompetent Winchman.

Libelant was employed by a contracting stevedore in discharging a vessel of a cargo of iron ore, and while at work in the hold was injured through the negligence of the winchman, who was a seaman furnished by the vessel. He operated the winch so carelessly as to endanger the workmen, and three several complaints had been made by the foreman and hatch-tender to the officer in command of the vessel prior to libelant's injury. Held, that the winchman's conduct and the complaints made were such as to require his removal, and that his retention was negligence which rendered the vessel liable for libelant's injury.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 84.*]

In Admiralty. Suit by stevedore for personal injury.

Howard M. Long, for libelant.

Convers & Kirlin and Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. This is an action in rem against the British steamship Brookby, brought by a laboring stevedore to recover damages for an injury received while he was helping to unload the vessel. The accident happened on February 6, 1907, under the following circumstances:

The steamship was under charter, and had brought a cargo of iron ore to the city of Philadelphia. It was the duty of the charterers to unload the ore, and in fulfillment of that obligation they had made a contract with a master stevedore, by whom the libelant was employed as an ordinary laborer. The ship had nothing to do with the discharge of the cargo except to furnish the winchmen and the necessary gear. After the winchmen were chosen by the ship, they were subject to the orders of the master stevedore, or his representatives, in all matters pertaining to the operation of the winches. They could not be removed by him, but, if they should prove to be careless or incompetent, the duty of making complaint to the ship about their lack of efficiency would rest upon him, and the duty of taking proper steps upon such complaint would then rest upon either the master or the mate, whichever might be in charge of the vessel. On the day in question, the libelant had been working in No. 2 hold for several hours, helping to fill the iron buckets that were used in hoisting the ore, when a loaded bucket that had been lifted to the level of the hatch coamings suddenly and with great rapidity descended again into the hold without warning, struck the empty tub which the libelant was filling, and then struck him, inflicting the injury complained of. There is no charge of contributory negligence, and the first matter for consideration, therefore, is the libelant's averment that he was hurt by the neglect of the winchman. Upon this point no time need be spent. It is conceded that the unexpected and rapid descent of the bucket was due to the mistake of the winchman in the management of the steam, and this mistake was negligence for

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which the ship must respond, unless the defenses that are set up present a sufficient reply to the libelant's case.

The first of these defenses is founded on the doctrine of fellow servant. An attempt was made by the libelant to show that the winchman was wholly a servant of the ship and in no sense a servant of the master stevedore, but the evidence upon this point is not suffi-No doubt the winchman was an able seaman on the ship's articles, and was paid, fed, and lodged by the vessel while he was operating the winch. It is also true that the ship could have ordered him away at any time and assigned him to other duty, and that he would have been bound to leave the winch and obey such order; but the essential fact remains that, while he was operating the winch, and throughout the course of that service, he was put under the control and direction of the master stevedore, or of his representatives in charge of the work of unloading the cargo. It was his duty to obey the signals of the hatch-tender, whether given by the voice or by the hand, and to hoist or lower the buckets as he might be directed. Under such circumstances, the winchman was a fellow servant of the libelant, both of them working at the time in the common employment of discharging the cargo, and both being under the general control and direction of the master stevedore. This has been unequivocally decided in The Elton, 142 Fed. 367, 73 C. C. A. 467, a case wherein the Court of Appeals of this circuit dissents from the conclusion reached by the Second Circuit in The Slingsby, 120 Fed. 748, 57 C. C. A. 52, a decision which has been urged upon us as controlling the present dispute. Obviously, The Elton and not The Slingsby lays down the rule that should now be applied, and I need do no more than refer to the opinion of the Court of Appeals, delivered by Judge Gray, for a statement of the reasons upon which the decision is founded.

Anticipating this ruling, the libelant takes the further position that. even if it be conceded that he and the winchman were fellow servants, the action is nevertheless sustainable, because the winchman was found to be careless and incompetent, and because the ship failed to remove him after due complaint had been made to the officer who was then in command. The testimony established the facts that the winchman was an able seaman who had had several years' previous experience in the operation of winches, and that he was a competent person to be chosen for that service on this occasion. With these facts in proof, if the evidence went no further than to charge him with carelessness in doing the act that caused the libelant's injury, The Elton is also authority for the proposition that "an allegation of negligence against a master in employing an incompetent servant is not sustained by proof of a single act of negligence on the part of the servant which caused the injury sued for." The libel and the evidence in the present case, however, go further than this. The libel avers that the master of the ship "had placed in charge of the said steam winch, used for hoisting the freight from the hold of the said steamship, an ignorant, incompetent, and careless seaman, one of the crew of the said steamship, and that the said master knew of the said seaman's incompetency, ignorance, and carelessness at the said time, or by the exercise of ordinary care and diligence might have known thereof." etc. In support of this averment, testimony was offered to prove that on the day in question, but before the libelant was injured, the winchman had been misconducting himself in the performance of his work, and that, although complaint was promptly made of his behavior to the officer in command of the ship, he was not removed, but was permitted to continue the operation of the winch. If these facts be true, they present a question that was not decided by 'The Elton, and it has therefore been necessary to examine carefully the testimony upon this point. From such examination, and after deciding what credence should be given to the witnesses who have offered conflicting accounts of what took place, I think the following statement fairly presents the occurrences of that day before the hour of half past 4 in the afternoon, when the libelant was iniured:

Almost from the beginning of his service in the morning, the winchman declined to operate the winch upon the signals of the hatchtender, declaring his ability to run it to suit himself. The proper method of raising a loaded bucket that comes from another part of the hold than the part directly beneath the hatch is to move it slowly so that the unavoidable swinging may be as slight as possible, and, after it has been brought to the space beneath the hatch, to lower it a little so as to steady it, and then to raise it above the coamings. Instead of pursuing this method, the winchman frequently moved the bucket rapidly and with a jerk, "snatching" it as one of the witnesses said, and swinging it about the hold so that the laborers were obliged to run out of the way. Instead of steadying the buckets, he sometimes hoisted them while they were swinging, in consequence of which they struck the coamings and spilled out some of the ore. After the buckets reached the deck, and while they were being swung over to the railroad cars that were awaiting the ore, he slacked the fall to which the buckets were attached so rapidly on several occasions that the buckets could not be swung properly by the workmen on shore, but were knocked against the cars or the rail of the ship. His management of the winch was so careless as to threaten the safety of the laborers, and the hatch-tender complained to the foreman, who in turn repeated the complaints to the mate. This notice of the winchman's improper conduct was given twice by the foreman, and once by the hatch-tender. In response to the foreman's communications, the mate apparently admonished the winchman, but no attention seems to have been paid to the complaint made by the hatch-tender. For a short time after the mate's intervention, the winchman appears to have acted more prudently, but the improvement in his method of operation was not permanent. After the mate had gone away, the same grounds of complaint appeared again, and there were similar reasons to fear that injury might result. This carelessness of operation was not continuous during the day, but it was apparent often enough to justify the fear of injury and to warrant the complaints that were made.

In my opinion, these facts called for the removal of the winchman, and, as this was exclusively within the power of the mate-who was then in charge of the ship, the master being absent—the failure to exercise such power was negligence for which the vessel must respond. It is a well-settled rule that a master must not only exercise due care in the employment of his servants, but must also exercise such care concerning their retention. This duty requires the removal of an incompetent or negligent servant, after the master knows, or has reasonable opportunity to know, of his fault. Wabash R. R. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; The Anaces, 93 Fed. 240, 34 C. C. A. 558; Southern Pacific Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; Balt. & Ohio R. R. Co. v. Henthorne, 73 Fed. 634, 19 C. C. A. 623; Southern Pacific Co. v. Huntsman, 118 Fed. 412, 55 C. C. A. 366. The degree of care to be exercised by the master, whether in the appointment or the retention of his servants, varies with the character of the work and the responsibility that they are required to undertake. To use the language of the Supreme Court in Wabash R. R. Co. v. McDaniels, on page 460 of 107 U.S., on page 937 of 2 Sup. Ct. (27 L. Ed. 605):

"Ordinary care in the selection and retention of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered."

In the case of a winchman upon whose competency or carefulness the safety and the lives of others may in large measure depend, the master should, I think, be more than usually cautious. No definite rule can be laid down concerning his obligation to remove such a servant; obviously, each case must be judged according to its own circumstances, but I think it is safe to say that, where a winchman has misbehaved as plainly and as frequently as this evidence discloses, and where his conduct has been brought to the attention of the officer who has power to remove him, the remedy by repeated admonition was inadequate, and the remedy by removal should have taken its place.

An amendment to the libel charges as a further fault on the part of the ship that the winch was defective, but no attempt was made to prove this averment, and it need not be further noticed.

A decree with costs may be entered in favor of the libelant. If it be desired, a commissioner will be appointed, or the parties may take additional evidence on the subject of damages within 30 days, and lay it before the court, with or without further argument, as they may prefer.

165 F.--7

MACKIN v. SHANNON et al.

(Circuit Court, E. D. Arkansas, W. D. November 25, 1908.)

GAMING (§ 19*)-VALIDITY-OBLIGATIONS FOR GAMBLING CONSIDERATIONS.

A note and mortgage executed in settlement of a partnership formed to carry on a gambling establishment in violation of the laws of the state, without any new consideration, are void for illegality of the consideration, and will not be enforced by a court of equity.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 39; Dec. Dig. § 19.*]

In Equity.

Rose, Hemingway, Cantrell & Loughborough, for plaintiff. Greaves & Martin, for defendants.

TRIEBER, District Judge. The plaintiff has filed his bill to foreclose a mortgage executed to him by the defendant William T. Shannon to secure the payment of a note for the sum of \$10,000, due six months after date. The other defendants are made parties as claiming some rights in the mortgaged property. The mortgagor, the defendant William T. Shannon, admits the execution of the note and mortgage sued on, but sets up that the same were executed in settlement of a gambling debt, and for this reason are null and void. The allegations in the answer are:

"That on the 24th day of February, 1905, he and the plaintiff entered into a copartnership for the purpose of carrying on and conducting the Kentucky Club, a gaming house, in the city of Hot Springs, Ark., for the season of 1905. That said copartnership continued until the 2d day of April, 1905, at which time it was dissolved by mutual consent of the plaintiff and this defendant. That upon the day of the dissolution, by reason of certain payments made by this defendant to the plaintiff, there was due the said plaintiff the sum of \$9,432, and the note sued on herein ought to have been credited by the plaintiff in a sum sufficient to reduce the indebtedness therein mentioned to said sum."

The other defendants filed separate answers, but it is unnecessary, in view of the conclusions reached by the court, to set them out in this statement of facts. There was a general replication filed by the plaintiff, and considerable proof taken by the parties. The proofs are somewhat contradictory, but adopting as findings of facts the testimony of the plaintiff and the conclusions advanced by his counsel, which are, of course, most favorable to him, they may be stated as follows:

That the defendant William T. Shannon was the owner of a gambling house in the city of Hot Springs known as the "Kentucky Clubhouse," where all kinds of gambling were carried on. That one part of the establishment was used exclusively for banking games, such as roulette, faro, and horse wheel, while in another part of the building there were poker rooms, from which the house received certain commissions. That in February, 1905, the plaintiff, being in the city of Hot Springs, was introduced to the defendant Shannon, and was informed that the Kentucky Clubhouse was in financial distress, owing considerable money which it was unable to pay. Thereupon an ar-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rangement was made whereby the plaintiff was to put in \$10,000, and was to have 30 per cent. of the business and the defendant Shannon the other 70 per cent. That he put \$10,000 into the business, and a day or so later put in \$5,000 additional. That thereafter he inquired where the money was, and he was referred to John Kelly, who was the cashier of the gambling establishment, who first told him that the money was deposited in the bank. Plaintiff told him that he did not want the money there, that he wanted it in the house, and thereupon Kelly promised he would draw it out of the bank and put it in the house the next morning. On the same day Kelly came back and informed plaintiff that at various times he had advanced \$12,202 of that money to the defendant Shannon. The bank roll was always to be the plaintiff's property, provided it was not lost in the game, and in addition he was to have 30 per cent. of the profits. He saw Shannon, and after some conversations this settlement was made, whereby the defendant executed, without any new, valid, or adequate consideration, his note for \$10,000, and secured it by the execution of a chattel mortgage on the property therein described. It seems that some of the money missing had been lost in the poker game carried on in the gambling establishment, the evidence tending to show that it was customary, if not a sufficient number of men could be secured to play poker, and strangers desired to indulge in the game, that some member of the house would be one of the players, and any moneys lost by him would be charged to the house, and it was also customary that strangers who were supposed to be "good" would give their duebills for the losses sustained by them, many of them afterwards refusing to pay them. But the plaintiff claims that the partnership of Mackin & Shannon had nothing to do with the poker game. Plaintiff's interest in the partnership, as claimed by him, included only the roulette wheel, the faro bank, and the horse wheel, and not the poker game. There have been some payments made on the note, being moneys collected on duebills executed for the gambling debts which had been turned over to the plaintiff, while others refused to pay these duebills.

Assuming these to be the undisputed facts, the question is whether he can invoke the aid of a court of equity, or any other court, for the purpose of collecting this note and foreclosing the mortgage executed

by the defendant to secure it.

The keeping of a gaming house is malum in se, as well as malum prohibitum, under the laws of the state of Arkansas, which provide for heavy penalties against those maintaining such an establishment. See sections 2737 to 2752, Kirby's Dig. St. Ark. 1904. While it is conceded by counsel for plaintiff that no court of law or equity will enforce a contract to carry on such a business or aid either party to the contract to maintain an action arising therefrom, it is contended that when the parties themselves have had a settlement, and upon such settlement a balance is found to be due to one of the parties from the other, and the latter executes to the other a note for the amount agreed upon as due, an action upon that note may be maintained. To maintain this proposition counsel rely upon the following cases: Sharp

v. Taylor, 2 Phil. Ch. 801, 817; Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732; Planters' Bank v. Union Bank, 16 Wall. 483, 21 L. Ed. 473; Armstrong v. American Exchange National Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; O'Bryan v. Fitzpatrick, 48 Ark. 487, 3 S. W. 527; Harcrow v. Gardiner, 69 Ark. 6, 58 S. W. 553, 64 S. W.

881; and other cases following the above decisions.

Planters' Bank v. Union Bank and O'Bryan v. Fitzpatrick are clearly inapplicable to the case at bar. The principle laid down in those cases is that a third person or agent is not discharged from accounting to his principal, or the person for whose benefit the money or property was delivered to him, by reason of past unlawful acts or intentions of the principal collateral to the matter of the agency. This is the rule established by the English courts as early as 1797 in Tenant v. Elliott, 1 B. & P. 3; and followed in Farmer v. Russell, 1 Bos. & Pul. 295, Johnson v. Landsley, 12 C. B. 468, and Bridger v. Savage, 15 O. B.

Div. 363, and followed by the American courts generally.

It will serve no useful purpose to review these cases and the many other cases following them. On the other hand, the authorities are not only numerous, but practically unanimous, that the execution of notes with securities in settlement of an illegal contract does not purge the new promise from the illegal consideration; the reason therefor being that the new promise is founded upon the illegal consideration a debt or demand growing out of the illegal transaction—and is as infirm in the eye of the law as the implied promise that existed previous to the giving of the notes. Fisher v. Bridges, 3 E. & B. 642; Sykes v. Beadon, 11 Ch. Div. 170; Brown v. Tarkington, 3 Wall. 377, 381, 18 L. Ed. 255; Coppell v. Hall, 7 Wall. 542, 558, 19 L. Ed. 244; Dent v. Ferguson, 132 U. S. 50, 67, 10 Sup. Ct. 13, 33 L. Ed. 242; Embrey v. Jemison, 131 U. S. 336, 348, 9 Sup. Ct. 776, 33 L. Ed. 172; Morris v. Norton, 75 Fed. 912, 927, 21 C. C. A. 553, 568; Watson v. Murray, 23 N. J. Eq. 257, 262; King v. Winants, 71 N. C. 469, 473, 17 Am. Rep. 11; Clemshire v. Boone County Bank, 53 Ark. 512, 14 S. W. 901; Shaffner v. Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. Rep. 624; Whitesides v. McGrath, 15 La. Ann. 401; Plank v. Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; Jackson v. McLain's Ex'rs, 100 Mo. 130, 13 S. W. 393.

In Fisher v. Bridges the plea to the action upon a covenant to pay money was that the consideration of the covenant to pay was a conveyance of land for an illegal object, and this was held by Jervis, C. J., delivering the opinion of the Exchequer Chamber, to be a good plea, reversing the judgment of the Queen's Bench, 2 E. & B. 118. The

Chief Justice in his opinion said:

"The agreement, being illegal, could not be enforced, and no action could be brought for the recovery of the purchase money of the lands, the subject of the illegal agreement. * * * But it is said that the covenant may be good and may be enforced at law, even though the original agreement were illegal and the purchase money not recoverable, if it had not been secured by an instrument under seal. It is certainly true that for a bond or other instrument under seal no consideration is necessary, but it does not therefore follow that every such instrument may be enforced by an action. The authorities cited in the argument show that where the bond or other instrument is connected with the illegal agreement it cannot be enforced, and therefore, if this plea advanced that the covenant was given in pursuance of the illegal agreement, it would, upon these authorities, be no answer to the action. But if it is not so understood, we think it shows a good defense. It is clear that the covenant was given for the payment of the purchase money. It springs from, and is a creature of, the illegal agreement; and as the law will not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money which, by the original bargain, was tainted with illegality."

In Sykes v. Beadon, decided by that eminent jurist, Sir George Jessel, Master of the Rolls, the English authorities on this subject are carefully reviewed, and the law stated as follows:

"I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or compensation for the breach of it, or contribution from the person making the profits realized from it. It does not follow that you cannot in some cases recover money paid over to third persons in pursuance to the contract; and it does not follow that you cannot in other cases obtain, even from the parties to the contract, moneys which they have become possessed of by representation that the contract was legal, and which belonged to the persons who seek to recover them; but I am bound to say I think there is no pretense for saying that the contract could in any way be enforced or aided by a court of law or equity."

In Coppell v. Hall it was held that when a contract is illegal, there can be no waiver, for the reason that:

"The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim 'Ex dolo malo non oritur actio,' is limited by no such qualification."

In Embrey v. Jemison it was sought to recover on a note executed upon a settlement made of a wagering contract for futures, plaintiff insisting, as is done in this case, that the settlement and execution of the notes purged the transaction of its original illegality; but the court held:

"He cannot be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected with, a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law."

In Dent v. Ferguson, where it was sought to recover property conveyed to defraud the grantor's creditors, the same contention was made that a new contract entered into between the parties purged it of the original taint of illegality; but the court, after a full review of the authorities, overruled this contention, saying:

"The principle established by those decisions in diversified forms, according to the varying cases, is that a new contract, founded on a new and independent consideration, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties, will be dealt with by the courts on its own merits. If the new contract be fair and lawful, and the new consideration be valid and adequate, it will be enforced. If, however, it be unfair or fraudulent, or the new consideration so inadequate as to import fraud, imposition, or undue influence, it will be rescinded and justice done the parties."

And, after citing cases, the court proceeds:

"But in all of those cases the court was careful to distinguish and sever the new contract from the original illegal contract."

In Morris v. Norton, Judge Taft, speaking for the United States Circuit Court of Appeals for the Sixth Circuit, held not only that a note given by one in nowise connected with the illegal transaction (deals in futures on margins, which are held to be wagering contracts), who felt in honor bound to reimburse a loss sustained by a payee through trust in a broker recommended by the maker, is void if there is no other valuable consideration, but in addition thereto said:

"More than this, the note would be void for illegality, because it would merely be evidence of Morris' assumption of the broker's obligation to pay a gambling debt without any new consideration. It would be the same debt with only a change of debtors, and would be subject to the same defense of illegality in the new deal as in the old."

In Clemshire v. Boone County Bank it was held that a promissory note, the sole consideration for which was an interest in a telephone exchange company whose business would infringe upon the patent rights of another company, cannot be enforced.

In Shaffner v. Pinchback the parties formed a partnership for the purpose of bookmaking, each contributing \$1,000 as the capital. In a suit by one of the partners against the other to recover money, it was said:

"It is urged that the view that the defendant can keep the \$1,000 furnished by plaintiff without any consideration therefor is so opposed to reason and conscience as to be untenable. * * * They are, in respect to such business, in pari delicto, and the law will refuse its aid to assist either, but will leave them in the position in which they placed themselves. Plaintiff, having embarked his money in an enterprise prohibited by a statute as against good conscience and public policy, has placed himself away and entirely outside the pale of the law, and if he has been despoiled by the failure of his associate to account for the funds placed in his hands for the purpose of carrying on the unlawful business, then both good morals and public policy require that the law should not aid him."

In Plank v. Jackson it was held that it is a good defense to an action on a note that the note sued on was given for money borrowed for the purpose of being used in gambling contracts or in paying losses sustained on account of such contracts.

In Whitesides v. McGrath it was held that an action to recover on a note given by defendant to make up his loss as a partner of plaintiff's and others in a faro banking game could not be maintained, as the association or partnership was not only against good morals, but it was criminal, and courts of justice are not open to that kind of litigants.

It may, therefore, be said that the law is well settled that where an

agreement of partnership is illegal on account of the consideration moving between the partners, or the character of the business to be transacted, the courts will not, after the business has been transacted, aid either of the parties to recover from another who shows that a note has been executed in settlement thereof, no other valid or adequate consideration intervening, and a settlement and execution of a note will not take the case out of the rule.

A later case in which this entire subject is very fully treated and the authorities carefully reviewed is McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117, which in the opinion of this court is practically conclusive of the case at bar. The most important case cited on behalf of plaintiff, and which comes nearer sustaining his contention, is Brooks v. Martin, but if that case has not been overruled, it has been much weakened by subsequent decisions of the Supreme Court. In McMullen v. Hoffman, the court, after reviewing that case and showing that none of the English cases cited by the court in Brooks v. Martin, with the exception of Sharp v. Taylor, sustained the conclusions reached in that case, says of Brooks v. Martin:

"There is a difference between the case before us and that of Brooks v. Martin, because in the latter case the fact existed that the transactions, in regard to which the cause of action was based, were not fraudulent, and they related in some sense to private matters, while in the case before the court the entire contract was a fraud and was illegal, and related to a public letting by a municipal corporation for work involving a large amount of money, and in which the whole municipality was vitally interested. It may be difficult to base a distinction of principle upon these differences. We do not now decide whether they exist or not. We simply say that, taking that case into due and fair consideration, we will not extend its authority at all beyond the facts therein stated. We think it should not control the decision of the case now before us."

Sharp v. Taylor, the only English case which the court in McMullen v. Hoffman thinks sustains the conclusions reached in Brooks v. Martin, was practically overruled by Jessel, Master of the Rolls, in Sykes v. Beadon, and has been seriously questioned, as was Brooks v. Martin, by many of the American courts, other than the Supreme Court of the United States in McMullen v. Hoffman. See Wald's Pollock on Contracts, p. 500, note 60, where many authorities are collected.

In the case at bar the original contract was clearly illegal, as it was a contract to carry on a gambling establishment in violation of the laws of the state where it was to be conducted. The note was executed in settlement of that partnership, without any new consideration whatever. If the contention of counsel for plaintiff is sustained, then the plea of illegal consideration could never be set up in defense to an action on a note executed in settlement of an illegal contract.

It was further claimed in the argument that under the agreement between the parties the money furnished by the plaintiff was to remain his property, and was to be used solely for the purpose of paying the losses of the gambling house, and that the taking of the money by the defendant was in violation of the contract. Assuming this to be established by the evidence, it does not change the rule of law. Plaintiff furnished the money for the purpose of carrying on an illegal business in violation of the laws of the state, and if his partner misappropriated the funds while carrying on that business, the business itself being illegal, the courts will not aid him, not for the protection of the defendant, but for the protection of the public, upon the ground that such a transaction is against public policy. As was said in King v. Winants, by Mr. Justice Reade, who delivered the opinion of the Supreme Court of North Carolina, in that case:

"Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveler the other rifles his pocket of one thousand dollars and then refuses to divide; and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy, the rencounter, and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if these robbers had taken the thousand dollars and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money; that would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of Brooks v. Martin, so much relied upon by plaintiff."

It may be a hardship on the plaintiff that he should be deprived of his money, but he knew when he entered into the agreement with the defendant that they would be engaged in the commission of a crime. He may have relied upon the fact that it is often said that "there is honor among thieves," but the defense and the facts of this case show that this is not universally the case. Parties coming into courts for relief must come with clean hands, otherwise public policy forbids the courts from aiding them.

There will be a decree dismissing the bill.

MACURDA v. GLOBE NEWSPAPER CO. et al. (Circuit Court, D. Maine. November 19, 1908.)

No. 82.

1. Garnishment (§ 4*)—Actions in Which Garnishment is Authorized—Maine Statute—"Slander by Writing or Speaking."

In Rev. St. Me. 1903, c. 88, § 1, which provides that "all personal actions except those of detinue, replevin, actions on the case for malicious prosecution, for slander by writing or speaking and for assault and battery may be commenced by trustee process," the words "slander by writing or speaking" are used in a comprehensive sense and include libel, and under such provision an action for libel cannot be commenced by trustee process.

[Ed: Note.—For other cases, see Garnishment, Dec. Dig. § 4.*].

2. Garnishment (§ 84*)—Jurisdiction—Waiver of Objection.

Where an action for libel against a foreign corporation was commenced in Maine by trustee process in violation of the state statute, the giving of a bond by the defendant to release the garnishees was not a waiver of its right to object to the jurisdiction of the court.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 84.*]

3. Removal of Causes (§ 31*)—Diversity of Citizenship—Parties.

Under the rule of the federal courts as affecting the right of removal on the ground of diversity of citizenship, garnishees are not indispensable parties.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 71; Dec. Dig. § 31.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Motion to Dismiss for Want of Jurisdiction. Arthur S. Littlefield, for plaintiff. Symonds, Snow, Cook & Hutchinson, for defendants.

HALE, District Judge. This case comes before the court on defendant's motion to dismiss the plaintiff's writ and action for want of jurisdiction. The record, to which the motion is addressed, shows the facts to be as stated by the defendant. The motion clearly defines the precise question at issue, and is as follows:

"And now comes the Globe Newspaper Company, defendant in the aboveentitled action, and respectfully represents to the court that it is a foreign corporation, organized and existing under the laws of the state of Massachusetts, and having its location and principal place of business at Boston in said state, and an inhabitant of said state of Massachusetts; that as such corporation it holds no charter from the state of Maine, and has, and had at the date of the writ in this action and the service thereof, no property therein subject to attachment; that the writ in said action is a writ of foreign attachment, generally known under the statutes of the state of Maine as a trustee process; that upon said writ there was no service upon the defendant corporation, and no attachment of property, within the state of Maine; that by said writ certain persons alleged to be trustees of the defendant corporation, and as such to have in their possession funds belonging to it, were summoned as alleged trustees of the said defendant company; that the summoning of said alleged trustee, and the attachment by said trustee process of funds of the defendant company alleged to be in the hands of said trustees, are the only grounds on which the jurisdiction of the state court, or of this court, over the defendant company can be claimed; the defendant company further respectfully alleges that by the statutes of the state of Maine (Rev. St. 1903, c. 88, § 1) it is provided that 'All personal actions, except those of detinue, replevin, actions on the case for malicious prosecution, for slander by writing or speaking, and for assault and battery, may be commenced by trustee process in the supreme, judicial or superior courts.' It is further provided by the Revised Statutes of the state of Maine (chapter 1, § 6, par. 20) that 'the words "in writing" and "written" include printing and other modes of making legible words.' The defendant corporation further respectfully represents to the court that the above-entitled action is an action on the case for slander by writing; that there is no authority under the statutes of the state of Maine for issuing a trustee process in such case, and that the attachment claimed of funds alleged to be in the hands of persons named as alleged trustees is wholly void, and therefore that the state Supreme Court and this court is wholly without jurisdiction of the defendant corporation in said process, the same having been issued, and the alleged foreign attachments thereon having been made, irregularly and without authority of law. For these reasons, all of which are apparent of record in the above-entitled action. the defendant corporation respectfully moves the court that the same be dismissed from the docket."

1. Does the statute of Maine (Rev. St. c. 88, § 1) prohibit commencing an action for libel by trustee process? The statute has been recited in the foregoing motion. Its language conveys a clear prohibition against commencing by trustee process an action for "slander by writing or speaking." But the learned counsel for the plaintiff contends that an action for libel is not necessarily or technically an action "for slander by writing." He urges that, under the rules of construction laid down by the Maine statute (chapter 1, Rev. St. Me.), "technical words and phrases, and such as have a peculiar meaning, convey such technical or peculiar meaning"; that each of the words "libel" and "slander" has a technical and distinct meaning; that, in construing

them, the court should give each its strict technical meaning, in order to make sense, and in order to find the exact intention of the Legislature; that the history of the statute in question requires that the word "slander" should have its ordinary meaning of oral defamation; that the original statute in chapter 61, p. 286, of the Laws of 1821, provides that the process of foreign attachment may be used by any party entitled to personal action, except in cases, among others, of "actions on the case for slanderous words"; that the words "slander by writing or speaking" first appear and take the place of the phrase "slanderous words" in the Revised Statutes of 1841 (chapter 119, § 1); that this change was made by the revisers without any special act of amendment. He sharply outlines his further contention as follows:

"Under a familiar rule of construction, it is not to be presumed, therefore, that the Legislature intended to change the section any further than it is absolutely necessary it should be held to be changed by the change in language. The fact that no specific amendment of the original section was ever made leads to the same conclusion as the rule of construction requiring the word 'slander' to be construed in its technical sense. Is there any necessity for construing it otherwise? We submit there is not; and in reaching this conclusion we are not required to repudiate the force of the word 'writing.' 'Slander' or 'slanderous words,' without modification, is understood in its technical sense as oral defamation of a person in such language as gives a right of action. There is, however, a technical slander which may be written. That is slander of property or title. In such 'slander' it makes no difference whether the defendant's words be spoken or written or printed."

Was it, then, the intention of the Legislature to include the action for libel in the prohibition against commencing by trustee process an action "for slander by writing or speaking"? There is no case in the state of Maine which expressly decides the question. The learned counsel for defendant points out that the history of legislation in Maine is precisely the same as the history of legislation in Massachusetts; that the Massachusetts act of 1794 (chapter 65, p. 121, § 1) provided:

"That any person or persons, body politic or corporate, entitled to any personal action, excepting detinue replevin actions on the case for slanderous words or malicious prosecutions, or actions of trespass for assault and battery"—

may be summoned as trustee by use of the trustee process; that the phrase "slanderous words" was in Massachusetts changed in the revision of 1836 (Rev. St. 1836, c. 109, § 1) to "slander, either by writing or speaking," without any new legislation except by force of the revision; that our revision of 1841 leaves the law practically the same as the Massachusetts Legislature left it by the revision of 1836; that therefore the exception in the statutes in both states had been originally of actions on the case for "slanderous words"; that, without any new act, the new phrase was adopted in the revision of 1836 in Massachusetts, and in the revision of 1841 in Maine; that it is evident that in 1841 the Legislature of Maine followed the latest revision in Massachusetts; that the court in Massachusetts has construed the Massachusetts statute in McDonald v. Green, 176 Mass. 113, 57 N. E. 211. In that case, the defendant moved to dismiss, on the ground that the action had been improperly brought by trustee process, such action

being forbidden by the Massachusetts statute, and not authorized by common law. In speaking for the court, Judge Barker said:

"The provision of Pub. St. 1882, c. 183, § 1, forbidding actions of tort for slander to be commenced by trustee process, is in the same part of the statutes with Pub. St. c. 167, § 1, and includes all actions of tort in which the wrong complained of is in the writing or speaking of words designed to injure the defendant in his property, as well as those defamatory of his person or reputation. All such actions are well known and well described as actions of tort for slander."

In that case, the slander which was before the court was "slander of title."

In coming to a conclusion as to the intention of the Maine Legislature in making the change from "slanderous words" to "slander by writing or speaking," it is interesting to observe the language of the law writers of a century or more ago on the subject of libel and slander. Bacon's Abridgement has this definition:

"Slander is the publishing of words in writing or by speaking; by reason of which the person to whom they relate becomes liable to suffer some corporal punishment, or to sustain some damage. * * *"

Bacon's Abridgement, in defining libel, says:

"Words, though not slanderous in themselves, yet if published in writing, tending in any way to the discredit of a man, are libel."

Bouvier thus defines slander:

"Slander is the malicious publication of words by speaking, writing or printing, by reason of which the persons to whom they relate become liable to suffer corporal punishment or to sustain some damage."

Bouvier further says:

"The reduction of a slanderous matter to writing or printing is the most usual mode of conveying it."

Rapalje has this later definition:

"Libel is a published writing, picture or similar production of such a nature as to immediately tend to do mischief to a party, or injure the character of an individual. Slander of title is a false and malicious statement, whether by word of mouth or in writing, in reference to a person's title to some right or property belonging to him, as where a person alleges that the plaintiff has a defective title to land. A written slander of title is sometimes called a libel in the nature of slander of title."

It seems, then, that the well-known authorities in the common law of the last century used "slander" as the more general term, and sometimes included "libel" in the general designation of "slander" or "slanderous words."

A further examination of the language of some of the writers on the common law shows that the phrase "slanderous words" was sometimes made to apply to spoken words, and sometimes to words either spoken or written. It seems to have generally been assumed that slander may be spoken or written, and that when written it becomes libel. I think the Legislatures of Maine and Massachusetts, in their original statutes, and in the subsequent revisions, used language with very much the same meaning as that employed by the law writers of a century ago. I can find nothing that induces me to believe that it

was the intention of the Maine statute to include only "slander of title" in the words "slander by writing," and to exclude all other forms of "written slander." The Maine statute of construction provides that technical words and phrases shall be given their technical or peculiar meaning; but it does not provide that they shall receive a strained or artificial meaning. I cannot escape the conclusion that the Legislature of Maine, both in the original use of the phrase "slanderous words" and in the later use of the words "slander by writing or speaking," intended to include libel; that it used the words of the revision of 1841 in order to make the law more distinct and clear; and that, in that revision, and in the present statute, it was the intention of the Legislature to prohibit the beginning of an action for libel by trustee process. In my opinion, therefore, the present provision of the Legislature prohibits commencing an action for libel by trustee process.

2. The plaintiff further contends that the defendant waived any objection which it might otherwise have had to the form of the writ by reason of the fact that it gave a bond to the plaintiff to pay whatever judgment should be rendered in the case; and that thereupon the attachment of funds in the hands of the alleged trustee was discharged. I have already stated my conclusion that the statute in question prohibits the commencement of an action for libel by trustee process. The plaintiff's action, then, is void and unlawful; the process is of no force or effect. It cannot be held that the bringing of the action is merely voidable, and that one of the parties is entitled to the option to treat it as legal or illegal. The plaintiff's action having been void and unlawful, the court has acquired no jurisdiction. And it cannot be given jurisdiction by anything which the defendant can do. By charging or discharging the garnishees, the parties could not eliminate them, and make the action over from an action by trustee process into an ordinary common-law action by writ of attachment. It cannot, therefore, be held that, by giving a bond to relieve funds from temporary restraint, the defendant can waive his right to be heard in court to say that the action is brought in violation of the law, and that the court has no jurisdiction. In answer to this contention, it is sufficient, then, to say that the action is void and illegal in the beginning, and not merely voidable; that the defendant did not waive the illegality of the action, and could not do so. It could not give jurisdiction to a court which had no jurisdiction to entertain a void and unlawful action.

3. The plaintiff urges that, even though commencing an action for libel by trustee process is prohibited by the Maine statutes, and even though there has been no waiver by the defendant, still, in any event, the action should not be dismissed, but should be remanded to the state court, for the reason that the garnishees are indispensable parties to the controversy, and some of them are residents of the same state with the plaintiff. And the plaintiff has accordingly moved that the action be remanded to the state court, from whence it was removed. This contention of the plaintiff cannot be sustained. Whatever may have been held by state courts in respect to garnishees being, for certain purposes, parties to an action, it is the rule of the federal courts, in matter of removal of causes for diversity of citizenship, that garnish-

ees are not indispensable parties to a suit. Moon on Removal of Causes, § 132, and cases cited; Cook v. Whitney, 3 Woods, 715, Fed. Cas. No. 3,166; Bacon v. Rives, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69. The federal courts in this circuit have acted consistently with this rule, although I do not find that cases in this circuit have come into judicial literature.

The writ and action must be dismissed.

In re MILLBOURNE MILLS CO.

(District Court, E. D. Pennsylvania. November 9, 1908.)

No. 2,837.

SALES (§ 98*)—Construction of Contract—Failure to Request Delivery.

Where a contract for the sale and purchase of commodities, to be delivered in the future prior to a stated time, as construed by the parties themselves, required the purchaser to notify the seller when deliveries were desired, a failure to give such notice prior to the time specified for completion of delivery authorized the seller to refuse to be further bound by the contract without incurring liability for its breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 263; Dec. Dig. § 98.*]

In Bankruptcy. On certificate of referee. See, also, 162 Fed. 988.

The following is the certificate of Edward F. Hoffman, referee: "To the Honorable Judges of the said Court:

"I hereby certify for review an order I made on September 25, 1908, reducing the claim of Sitley & Son, Incorporated, from \$2,214.50 to \$200. The question arose on an order I made in the course of proceedings to review the claim of Sitley & Son, Incorporated, for damages against the bankrupt for failure to comply with its contracts for the delivery of commodities.

"The following is a copy of the order:

"It is ordered that the amount of the said claim be reduced from the sum of twenty-two hundred and fourteen dollars and fifty cents (\$2,214.50), as set forth in the affidavit in the proof of claim by said creditor in the said case, to the sum of two hundred dollars (\$200), and that the latter named sum be entered upon the books of the trustee as the true sum on which a dividend shall be computed."

"The question, briefly stated, is as follows: The bankrupt by contracts agreed to deliver commodities to the claimant at prices specified in said contracts and on dates therein specified. Delivery was not demanded by the claimant within the time specified in the contracts, but subsequent to the time limits of the contracts the claimants bought in the open market the undelivered portions of said contracts at prices in excess of the contract prices and charged said excess as a debt due by the bankrupts.

"I ruled that the claimants, not having demanded delivery within the time limit of the contracts, could not, after the expiration of said time, buy against

the contracts and charge the bankrupt with the loss sustained.

"I overruled an offer of proof that in the course of dealings between the parties the time limit was not observed, and reduced the claim for failure to deliver within the written specifications to the amount demanded within that time. The facts are as follows:

"On March 27, 1908, the claimants filed their proof of claim, setting forth a contract for the delivery of 100 tons of winter middlings at the price of \$22.50 per ton, shipment before April 30, 1907, and a contract for 100 tons of winter

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

middlings, \$22.50 per ton, shipment April and May. They alleged that they bought against this at an excess of \$4 per ton, netting a loss on the said 200 tons of \$800. On the 2d day of February, 1907, they set forth a contract with the bankrupt for 300 barrels of flour, at \$4.40 per ton, shipment when ordered, within 60 days, on which they allege a purchase of 170 barrels against said contract, at the rate of \$5.75 per barrel, charging the said bankrupt with \$229.50. On the 7th day of March, 1907, they set forth a contract with the bankrupt for delivery of 1,000 barrels of flour at \$4.15 per barrel, shipment in 90 days, and they allege that they bought against that contract 790 barrels, at \$5.65 per barrel, making an excess of \$1,185.

"Summary.

Loss o	n failı	re to de	eliver	200 tons	of m	iddlings.	.		\$ 800	00
66 6	16 6	6 44	46	44	No. 2	• • • • • •			1185	00
										-
									\$2.214	50

"To this proof of claim the trustee filed on June 2, 1908, petition to review, admitting that the claimants had made demand for delivery of two car loads of middlings, within the time specified in the contracts, and allowing damages for said failure in the amount of \$200, and denying that a demand had been made by claimants for delivery of any other portion of the commodities contracted for within the time limits of the contracts, and setting forth a copy of a notification from the bankrupts to the claimants that they had canceled the contracts for the balance not demanded before expiration of time limit.

"The hearing was held before the referee on September 25, 1908, and was duly attended by J. Wilson Bayard, Esq., attorney for trustee, and Mr. Carr, of Wilson, Carr & Stackhouse, representing the claimants, at which the testimony of Frank Sitley, the claimant, was taken. The allegations of the petition to review were sustained by the testimony. As to the facts that the demands for delivery were not made within the time limits of the contracts, the following offers of proof were made, which I overruled—I cite from testimony:

"'By Mr. Carr: Q. Mr. Bayard asked you about the "custom" with reference to these contracts. I now ask you whether, under the form of order used here, it was the custom to take out the flour within the time limited, or were the orders filled within the time limit? (Mr. Bayard objects.) specified time within which shipment shall be made. (Referee sustains objection. Referee grants Mr. Carr exception.) Mr. Sitley, where no shipping directions were given within the time limits, were these goods shipped to you at Camden? (Mr. Bayard objects. Referee sustains objection. Referee grants Mr. Carr an exception.) Mr. Carr now offers to prove by Mr. Sitley that through a long course of dealings, covering 10 or 15 years, that time has not been held to be of the essence of the contract between Mr. Sitley and the Millbourne Mills. He offers to prove that orders have been filled by the Millbourne Mills many months after the time limit placed in these orders, and upon the same terms as that originally contracted for. I offer further to prove that by the rules of the Commercial Exchange of Philadelphia, of which both Messrs. Sitley & Son, incorporated, and the Millbourne Mills Company were members, that it became the duty of the buyer to furnish shipping instructions at the time the contract was made, and that, if the buyer is desirous of having the shipment held for shipment directions, it shall be his duty to specify at the time of purchase. That the failure on the part of the buyer to furnish directions after an alleged time would give the seller the right and privilege to ship the goods to the post office address of the buyer. That in case of failure on the part of the seller to ship goods on contract time, within shipping directions, the buyer shall have the right to cancel the contract outright or to do what the buyer elects.

"'Referee enters of record that in his opinion the evidence offered, received in full, would not affect the merits of the case, and, therefore, overrules the offer.'

"In support of my rulings, I would state: That in my opinion a written contract must be construed strictly, and can only be modified by proof of oral agreement, modifying the contract at the date of the making of said contract.

Waiver of conditions in other contracts between the same parties on different subject-matters cannot be received in evidence as establishing a custom, nor could the rules of the Commercial Exchange be proved by testimony, nor could they govern the construction of contracts by the court.

"I attach hereto:

"(1) Proof of claim of Sitley & Son, Inc.

"(2) Petition to review.

"(3) Record of meeting on petition to review."

Wilson, Carr & Stackhouse, for claimant. J. Wilson Bayard, for trustees.

HOLLAND, District Judge. On September 25, 1908, the referee made an order reducing the claim of Sitley & Son, Incorporated, from \$2,214.50 to \$200. This claim of Sitley & Son was for damages which they alleged they sustained by reason of the bankrupt company's failure to deliver certain merchandise purchased by them during the year 1907, and that they were compelled to go into the open market and buy the same merchandise at a much higher price than what they had agreed to pay the bankrupt company. The facts are fully stated in the certificate of the referee, and his reasons given for reducing the claim in accordance with the terms of his order.

We are unable to find any error either in the referee's ruling on the evidence offered, or his conclusion as to the right of the claimants to recover for the difference in price on goods subsequently purchased by them in the open market instead of similar merchandise for which they made no call on the Millbourne Mills Company, as required by their contracts, either before or after the time limit had expired. It is plain these contracts, as interpreted by the parties themselves, required the claimants to notify the bankrupt company when they desired the deliveries to be made, and, in the absence of a receipt of such a notice, the Millbourne Mills Company had a right to assume that plaintiffs were not ready for delivery, and if, as in this case, the claimants failed to take the merchandise purchased according to contract within the time specified, the seller had a right, after the expiration of the time, as he did in this case, to notify the claimant of its refusal to be further bound by the contract. In mercantile transactions time is of the essence of the contract, unless the contrary appears, as the purchase and delivery of goods is a matter of importance to both buyer and seller for the purpose of enabling them to successfully develop and execute their plans in connection with the goods bought or sold in the use to which they are to be put. 9 Cyc. 604 and 616f: Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; White v. Wolf, 185 Pa. 369, 39 Atl. 1011; Jones v. United States, 96 U.S. 24, 24 L. Ed. 644.

The order of the referee of September 25, 1908, in reducing the claim of Sitley & Son, Incorporated, from \$2,214.50 to \$200, is hereby affirmed.

In re CAMERON.

(District Court, E. D. Washington, S. D. October 28, 1908.)

ALIENS (§ 68*) — ADMISSION TO CITIZENSHIP — DECLARATION OF INTENTION — ABANDONMENT.

A declaration of intention by an alien to become a citizen of the United States will not support an application for admission to citizenship, where after it was made the applicant returned to his native country with the intention of remaining there, and who voted and otherwise participated in its local affairs, such act operating as an abandonment of his declared intention.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 68.*]

Application for Admission to Citizenship.

Andrew J. Balliet, Asst. U. S. Atty.

WHITSON, District Judge. The applicant, an alien, born in Canada, declared his intention to become a citizen of the United States on the 2d day of August, 1895. He remained here for several years after his declaration, after which he went to Canada, without at the time intending to return to this country. He subsequently came back, and has lived in the United States for more than five years immediately preceding his petition. He is shown to have the necessary qualifications, and is particularly to be commended for frankness of statement in regard to his purpose at the time he left. He relies upon the original declaration of intention, but in view of the circumstances he is not entitled to admission by virtue thereof; for though it was bona fide his intention to become a citizen at the time he made it, his subsequent resumption of allegiance and assertion of his right to citizenship in his native country, where he voted and otherwise participated in its local affairs, raises a conclusive presumption of the abandonment of that intention. The statute contemplates continuous inhabitancy, after the first step is taken, up to and including the time of admission, during which the intention to become a citizen must in fact continue. An applicant cannot hold a divided allegiance, in part to his native country, to be resumed at will, and in part to that of his adoption, to be availed of at pleasure. He owes undivided allegiance during the probationary period; otherwise, he could continue his relations with the country of his citizenship unto the day of his final proof, which would neither be within the spirit of the statute regarding residence nor within its provisions as to the bona fide intention to become a citizen. Nor will the fact that he has resided here for the time required by law since his return entitle him to admission, even though that residence may be accompanied with an intention to become a citizen; for his right depended upon the continuance of the intention to expatriate himself, and he cannot rest his claim upon that which he voluntarily relinquished and abandoned by exercising his rights as a citizen of the country from which he came.

For these reasons, the petition will be denied.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

UNITED STATES ex rel. PITCAIRN COAL CO. v. BALTIMORE & O. R. CO. et al.

BALTIMORE & O. R. CO. et al. v. UNITED STATES ex rel. PITCAIRN COAL CO. et al.

(Circuit Court of Appeals, Fourth Circuit. September 17, 1908.)

Nos. 772, 773,

1. Carriers (§ 32*)—Interstate Commerce—Discrimination—Distribution of Cars.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155), which prohibits discriminations, and section 1 as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), which requires carriers to furnish transportation on reasonable request therefor, make it the duty of an interstate carrier to furnish equal facilities for transportation, as well as equal rates, to all shippers who are similarly situated; and it cannot evade such duty in the distribution of cars by claiming that it is not the owner of a portion of the cars carried over its lines.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*

Duties and liabilities of carriers as to furnishing facilities for transportation, see note to Harp v. Choctaw, O. & G. R. Co., 61 C. C. A. 414.]

2. Carriers (§ 32*)—Private Cars—"Undue Preference."

In the distribution of cars by an interstate railroad company between coal mining companies on its line, when the supply is insufficient to meet all demands, a mining company which owns cars individually is entitled to have such cars assigned to its use; but it is not entitled in addition to a pro rata share of the cars owned by the railroad company, and such a distribution, if made, resulting in giving to such company larger facilities for transporting its product than are given to other companies similarly situated, but which own no private cars, constitutes the giving of an undue preference or advantage to such company, in violation of the interstate commerce law.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.* For other definitions, see Words and Phrases, vol. 8, p. 7172.]

3. Carriers (§ 32*)—Discrimination—Distribution of Cars.

An interstate carrier, in the distribution of cars, cannot give a shipper a preference in order that it may profit thereby, or that the shipper may profit thereby; and when called upon by a shipper for full car service the only defense which the carrier can interpose, in case of failure to comply which the demand, is that the supply which it has furnished is sufficient for normal demands, or that in case of shortage it has fairly and impartially prorated all of its car equipment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

4. Carriers (§ 32*)—Fuel Cars—Foreign Cars.

In the distribution of cars by an interstate railroad company between the operators of coal mines on its line, its own fuel cars, the fuel cars of other roads sent upon its line to be loaded, its regular equipment of cars, and the private or individual cars of any mine operator should be placed absolutely on the same basis as together forming the available car equipment of the road as a whole; and where its own fuel cars or those of other roads are consigned to a particular mine, or the operator's own private cars are delivered to it, they should be charged against such mine, and it should be allotted only so many of the system cars as are necessary to make up its pro rata share of the whole.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—8

5. Carriers (§ 32*)—Distribution Between Coal Mine Operators.

A rule of a railroad company under which any coal mine operator on its line using its terminal tracks at the seacoast and there unloading its cars within five days on an average during any month is given as a premium a 50 per cent. larger allotment of cars during the next month is an attempted evasion of the provisions of the interstate commerce act requiring a fair and impartial distribution of cars between shippers, and gives an undue preference or advantage to shippers so favored, in violation of such act.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

6. Carriers (§ 32*)—Rating of Mines.

In the distribution of cars by a railroad company between operators of coal mines on its line in times of shortage, the percentage of cars to which each mine is entitled should be determined solely by the physical capacity of the mine to furnish coal for shipment; and a rule of distribution by which such capacity is taken as one, while the amount of shipments for the preceding two years is taken as two, the sum of the rated capacity and such shipments being divided by three to determine the basis of distribution, is unfair and inequitable to new mines, and results in giving an undue preference or advantage to old mines, in violation of the interstate commerce law.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

7. Carriers (§ 32*)—Main and Collateral Branch Lines.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), which requires railroad companies to furnish cars to shippers on collateral branch lines without discrimination in favor of or against any such shipper," shippers on the main line of a road and those on a collateral branch line are entitled to precisely the same treatment in the distribution of cars.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

8. Words and Phrases-"Transportation."

The word "transportation," as used in Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), amending Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155), includes all kinds of instrumentalities of shipment and carriage.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7075.]

McDowell, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore.

Hugh L. Bond, Jr., John G. Wilson, and Edgar H. Gans (Charles Markell, Jr., on the brief), for plaintiff in error in No. 772 and defendants in error in No. 773.

Wm. A. Glasgow, Jr., and Frederick Dallam, for defendants in error in No. 772 and plaintiff in error in No. 773.

Before PRITCHARD, Circuit Judge, and McDOWELL and DAY-TON, District Judges.

PRITCHARD, Circuit Judge. These are writs of error from the judgment of the Circuit Court for the District of Maryland, by both the petitioner and defendants. The following statement substantially contains the facts as to the matters in controversy between the parties:

A petition for mandamus was filed in the Circuit Court to require

[◆]For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Baltimore & Ohio Railroad Company to cease from subjecting the relator and coal companies on the Monongah Division to undue and unreasonable discrimination in the shipping and transportation of coal. This petition was filed January 16, 1907, by the relator, the Pitcairn Coal Company, a corporation of West Virginia, against the Baltimore & Ohio Railroad Company and the Cumberland & Pennsylvania Railroad Company and 37 coal companies, most of them operating mines in West Virginia in what is known as the "Fairmont region." Of the defendants, the Fairmont Coal Company, the Clarksburg Fuel Company, the Pittsburg & Fairmont Fuel Company, the Southern Coal & Transportation Company, the Consolidation Coal Company, and the Somerset Coal Company are allied companies, practically all controlled by the Consolidation Coal Company, which also owns substantially all the capital stock of the Cumberland & Pennsylvania Railroad Company. The majority of the stock of the Consolidation Coal Company, until May, 1906, was owned by the Baltimore & Ohio Railroad Company, and was then sold by the Baltimore & Ohio Railroad Company to Clarence W. Watson, acting for himself and his associates; the railroad company retaining a lien for a portion of the purchase money. The allied companies are referred to as the "Fairmont Coal" Companies," and the other coal companies operating in the Fairmont region of West Virginia are spoken of collectively as the "Independent Companies." The Baltimore & Ohio Railroad Company fully answered the petition, denying all allegations of undue preference or discrimination, and the Fairmont Companies fully answered, denying any discrimination in their favor. Thirteen other defendants answered, asking the same relief as prayed for by the relator, and others of the defendants who were summoned did not intervene in any way. At the hearing a jury was waived, and it was agreed by a stipulation in writing that the issues of facts should be tried and determined by the court without the intervention of a jury.

The Pitcairn Coal Company, the relator, owns a tract of about 1,000 acres of coal land near Clarksburg, W. Va., and has been operating a mine there since 1903, in what is known as the "Monongah district," on the West Virginia & Pittsburg Railway, which railway belongs to and is operated by the Baltimore & Ohio Railroad Company as a part of its railroad system. The Pitcairn mine has an eight-foot vein of good bituminous steam and gas coal, with working places for 208 miners, is well equipped with electric cutting machines, and is rated by the railroad company as having a possible physical capacity of mining 1,000 tons per day. The relator invoked the action of the court under section 23 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 387), as follows:

"Sec. 23. That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier of any of the provisions of the act to which this is a supplement and all acts amendatory thereof as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the

traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, not-withstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

The provisions of the act of which the relator complains as being violated by the railroad company in favor of the Fairmont Coal Companies are set forth in section 3 (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), as follows:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The complaint of the relator is thus formulated in its petition:

"(7) Relator shows that the capacity of its mine at Clarksburg, West Virginia, aforesaid, is one thousand (1,000) tons of coal per day, and that if cars are received by it to load the same that it can and would load as much as one thousand (1,000) tons per day for shipment over the said Baltimore & Ohio Railroad, but it has never been able to get the cars sufficient to ship that amount of coal, and it has been unable to ship sufficient coal to fill contracts which it has and has had on hand, and has been unable to take certain valuable contracts for the delivery of coal which were offered to it, because of its inability to get a sufficient supply of cars from the Baltimore & Ohio Railroad Company in which to ship the same.

"Relator further shows that it has frequently made within the last three months and prior thereto, reasonable requests for cars to fill its contracts and to enable it to take valuable contracts which were offered, but the Baltimore & Ohio Railroad Company refused, declined, or failed to furnish to it such cars and other vehicles, instrumentalities, and facilities for shipping coal as were needed by relator in order to fill its contracts, or to ship the coal which was required by it under its obligations to persons to whom it had sold coal, and to enable it to take the valuable contracts aforesaid.

"Relator further charges that the Baltimore & Ohio Railroad Company has declined to give to relator the cars for carrying coal from its mines to which it was justly and properly entitled, as hereinafter particularly set forth; and, further, that the Baltimore & Ohio Railroad Company, as hereinafter more particularly set forth, has given an undue and unreasonable preference or advantage to other persons, companies, firms, and corporations, as hereinafter more specifically set forth, in its distribution and assignment of cars for service and shipments from the coal mines and coal operations along its line of road; and, further, the Baltimore & Ohio Railroad Company, as hereinafter more specifically set forth, has subjected relator and the other independent coal operators, defendants to this petition, to undue and unreasonable prej-

udice or disadvantage in its system of car distribution, and in service to the coal mines owned and operated by relator and such independent coal companies

"(8) Relator further says that when the supply of cars is sufficient on the Baltimore & Ohio Railroad Company that all orders for cars are filled, but that this condition of affairs rarely exists, except for a few months of the year in the summer time; but, whenever in any district the supply of cars is insufficient to fill all orders, cars are supposed to be distributed, and the Baltimore & Ohio Railroad Company alleges that it has distributed such cars, on a percentage basis, to all of the mines in such district, but in the distribution of cars on a percentage basis, before distribution is made, certain arbitrary assignments of cars are made, reducing the total number of cars to be distributed. on the percentage basis aforesaid, as follows:

"First. All cars placed at the mines for the fuel or supply coal of the Baltimore & Ohio Railroad Company are not charged against the percentage to

which the mines furnishing such coal are entitled.

"Second. New mines are allotted an arbitrary number of cars, daily or weekly, for development.

"Third. When foreign railroad companies—that is, companies other than the Baltimore & Ohio Railroad Company—send their own cars for fuel or supply coal to mines on the Baltimore & Ohio Railroad, such cars are treated as arbitrary, and are not charged against the percentage of the mines to which they are sent.

"Fourth. Cars owned by individual companies or operators, and commonly known as 'individual cars,' are placed at mines of the owners for shipment of their coal, and are not charged against the percentage of such mines.

"Fifth. Whenever a shipper on the Baltimore & Ohio Railroad ships cars to Curtis Bay, a tidewater terminal of the Baltimore & Ohio Railroad, and such cars are handled promptly in any one month, such shipper is allowed in the succeeding month a premium of fifty (50) per cent. of the number of cars so shipped, in addition to his regular percentage.

"Sixth. At certain points which are noted on the sheets of the Baltimore & Ohio Railroad Company, showing a distribution of cars on a percentage basis,

an arbitrary number of cars is assigned to mines on fire.

"Seventh. Certain mines in the immediate vicinity of industrial plants are given an arbitrary allotment of cars which are empty and intended for loading at such industrial plants, if the cars, when loaded with coal, are to be consigned to such industrial plants.

"Eighth. When annual contracts are placed for foreign railroad fuel or supply coal with mines on the line of the Baltimore & Ohio Railroad, and cars are furnished by such foreign road for shipment of such fuel or supply coal, then the Baltimore & Ohio Railroad Company allots to the mine shipping such coal an arbitrary allotment of cars out of its equipment equal to the foreign cars furnished for such fuel or supply coal.

"After the foregoing arbitrary cars are allotted and assigned to the mines on the Baltimore & Ohio Railroad, the remaining cars, it is claimed by the Baltimore & Ohio Railroad Company, are divided among all the mines or operators, including those enjoying the arbitrary allotment of cars aforesaid, on the percentage basis.

"The above is the system of distributing cars as claimed by the Baltimore & Ohio Railroad Company, on the Monongah Division of said road, as above set forth, and relator charges that all such exceptions, limitations, and rules are made to the undue advantage of and in preference to certain coal companies and shippers, as herein set forth, in the prosperity of which the Baltimore & Ohio Railroad Company is interested. The Baltimore & Ohio Railroad Company claims to distribute cars on the several divisions of its road to coal mines on a capacity basis; that is, the capacity of the mine is supposed to have been arrived at by taking into consideration: (1) Physical capacity of the mine. (2) Previous shipments therefrom. And from this capacity a percentage is worked out for each mine of the cars for distribution on that division, in comparison with the capacity of the other mines on said division, and the assignment of cars to each division is worked out by arriving at the per-

centage of the equipment to which such division is entitled in comparison with the capacity for shipping coal to all the mines on the other divisions of said road."

Of the foregoing enumerated grounds of complaint there were three which were not urged at the hearing below, to wit, the second, sixth, and seventh. It was contended in the court below by the relator, Pitcairn Coal Company, that all of the cars available for use at the mines in the Monongah Division of the Baltimore & Ohio Railroad in West Virginia should be divided upon the percentage basis established in that district, and that the elimination of cars set forth under 1, 2, 3, and 4 above from the available cars for distribution, before applying the percentage division, gave the companies using such arbitrarily allotted cars an undue preference in having tonnage moved by the carrier, and subjected the relator and those companies not enjoying the use of such arbitrary cars to an unreasonable and unjust advantage.

The court below held that the railroad company, in allotting what are known as "individual cars" to the companies or coal operators owning the same, or to mines designated by such owners, without charging such cars against the number to which the mines using the same are entitled under the percentage system, was guilty of undue preference to such mines, and subjected the relator and the companies not receiving such individual cars to undue and unreasonable disadvantage, and that, while such cars ought to be allotted to the service of the company or coal operator owning the same, they should be charged against the number of cars which such owner or coal operator was entitled to under the percentage system in effect in the Monongah district. As to all the other cars, under paragraphs 1, 2, and 3, the court held that the arbitrary allotment of these cars was not an undue or unreasonable disadvantage to the company not receiving such cars. And the court ordered that a mandamus issue requiring the Baltimore & Ohio Railroad Company to charge all of the "individual cars" against the percentage of cars of the mines using the same, and overruling the complaint of the relator as to all other matters set up in its petition. From this order, as to "individual cars," the Baltimore & Ohio Railroad Company, the Fairmont Coal Company, and others. defendants, sued out a writ of error; and from the order refusing to grant the relief prayed for in the petition as to the other cars set forth. the relator sued out a writ of error.

We will first consider the assignments of error relied upon by the defendants, the Baltimore & Ohio Railroad Company and the Fairmont Coal Company and others. The learned judge who tried the case below made the following finding of fact which is taken as a basis of appeal on the part of these defendants:

"I find from the evidence in this case that, in times of coal car shortage, the giving by the Baltimore & Ohio Railroad Company to the mine operators in the Monongah district who own individual cars their own cars and in addition thereto their full percentage of the available general coal car equipment of the Baltimore & Ohio Railroad Company results in subjecting the relator, and the defendants asking with it the same relief, to undue and unreasonable prejudice and disadvantage, and that the said individual cars should be counted against the percentage distribution of the mine operators entitled to their exclusive use, respectively."

The record shows that many of the coal companies operating in the Fairmont region and controlled by the Fairmont Company owned individual cars. The evidence further shows that since 1852 coal companies have been the owners of individual cars, and that those cars have never been considered or taken into account by the railroad company making a pro rata division of the coal car equipment when the supply of coal cars was not sufficient to meet the demands of all the mine operators. The learned judge who tried this case below, in referring to this phase of the question, makes the following admirable statement as to the facts upon which he based his judgment as respects the individual cars heretofore mentioned:

"It is not contended in this case that the equipment of coal cars provided by the Baltimore & Ohio Railroad is not reasonably sufficient for their coal trade on the yearly average of the seasons. It is not in this proceeding claimed to be reasonable that of cars available solely for the transportation of coal, the demand for which is not constant during the year, the railroad should furnish sufficient for the maximum demand. Their equipment of coal cars has been recently largely added to, and is now, for about seven-twelfths of the year, ample to supply the demand of the mine operators. But during the remaining five-twelfths of the year, embracing the winter months, the demand for coal cars is on most days greater than can be furnished. Then it is that a percentage of the whole number available is allotted to each mine. The business of mining, transporting, and selling of bituminous coal is peculiar. The mine operator, as a rule, has no means whatever of storing the coal. It must be dumped from the mine cars directly into the railroad cars, and taken by the purchaser at its destination in those cars directly to the place where it is to be consumed, or to the vessels in which it is to be further transported by water carriage. This makes the railroad cars the place of storage for the coal from the mouth of the mine to the premises of the consumer or to the ship's side, if it is to be water-borne, or until a purchaser be found if the consignee has not a purchaser ready when the car arrives at the point of destination, and, as there is no place of storage at the mine, the cars must be supplied daily to receive the coal as mined. The difficulties resulting from the irregularity of the demand for coal between winter and summer, the difficulties resulting from it being a commodity which usually cannot be stored, and the fact that many of the large consumers require the coal dealer to contract to deliver them a daily and never-failing supply, has induced certain mine operators, having large capital, to increase their equipment of individual cars, and this has been availed of by the Fairmont Company to a very large extent, so that the Fairmont Company and its allied companies have now running regularly on the Baltimore & Ohio Railroad some 5,500 individual cars, many of them of 50 tons capacity. These allied companies have also, for the purpose of increasing the sales of the output of their mines and providing constant use for their individual cars, acquired large terminals on western lake ports and terminal facilities at seaboard ports in New England, and vessels and barges to carry coal between Curtis Bay and New England, and this has introduced their coal into new markets and greatly increased their business.

"The complaint of the relator is, not that the railroad company permits the exclusive use by their owners of the individual cars, but that by the system of car distribution, when there is a shortage, as practiced by the railroad company, there is produced an undue and unreasonable preference in favor of the owners of individual cars, and the relator and others in like situation are subjected to undue and unreasonable prejudice and disadvantage. By a method of calculation, which will be mentioned later, each mine in the district is given by the railroad officials a fixed percentage, based on its capacity to ship coal, and which is intended to be its proportion of the whole output of all the mines in the district. When the available car supply for the day is less than the demand, the mine is entitled to get that percentage pro rata of the whole available supply of coal cars belonging to the railroad company.

"The complaint of the relator is that from the whole available supply of

cars in the district on which the percentage is calculated there is first deducted and given to each mine its own individual cars, and then, besides, it also gets its full percentage allotment of the remaining Baltimore & Ohio Railroad cars, and that this system produces results which are very prejudicial to the mine having no individual cars, and which are made evident in many ways: First, that the railroad's tracks, engines, and operating force are taxed by handling so great a number of individual cars, so that the car supply comes to the mine late in time and irregularly and uncertain in numbers, with the result that the independent mines are constantly idle, and the force of miners, who are paid by the ton and who cannot work for want of railroad cars to receive the coal, become discouraged and leave; also, as the percentage of the mine is rated in large part by its actual output, its development and consequent percentage rating is kept from increasing, and the whole enterprise is held in check; also that, on account of the limited and uncertain and varying car supply, it is not reasonably possible for the independent operators to enter into any contracts to ship coal during the winter months when the demand is greatest and the prices highest. In the month of November, 1906, which was a month of average winter car supply, and in which the relator could reasonably have loaded 20 cars a day, and needed 20 cars a day to keep its miners and other employes from losing time, and had notified the railroad that it required at least 20 cars a day, making in all over 600 for the month, it received only 183 cars, and these were received very irregularly, viz.: On 4 days none, on many days only 1 or 2 or 3, making 18 days on which less than 10 were received. During the month there were a few nonpercentage days, usually Mondays, when the car supply was adequate, and on these days the relator's mine received and loaded very nearly its full capacity.

"It would not be reasonable to hold that the exclusive use of individual cars by the mine operators under a system which has grown up during half a century, and under which the trade has enormously developed, and upon the faith of which mine operators have invested millions of capital, often at times when the railroad company had neither money nor credit with which to increase its equipment, is now to be denied, unless it could be done upon fair terms mutually acceptable to the mine operators and the railroad. The use of individual cars is not peculiar to the Baltimore & Ohio Railroad, but has been quite generally used from the beginning of the coal trade in the United States and in England. While it is true that, if the railroad was so disposed, it might, by not keeping up its coal car equipment, gradually force all mine operators to provide individual coal cars, which would in the end leave in the business only those operators who were able to obtain and profitably use the large capital required to purchase individual cars, it does not appear that the railroad has pursued that policy. On the contrary, in 1905 it ordered 5,000 new coal cars of large capacity, increasing the total coal car equipment to about 45,000, and also increasing its engine equipment, so that it is abundant. Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of the individual cars; on the contrary, it is only just. But under the actual circumstances of the business of the coal trade on the Baltimore & Ohio Railroad, from which it is apparent that the great struggle of the mine operators is to get sufficient cars to ship their product during the winter months, and that their business existence depends upon it, it is not unreasonable to hold that the railroad shall do all that it is practicable to do to avoid subjecting the operators who do not have the use of individual cars to unreasonable disadvantage. While it is true that the existence in the trade of a large number of individual cars does increase the total car equipment, and so far as the individual cars satisfy the requirements of the owners does increase the number of free equipment cars which the railroad has at its disposal, it still is a fact that in times of car shortage the demand is so great that all the mines having individual cars require and get their full percentage of the railroad's equipment, without reference to their own cars."

The interstate commerce act, in pursuance of which this suit was instituted, was passed on the 4th day of February, 1887, and was intend-

ed, among other things, to secure an equal and fair distribution of car facilities to all shippers similarly situated. It is sought by this proceeding to secure the enforcement of the provisions contained in section 3 of the interstate commerce act and section 1 of the act as amended June 29, 1906, 34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1907, p. 892]). The amendment to the latter section is as follows:

"It shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon a reasonable request therefor."

By reference to the body of this section it will be seen that the word "such" refers to the previous sentence of the act, which, among other things, provides that:

"The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit. storage and handling of property transported."

It was evidently the intention of Congress, in the employment of the term "transportation," to include all kinds of instrumentalities of shipment and carriage, and the one explicit requirement of the entire section is that there shall be just and reasonable charges in connection with the "transportation of persons or property as aforesaid," and that cars shall be furnished "irrespective of ownership or of any contract, express or implied, for the use thereof."

Section 3 of the act provides that:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

As was said by this court in the case of United States ex rel. Greenbrier Coal & Coke Co. v. Norfolk & Western Ry. Co. et al., 143 Fed. 268, 74 C. C. A. 406:

"The purpose of this act is to place 'all shippers on an absolute equality.' The sections in question were intended to prevent discrimination in all branches of freight traffic."

While section 3 is comprehensive in its scope, it did not afford the means by which the provisions of the act could be carried into effect. Therefore Congress passed a supplemental act on the 2d day of March, 1889 (25 Stat. 862, c. 382), section 10 of which is now section 23 of the interstate commerce act hereinbefore quoted. Section 1, as amended, and section 3, confer certain rights upon shippers, and it is clearly provided, among other things, that there shall be no discrimination against or in favor of those similarly situated by the common carrier in furnishing means of transportation. Section 1 makes it the duty of the railroad to provide and furnish such transportation upon a reasonable request therefor, and section 3 is intended to secure to the shipper the same treatment with reference to facilities for transportation. Section 3 provides that all shippers shall have a just equality

of facilities, and section 1 provides that all shippers shall be given a just and equal sufficiency of facilities. This is a wise provision, and was intended to prevent common carriers from either directly or indirectly giving certain shippers an undue preference in the distribution of car service. In the absence of such legislation providing the means by which summary relief could be afforded the shipper, it would be an easy matter for the common carrier, by favoritism, to build up one class of shippers and at the same time utterly destroy the business of another class similarly situated, and it was to prevent this kind of discrimination that this act and the acts amendatory and supplemental thereto were passed.

The purpose of the provisions of the interstate commerce act relating to this controversy is to prevent the railroad from giving any undue or unreasonable preference or advantage to any mine owner in any respect whatever. Section 1 of the act, as we have stated, makes it the plain duty of the railroad to furnish transportation upon reasonable request. This duty is imposed upon the railroad, and it was clearly the intent of the framers of the act that the railroad should, upon reasonable request for the same, furnish vehicles for transportation. This duty in no sense of the word rests upon the shipper, but relates solely to the carrier. In this instance, as is the case in the enactment of almost every statute, there must have been strong reasons for the passage of this act. It is obvious, from even a casual reading of the statute, that at the time of its enactment certain shippers were unable to operate their mines so as to develop them, owing to the lack of car service, due to the unequal distribution of cars among those who were engaged in operating coal mines, and it was to correct this inequality that legislation of this character was deemed to be advisable and expedient. While the interstate commerce act is intended to regulate rates as well as facilities, there is no question of a rate involved in this proceeding. We are called upon to deal with facilities, and therefore it is not necessary to discuss the question as to the intent and meaning of the statute in so far as it relates to the regulation of rates.

In passing upon the questions involved, it should be borne in mind that the statute casts upon the carrier the plain duty of furnishing a fair and equal distribution of facilities to the shipper. The duty thus enjoined cannot be evaded by the carrier by claiming that it is not the owner of a portion of the cars carried over its lines. The duty of furnishing equal facilities relates to and involves purely the question of transportation, and when we are called upon to determine as to whether in any particular instance there has been an undue and unreasonable discrimination or preference as contemplated by the statute, the sole question is as to whether the entire equipment operated over the lines of the carrier has been fairly and equally distributed among all the shippers along its lines who are similarly situated. The defendant mine owners insist that in the purchase of individual cars they have expended a considerable sum of money, which thereby becomes a part of their investment and should be treated as such, and that it would be unfair to them to require the carrier to charge such cars as a part of the percentage to which they are entitled. This is a matter which we cannot consider, inasmuch as the statute was not

enacted for the purpose of promoting the interests of any particular mine owner; it being limited to one purpose, to wit, the fair and equal distribution of car service by railroads or transportation companies among all mine owners similarly situated within the territory in which their lines are operated.

It is made the duty of the carrier to move the product of the shipper, and in doing so, if the carrier should by any means deny to a particular shipper his just and proportionate share of facilities as compared with other shippers similarly situated, then, in that event, the shipper would undoubtedly be entitled to the relief afforded by section 23 of the act. If, as in this instance, a carrier, by contractual arrangement, operates individual cars belonging to mine owners as a part of its equipment, such arrangement cannot in the slightest degree relieve the carrier of the duty to furnish equal facilities to all shippers similarly situated. To adopt any other rule would be to make it possible for wealthy mine owners, by the purchase of car equipment, to utilize the means of transportation operated by the carrier to such an extent as to practically deprive other mine owners similarly situated of any means of transportation, and it was to avoid this very kind of discrimination that the provisions of sections 1 and 3 of the interstate commerce act were enacted. There is nothing in the interstate commerce act which prohibits a carrier from making any arrangement it may choose as respects the ownership of cars which it operates on its lines. That is a matter which is left entirely with the carrier; but, while such is the case, it is equally true that the carrier cannot, by any such arrangement, by indirection, accomplish that which is prohibited by the statute.

We do not think it was the purpose of the framers of the act to undertake to secure the same development of each mine, but rather to place the various shippers upon an equal footing in so far as shipping facilities were concerned. To any one who is acquainted with the coal business it will be readily seen that, under any system of car distribution which places a particular mine owner in a position where such owner is unable to make prompt delivery of the product of his mine, such failure on the part of the shipper to receive his proportionate share of cars must necessarily result in placing him at a great disadvantage and in a position where it would be practically impossible to operate his mine, and all this to the very great injury of the consumer, who, under such conditions, is from necessity compelled to purchase from the favored shipper, at higher prices, or, at least, with suppressed competition, because the favored shipper can alone, under such conditions, guarantee and secure to him steady and uniform shipments of fuel absolutely necessary, in most cases, for the successful conduct of his business.

While the evidence in this case shows that in the year 1905 the railroad ordered 5,000 new coal cars of large capacity, increasing its total car equipment to 45,000 and its engine equipment to such an extent that in so far as its capacity for transporting freight is concerned, its equipment is sufficiently adequate to meet the requirements arising from the operations in that region, nevertheless it does appear that certain operators in that section, named as defendants in this proceed-

ing, are the owners of individual cars to a large extent, and that, in addition to receiving the percentage to which they were entitled upon the basis adopted by the railroad company in that territory, such owners are given an undue preference in the distribution of car service. In other words, the individual cars were arbitrarily assigned to the owners, and in addition thereto they were given their pro rata share

of the cars belonging to the railroad company.

It appears from the statement of the learned judge who tried the case (hereinbefore quoted) that in the month of November, 1906, the relator could have loaded 20 cars a day, and actually needed that number of cars a day to keep its miners and other employés from losing time. It also appears that the railroad company was notified by the relator that it needed such number of cars per day, making in all over 600 for the month. It further appears that only 183 cars were received during the month, and those at irregular intervals, to wit: On four days none, on many days only 1, 2, or 3, making 18 days on which less than 10 were received. It further appears that during the month there were a few nonpercentage days when the car supply was adequate, and that on those days the relator's mine received and loaded very near its full capacity. This is clearly a discrimination under the statute, which entitles the relator to the remedy afforded by section 23.

In view of the opinion which we entertain as to the proper construction of this statute, it is not necessary to pass upon the contractual relations existing between the railroad company and the mine operators as respects individual cars. It appears that some of these cars have been paid for by the railroad company by the working out of the mileage contracts under which they were placed on the road, and are therefore the property of the company. The exclusive use of other cars now belonging to the Baltimore & Ohio Railroad Company is claimed by virtue of an agreement made with the Monongahela River

Railroad Company, the former owner.

The defendants below contend that this question was decided in the case of Fairmont Coal Company v. Baltimore & Ohio Railroad Company, instituted March 12, 1903, in the United States Circuit Court for the Northern District of West Virginia, in equity, in which a hearing was had on a bill, and adjudged that the Fairmont Coal Company was entitled to the exclusive use of its individual cars, in addition to its proper pro rata share of all other cars of the railroad company's general equipment and car supply. That was a proceeding solely between the Fairmont Coal Company and the railroad company, in which no other shippers of coal were parties or had any opportunity to be heard. Therefore there is nothing in that proceeding to conclude the rights of the relator in the case at bar.

The other case relied upon by the defendants is Riverdale Mining Company v. Baltimore & Ohio Railroad Company, instituted in the United States Circuit Court for the Southern District of Ohio, in 1906, which was a suit for damages, claiming that the Baltimore & Ohio Railroad had discriminated in favor of the Fairmont Coal Company against the Riverdale Mining Company, the plaintiff in that case, in the distribution of coal cars, in violation of the interstate commerce act. In that case the court instructed the jury that the individual cars

belonging to the Fairmont Coal Company were not to be taken into consideration in estimating the cars to which complainant was entitled in the distribution among the mines of the Mononga Division. There the relator was not a party. While we entertain the greatest respect for the rulings of the learned judges who heard these cases, we do not think that, in a case like the one at bar, in which all the parties in interest have been afforded an opportunity to fully present their contentions the rulings in those cases are controlling in the case at bar.

That the proof in this case shows a preference in favor of the Fairmont Coal Companies and a resulting prejudice to relator growing out of such preference to the Fairmont Companies, does not appear to be seriously controverted. When it is shown, as in this instance, that the carrier has not supplied the facilities demanded, the burden is upon the defendant, in order to exonerate itself from such charge of undue preference, to show that it is prorating its cars fairly and equally among all the operators who are similarly situated and engaged in

transporting freight over its lines.

It is insisted that the Fairmont Company has large contracts, and therefore it must have a preference in cars by which it might keep its This contention is untenable. If this condition of affairs could be pleaded in justification of a discrimination in favor of a particular mine owner on the part of the carrier, then the provisions of sections 1 and 3 of the act would be without force, and those mine owners who were favored by the carrier with an unlimited supply of car service would be in a position to go upon the market and solicit business with little or no competition, thereby rendering it impossible for the weaker companies to successfully compete in the open market with their more favored competitors.

It was earnestly insisted by counsel for defendants below that in a case like the one at bar the rule that surrounding circumstances and conditions were to be taken into account in determining whether there had been an undue and unreasonable preference in the meaning of section 3 should control, and that the circumstances and conditions shown in this case are such as to justify the defendant in making the preference in question. That the surrounding circumstances and conditions are to be considered in determining whether there has been an undue and unreasonable preference in favor of another particular shipper is undoubtedly true; but in determining that question it necessarily follows that we should consider the circumstances and conditions surrounding the shipper, and not those that may happen to surround the carrier. If this were a case where we were called upon to deal with the question of rates as between rival lines, we would have to consider the peculiar conditions and circumstances surrounding the carrier; but that question is not involved in this proceeding.

We have carefully considered the cases cited by defendants in support of the contention that the court should consider the conditions and circumstances surrounding the carrier, and are of opinion that they do not apply to this controversy. In none of these cases does it appear that the question of competition among shippers was involved, nor does it appear that the circumstances relied upon to constitute a

preference were similar to those relied upon in this case. At common law the carrier is required to furnish to all shippers, regardless of the question of profit to itself, like facilities without any discrimination, and any contract which does not comply with these principles is void as against public policy. A carrier cannot give a shipper a preference in order that it might profit thereby; neither can it give the shipper a preference in order that the shipper may profit thereby, and, when called upon by the individual shipper for full car service, the only defense which the carrier can interpose in case of failure to comply with the request of the shipper is that the supply which it has furnished is sufficient for normal demands, and that in times of stress it has fairly and impartially prorated all of its car equipment. If it should appear in any such case that any particular shipper was given preference in excess in his pro rata share of its cars, then such preference would necessarily be an "undue preference" at common law. That portion of the interstate commerce act which relates to undue preference is declaratory of the common law, and, when considered in connection therewith, we are forced to the conclusion that any undue preference which is based upon the theory that the preference is made with a view of promoting the interests either of a shipper or a carrier, without due regard to the interests of shippers who are similarly situated, is violative of the sections under which this suit was instituted.

We have carefully considered the evidence bearing on the questions raised by the assignments of error of the Baltimore & Ohio Railroad Company and the Fairmont Company, and are of opinion, for the reasons herein stated, that the findings of fact by the court below are fully justified by the evidence, and that the rulings of the court as respects the questions involved therein, under the circumstances, were eminently proper.

Having disposed of the questions involved in the defendants' writ of error, we will now consider those matters assigned as error by the

relator.

The court below, in dealing with the question relative to the fuel cars of the Baltimore & Ohio Railroad Company and foreign railroad cars, held that they were not to be charged against the companies using them as a part of the percentage to which they were entitled under the arrangement agreed upon to which reference has heretofore been made. A careful consideration of this phase of the question forces us to the conclusion that the fuel cars of the carrier, its regular equipment of cars, the cars of other roads sent in for fuel, and the private or individual cars of the mining operators should be placed absolutely upon the same basis in so far as the distribution of car service by the carrier is concerned. We fail to understand upon what theory the carrier can relieve itself from a charge of discrimination, when it is shown that such cars are arbitrarily allotted to certain mines, and not charged to such mines as a part of the percentage to which they are entitled under the arrangement by which it is undertaken to secure a fair distribution of car service among shippers on its line. This question has been passed upon by the Interstate Commerce Commission in the case of Railroad Commissioner of Ohio et el. v. Hocking Valley Railway Company (No. 1,008) 12 Interst. Com. Rep. 398, in which, among other things, it is said:

"Defendants are engaged principally in the transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines upon the lines of defendants and send their own cars upon the lines of defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased or so-called 'private' cars, devoted exclusively to the use of such lessees. During a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or 'private' cars are excluded from consideration, and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars alloted to such mines in the proportionate distribution. Complaint alleges unjust discrimination against other coal operators along the lines of defendants. in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or 'private' cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantage over other operators in the mining and marketing of coal. Held, that a carrier should give to owner or lessee of private cars the use of such cars, and should also give to a coal company the foreign railway fuel cars consigned to it, but that such 'private' and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered, and such company should not be given, in addition to such delivery, a share of the system cars, except when the number of 'private' and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called 'private cars,' in which event it should be given only so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called 'private' cars."

In the case of Logan Coal Co. v. Pennsylvania R. Co. (C. C.) 154 Fed. 497, Judge Holland, in an opinion handed down July 1, 1907, among other things, says:

"What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company, in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator. This precise question has not heretofore been considered, but the question of car distribution to shippers, including individual and fuel cars, has been before the courts in a number of cases, and the general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other."

It is manifest that it was the purpose of Congress to prevent railroad companies from resorting to such means in order to evade the requirements of the act, to wit, a fair and equal distribution of facilities among shippers similarly situated. In determining as to whether there has been an undue and unreasonable preference in any particular instance, the sole question to be considered is as to whether all the cars hauled over the carrier's lines have been prorated so as to give each and every shipper on its lines his proportionate share of facilities to which he is entitled on the basis agreed upon as the means by which there should be a fair and equal distribution of such car service. Therefore, when we consider the statute, the provisions of which are plain and unmistakable, we are impelled to the conclusion that the arbitrary allotment of the fuel cars of the company and foreign fuel cars is violative of the provisions of the act. Section 1, among other things, provides that:

"Cars shall be furnished irrespective of ownership or any contract, express or implied, for the use thereof."

This makes it the duty of the company to furnish cars, regardless of ownership or of any contract, express or implied. Therefore the question as to the ownership of the cars or the purposes for which they are used can have no bearing in this controversy. In other words, in a proceeding instituted pursuant to section 23 of the act, it would not be a good defense for the railroad company to insist that it was using a portion of its cars for the purpose of transporting fuel, and was therefore unable to give the relator its pro rata share of cars upon the

basis agreed upon.

Relator insists that the court below erred in its ruling in relation to what is known as the "Curtis Bay premium." The defendant says that to encourage a prompt discharge and return of coal cars, and also the use of its own tracks at Curtis Bay, the terminal of the railroad, at Baltimore, it put in force a rule by which all shippers or consignors who during the month average not more than five days' detention of the cars assigned to them were granted a premium of 50 per cent. additional to their car supply for the next month. It is also insisted that this opportunity is open to all shippers who consign coal to Baltimore for water transportation. It is insisted by the relator that, if the road desires to bring about a quick unloading and return of cars, it should do so by a penalty in the nature of demurrage for delay and that to attempt to secure promptness by offering a premium is in violation of the spirit of the act. The method adopted by the railroad company in this respect seems to us to be still another means by which the carrier is enabled to evade the requirements of the act. By this system it is possible for certain favored companies to secure a large number of cars in excess of the amount to which they would be entitled under a fair and equal distribution of the same, while, on the other hand, the carrier could adopt a plan by which those who are not prompt in making deliveries at that point could be made to pay penalties by demurrage without affecting the car supply one way or the other, and thus, without inconvenience to the carrier, place all shippers on equality. That this sytem by which premiums are given to those who are prompt in making delivery at Curtis Bay can be used so as to give certain shippers an undue and unreasonable preference over those who are less fortunate is apparent, and we think constitutes a violation of the provisions of the act.

In determining the number of cars to which the various companies on the line of the Baltimore & Ohio Railroad Company are entitled, the percentages are based, first, on the capacity of the mine; second,

on the previous shipments, the capacity being allowed to count as one (1) and the shipments as two (2) in ascertaining the percentages. The capacity of each mines is ascertained by a personal inspection by the inspector of mines of the Baltimore & Ohio Railroad Company. The contention of the relator in regard to this method is as follows:

"We insist that this method of arriving at the percentage of car supply to which the several shippers are entitled is unjust and unfair, and discriminates against the Pitcairn Coal Company in favor of companies which have been engaged in mining coal for a longer period of time than it. For illustration of the way in which this system works as against a new mine, take a mine opened in 1905, with a physical capacity in January, 1907, when this action was brought, rated by the inspector of mines at 500 tons per day. The average daily shipments of the mine during the summer of 1906 were, say, 40 tons per day. The average daily shipments during the summer of 1905 were nothing. Under this system you add the physical capacity, 500 tons, to the average daily shipments for 1906, 40 tons, and then add the average shipments of 1905, nothing, which makes a total of 540 tons. This is divided by three, which gives the rating of the mine at 180 tons per day; and the percentage that this rating of 180 tons per day is of the total rating of the district in the same way is the percentage of cars to which such mine is entitled."

The court below, in passing upon this subject, said:

"I cannot find any unfairness in the method of rating complained of."

This method is comparatively new, having gone into effect in January, 1903. The witness, Mr. R. M. Hite, who, testified that he had been in the coal business all his life, and who is now engaged in mining at Kingmont, having operated that mine since 1891, bearing on this point, testified as follows:

"I don't think previous shipments are a proper element to take into consideration in arriving at the percentage of equipment to which a mine is entitled. There are many reasons why. In the first place, take a small acreage of coal, say 50 to 100, and a man opens a mine with 50,000 tonnage capacity, and they rate it on previous shipments, and they get to working it for a year, and that reduces the capacity, as the coal begins to run out and the working places will run off; and, when it comes to rating it on a capacity basis, they would reduce that amount on account of the number of working places being reduced. In the system of taking into consideration the previous shipments there would be a decided advantage in favor of an old mine, or a mine that was developed as against one that was beginning to be developed. Of course, the new mine has no shipments to commence with, and the natural effect in times of great demands for coal is to limit the supply, and they get a large supply from the old mines."

In discussing this question, Mr. Arthur Hale, general superintendent of transportation of the Baltimore & Ohio Railroad, says:

"Supposing we take a new mine, whose production is 5,000 tons the first year, and then come to rate that mine along with others, alongside of an older mine which has produced 20,000 two years before, and 20,000 the year immediately preceding the day of rating, the new mine only gets as its elements one year's shipments, because there have been none the second year. The older mine gets the two years' shipments. That operates against the newer mine, The whole effect of that is disadvantageous to the new mine. We take past shipments, and give that a valuation of twice the value of the actual physical power to get out coal, because the physical capacity usually exceeds the average output so much that, if you only take one year, it gives the capacity an undue prominence—it becomes of very much more importance than previous shipments."

In the case of United States ex rel. Kingwood Coal Co. v. W. Va. No. R. R. Co. (C. C.) 125 Fed. 255, Judge Goff, in a very able and exhaustive opinion on this subject, in discussing the proper rule to be observed in working out the most desirable basis for securing a fair distribution of railroad cars to the mine owners, says:

"I am of the opinion that in reaching a proper basis for the distribution of railroad cars it is necessary that an impartial and intelligent study of the capacity of the different mines be made by competent and disinterested experts, whose duty is should be to carefully examine into the different elements that are essentially factors in the finding of the daily output of the respective mines which are to share in the allotment. Among the matters to be investigated are the following: The working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the hauling system and the power used, the number of miners and other employes, the mine openings, and the miners' houses. No one of these various and essential elements can safely be said to be absolutely controlling, though likely the most important of them all are the real working places, the available points at which coal can be profitably mined. At each true working place a certain quantity of coal, to be determined by the thickness of the seam and conditions peculiar to the different coal fields, can be excavated and removed during stated periods of time; and so it follows that, if other essentials are adequate, the daily output of a mine can be computed by the number of its available working places."

Under the present method of ascertaining the percentage of cars to which the shipper is entitled, those shippers who are just beginning to develop their property are placed at a great disadvantage, and owing to which it is well-nigh impossible for a shipper thus situated to secure a sufficient allotment of cars as to enable him to dispose of the product of his mine in such quantities to secure anything like a substantial development of his property. Therefore we are of opinion that such system of coal mine rating is unfair and inequitable to new mines located along the line of this railroad company, where there are a number of old and established mines. To hold otherwise would be to give the Fairmont Coal Company and other favored companies an undue and unreasonable preference, which, as we have heretofore stated, is forbidden by the act, and we are therefore of opinion that the court below erred in ruling that this particular method was a fair and reasonable one. We think the true rule as to the basis for the distribution of cars is correctly stated by Judge Goff in the case of United States ex rel. Kingwood Coal Co. v. W. Va. No. R. R. Co., supra, and that, in determining the percentage of cars to which each mine is entitled, the railroad company should be guided solely by the physical capacity of the mine to furnish coal for shipment.

It is further insisted by the relator that the court below erred in its ruling in respect to the distribution of cars for the Cumberland & Pennsylvania Railroad. It contends that the allotment of coal cars by the Baltimore & Ohio Railroad from its equipment before they reached the Monongah Division of the West Virginia & Pittsburg Railroad, operated by the Baltimore & Ohio Railroad, to the Cumberland & Pennsylvania Railroad at its junction with the Baltimore & Ohio Railroad, at Cumberland, thus preventing such cars from coming to the Monongah Division, gives an undue advantage to the shippers on the Cumberland & Pennsylvania Railroad, to the prejudice

of the shippers on the Monongah Division, where there is a shortage of coal cars. The court below heard all the evidence bearing on this question, and after considering the same, among other things, said:

"The coal traffic on the Baltimore & Ohio Railroad began in 1843, and until 1855 was all from the Cumberland region, and from mines none of which were located on the Baltimore & Ohio Railroad, but were reached by lateral roads from the mines to the Baltimore & Ohio Railroad at Cumberland and Piedmont. Several of these lateral roads became incorporated in the Cumberland & Pennsylvania Railroad, which practically is a combination and extension of the lateral roads to which, for half a century, the Baltimore & Ohio Railroad has been supplying equipment, and by which the coal traffic, which is its most important business, was started, and has been built up. It cannot be maintained that fair treatment to the new coal mines of the Fairmont region, which are on the lines of the Baltimore & Ohio Railroad, requires that the old established mines on these lateral feeders shall be deprived of the equipment which for half a century has been furnished them, and was being furnished when the relator began operating its mine. The equipment furnished is based on the number of cars the Cumberland & Pittsburg Railroad has had in previous years, and there is no sufficient evidence to show that it is an unfair allotment and works an unjust discrimination against the relator."

The relator insists that the ruling of the court below, to the effect that the Cumberland & Pennsylvania Railroad Company is a lateral branch of the Baltimore & Ohio Railroad, is erroneous, and further insists that, even if the court below was correct in its ruling in this respect, it is not entitled to claim a supply of the Baltimore & Ohio cars under that portion of the first section of the interstate commerce act which relates to lateral or branch lines of railroads. The provision in question reads as follows:

"Any common carrier subject to the provisions of this act, upon application of any lateral branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

We have carefully considered this clause of the act, and are of opinion that it is intended thereby to provide that a shipper located on a branch or lateral line shall be furnished cars without discrimination either in favor of or against such shipper. To hold otherwise would be manifestly unjust to those shippers who do not happen to own mines along the main line of any particular road. It was undoubtedly the purpose of Congress in the enactment of this clause to secure for shippers located on branch or lateral lines the same kind of treatment that is accorded to those whose mines are located on the main line of the carrier, and, as we have heretofore said, we think the court's ruling to the effect that this is a branch or lateral line of the Baltimore & Ohio Railroad is proper, in view of the testimony hearing on that subject. However, when we come to consider the allotment of cars by the Baltimore & Ohio Railroad Company to the Cumberland & Pennsylvania Railroad Company, we are of opinion that such allotment should be made on the same basis by which the Baltimore & Ohio Railroad is required to allot cars to its own shippers. We do not understand upon

what theory the system now in vogue, by which cars are allotted to these branch or lateral lines of road, can be sustained. Therefore we think that the Baltimore & Ohio Railroad Company by the provisions of the interstate commerce act is required to furnish cars to the Cumberland & Pennsylvania Railroad for the use of shippers on said road, but in doing so, due regard should be had to the system by which the Baltimore & Ohio Railroad Company distributes its car service to the patrons along its lines. Having indicated our views as to the proper system which should be adopted by the railroad company in the distribution of cars among the shippers on its line, we do not deem it necessary in this connection to discuss the matter further than to say that the distribution of car service on this line should be in accordance with the views which we have already expressed on that subject.

It has been earnestly insisted by counsel for defendants that to require the railroad company to charge individual cars, as well as fuel and foreign cars, as a part of the percentage to which a particular shipper may be entitled, would be a great injustice to the mine owners. This may be true; but we are called upon to construe the law as we find it, and the court has no power to alter or change the law in that respect, and, so long as the law remains as it now is, we must place that construction upon it which will give full force and effect to the intent

and purpose for which it was enacted.

For the reasons hereinbefore stated, the judgment of the Circuit Court, in so far as it relates to the questions raised by defendants' writ of error, is affirmed, and the judgment of the court on the questions raised by the relator's writ of error is reversed, in so far as it relates to fuel cars, foreign fuel cars, the method of arriving at the capacity of a mine for car distribution, and the fixing of the percentage of cars to which each mine is entitled, and the Curtis Bay premiums. The judgment of the court to the effect that the Cumberland & Pennsylvania Railroad is a branch or lateral line of the Baltimore & Ohio Railroad Company, and entitled to its proportionate share of cars, is affirmed; but the judgment of the court to the effect that the method of car distribution on said lateral or branch line is correct is reversed. The case will be remanded to the Circuit Court, with instructions to proceed in accordance with the views herein expressed.

Remanded.

McDOWELL, District Judge, dissents.

SOUTH CHICAGO ELEVATOR CO. v. UNITED GRAIN CO. UNITED GRAIN CO. v. SOUTH CHICAGO ELEVATOR CO. (Circuit Court of Appeals, Seventh Circuit. July 22, 1908.)

Nos. 1,456, 1,458.

1. APPEAL AND ERROR (§ 846*)—REVIEW—ACTION TRIED WITHOUT JURY. On review of a judgment in an action at law tried by the court without a jury, the law of the case must be determined from a finding by the trial court of ultimate facts in issue, and in the absence of such finding

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an ultimate fact cannot be supplied by the appellate court from evidence recited in the findings or findings of facts which are merely evidential in character.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 846.*]

2. Contracts (§ 9*)—Requisites and Sufficiency—Time of Commencement.

Plaintiff, an elevator company, and defendant, a company dealing in grain, after correspondence, met and agreed on a memorandum for a contract that plaintiff should store and handle in its elevators for one year grain delivered by defendant, to be not less than 5,000,000 bushels, at one-half cent per bushel. A few days later defendant commenced delivering grain, and for a year plaintiff continued to receive, store, and handle the same, with the understanding by both parties that it was done under the contract; plaintiff rendering bills at one-half cent per bushel from time to time, which were paid by defendant. A short time after the deliveries commenced the parties again met and agreed that a formal contract was not necessary, as they were then doing business under the contract, the terms of which were sufficiently shown by the correspondence and memorandum. During the year plaintiff reserved storage room for the full quantity of grain called for by the contract, but a smaller quantity only was delivered. Held, that the correspondence and memorandum contained all of the requisites of a complete contract, and that, in view of the fact that they were adopted as such after performance had been entered upon, it was immaterial that the parties did not therein fix any particular day on which the contract should go into effect.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 9.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The plaintiff below, South Chicago Elevator Company, sued United Grain Company in assumpsit, and recovered judgment in the Circuit Court, on special findings of fact by the trial court (a jury being waived), in favor of the plaintiff for the principal sum of \$6,042.01. Review of such judgment is sought by each party under these writs of error, with No. 1,456 prosecuted by the plaintiff below, and No. 1,458 prosecuted by the defendant as a crosswrit; the plaintiff complaining of error in the conclusion of law against recovery upon express contract, and the defendant challenging the sufficiency of the findings of fact to support any recovery. The suit was brought to recover an alleged balance of \$15,065.67 as due upon contract for handling and storage of grain for the defendant in the plaintiff's elevator, with a declaration consisting of the common counts and five special counts, to which the defendant filed pleas of general issue. The findings of the trial court, designated as "special findings of fact," are not limited to statements of ultimate facts, but set out correspondence and other recitals of evidence which enter therein. Such findings as are deemed material are sufficiently stated in the opinion.

The conclusions of law upon the facts found are thus stated by the trial court:

"(1) The court concludes, as a matter of law from the foregoing findings of fact, that no contract or agreement was entered into between the parties in the manner and form as alleged in any of the several special counts of the plaintiff's declaration.

"(2) The court having concluded as a matter of law that no express contract existed between the parties, for the reason that they did not agree upon a particular day when the plaintiff was to begin the elevation of 2,500,000 bushels of grain for the defendant, yet the plaintiff having elevated for the defendant, at its request, 2.119,957 bushels of grain during the year beginning September 12, 1904, and ending September 12, 1905, and both parties believing they had an express contract, although lacking the question of time when the same was to begin, the plaintiff is entitled to a reasonable compensation for the services performed, which the court finds to be three-fourths of a cent

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

per bushel, amounting to \$15,899.61, and while it rendered bills from time to time at one-half cent per bushel, which were paid by the defendant, the same amounting to \$9,957.60, judgment will be entered by the clerk for \$6,042.01, with 5 per cent. interest thereon, from the 19th day of October, 1905."

On behalf of the plaintiff a ruling was requested in its favor that "the plaintiff was entitled to a judgment upon the special findings of fact in the sum of \$15,065.67" and interest, and upon denial thereof judgment was directed

and entered in conformity with the conclusions above stated.

W. S. Oppenheim, for South Chicago Elevator Co. Robert J. Cary, for United Grain Co.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The plaintiff, South Chicago Elevator Company, contends that facts are found and settled by the trial court which establish both the existence of express contract obligations between the parties, within one or the other special count of the declaration, and liability of the defendant thereunder for the principal sum of \$15,065.67. Error is assigned for that cause under its writ, No. 1,456, and, if the findings are conclusive of such obligations under an express contract within the issues, the judgment must be reversed, as the recovery is not in conformity with either issue upon express contract and rests alone upon a quantum meruit finding. The sufficiency and effect of the findings of fact, under the issues, are the only questions arising for solution under this writ of error (No. 1,456); and, in the event of sufficiency in the facts found to establish express contract liability, no questions raised by the defendant under its cross-writ of error, No. 1,458, require consideration.

The controversy arises over these undisputed facts: Plaintiff corporation, operating elevators at Chicago, handled and stored for the defendant corporation all grain tendered by the defendant, amounting to 2,119,957 bushels 48 pounds, during a period of 12 months, commencing September 12, 1904, under a supposed contract to receive and handle during the year a minimum amount of 5,000,000 bushels, at one-half cent per bushel. Bills were rendered from time to time, at that rate, for the grain received, and the defendant paid thereupon the aggregate sum of \$9,957.60. The plaintiff provided storage room and means to handle 5,000,000 bushels, as contemplated, and at the close of the year demanded payment by the defendant of \$15,065.67, as the amount due under the alleged contract, after crediting the payments so made, for which recovery is sought under the declaration, consisting of the common counts and special counts upon the alleged agreement. Although the defendant filed pleas of general issue, it clearly appears, as stated in the brief and argument submitted here on its behalf, that:

"The issue made between the parties at the trial of the cause was whether any contract had been entered into between the parties, in accordance with any one of the special counts."

The case was heard by the trial court, without a jury, and its findings of fact are special—including the circumstances and written evidence comprising the alleged contract—with conclusions of law stated

thereupon, substantially, that "no express contract existed between the parties, for the reason that they did not agree upon a particular day when the plaintiff was to begin the elevation" of grain for the defendant, and that the plaintiff is entitled to "a reasonable compensation for the service performed," fixed at three-fourths of a cent per bushel, amounting (after deduction for payments) to \$6,042.01.

The question, therefore, whether the service was performed under and pursuant to express contract, binding between the parties, must be ascertained from these findings of fact. For the purpose of review, the rule is well settled that the law of the case must be determined from a finding by the trial court of ultimate facts in issue—its "finding of the propositions of fact which the evidence establishes, and not the evidence on which these ultimate facts are supposed to rest." Norris v. Jackson, 9 Wall. 125, 127, 19 L. Ed. 608; 7 Notes U. S. Rep. 148; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121, 127, 22 Sup. Ct. 55, 46 L. Ed. 113. So any inferences of fact to establish an ultimate fact in issue cannot be supplied by this court from evidence recited in the findings of facts which are merely evidential in character and not final, in the absence of a finding by the trial court of the ultimate fact. We are of opinion, however, that the facts upon the issue under consideration are settled by the findings within the foregoing rule. Written communications between the parties are set out therein, bearing date from August 27 to September 6, 1904, which contain their respective negotiations and propositions for handling and storing grain for a year, with acceptance by the plaintiff of the defendant's proposition, thus stated in the plaintiff's letter of September 6th:

"We therefore accept your proposition to handle your grain at one-half cent per bushel, the minimum amount to be handled during the year to be 5,000,000 bushels. We should be glad to commence business with you at your earliest convenience."

Thereupon it is distinctly stated and found, in substance, that the parties met personally, prior to September 6th, and arranged for a subsequent meeting to settle the terms of a contract, and within 10 days after that day met and "agreed upon the following memorandum of agreement, which they at the same time and place agreed should be subsequently put into a formal written contract," setting out the memorandum, which contains minor provisions for service not in controversy, and fixes "one-half of a cent per bushel" to be paid for elevation of the grain and 5,000,000 bushels as the minimum amount to be handled in the year. The meaning of these provisions in memorandum and letter is not only clear, but uncontroverted. It is further stated and found that the principals met in December, 1904, and that "it was then agreed between them, acting for the parties to this suit, that it was unnecessary to reduce the agreement to a formal written contract, as they were doing business under the contract and had an abundance of letters and memorandum to show what had been agreed * * * that shortly after the receipt of the letter" of September 6th, above mentioned, the defendant proceeded to deliver the grain in question, "and on the 12th day of September, 1904, the plaintiff began" its service under the alleged agreement, and so continued "for the whole period of 12 months"; and "that both the plaintiff and the defendant believed a contract existed between them, which contract was evidenced by letters and memoranda" set forth.

The facts thus found are the ultimate facts under the issue, whether an express contract existed between the parties—not merely evidential facts, which leave an inference of fact to be determined, as contended on behalf of the defendant—and are thus plainly distinguishable from the findings involved in Wilson v. Merchants' Loan & Trust Co., supra, cited and discussed in the brief for the defendant. They settle, as we believe, (a) that all terms of the proposed contract for delivery and storage of the grain in question are set forth in these letters and written memorandum; (b) that the parties met and agreed thereupon as their contract; and (c) that the plaintiff's service in suit was in performance thereof. With facts so found, the only deductions to be drawn under that issue were conclusions of law, either as to the validity of the agreement or interpretation of the written instruments thus agreed upon. The findings, however, further recite written communications between the parties, during October, 1904, when storage was in progress, which we omit from the foregoing summary of the contract provisions as found, for the reason that they do not enter into or affect the terms of service found to be agreed upon. They are obviously included in the findings to make complete and definite the statement of the subsequent (December) agreement of the parties, as found, to let their "letters and memoranda show what had been agreed upon," and not "reduce the agreement to a formal written contract." Thus the October communications are made part of the written instruments tendered by the parties as forming their contract, for construction in conformity with their legal import as an entirety, with no inference of fact unsettled.

It is contended, on behalf of the defendant, that one of the letters referred to, written by the defendant October 14th, proposes terms to be "embodied in the contract" which differ in some particulars from the memorandum of terms agreed upon in September, and (in effect) that it is not expressly found whether this subsequent proposal was or was not agreed upon, thus leaving the actual terms uncertain. But this contention is without force, as we believe, under the above-mentioned express finding that both parties theretofore agreed upon the September memorandum as containing the contract terms for performance, and proceeded accordingly. So neither party could introduce change in such terms, nor create uncertainty in the contract, by his subsequent request or suggestion thereof, without consent of the other party—laying aside any question of new consideration—and, with no finding of express or implied consent to the new terms proposed by the defendant, such proposal is without legal effect in ascertaining the contract terms upon which the parties agreed, as found by the court.

The issues of fact, therefore, upon which the controversy hinges are settled by these findings, establishing as well the intended contract terms within the special counts of plaintiff's declaration, and the fact

that the parties mutually agreed thereupon, as their contract for elevator service for a year; moreover, that both proceeded in performance thereof upon the understanding that such was their contract. The further inquiries remained: (a) Whether such agreement of the parties became obligatory as their contract; and, if so, (b) what were those obligations—questions of law, purely, and not of fact, under such findings. As the terms so found are plain and unambiguous, with no question of interpretation raised, the ultimate question for solution is whether the trial court erred in its conclusion of law "that no express contract existed between the parties, for the reason that they did not agree upon a particular day when" elevation of grain was to begin. The fact that neither letters nor memorandum recited in the findings state any date for commencing delivery or storage is both obvious upon their face and stated as a finding of fact; and this conclusion of law rests upon the following statements at the close of the findings of fact:

"(16) That no specific day was agreed upon by the parties whereon was to begin the elevation and storage of grain at said Elevator ").

"(17) That the minds of the parties did not meet on the question of time as to when the year was to begin."

It does not appear upon what theory or provision of law this fact of omission to specify the day of commencing operations was deemed by the trial court either material under the agreement found or cause for its conclusion of law thereupon. That both finding and conclusion refer alone to such omission in the written evidence of terms, which preceded the commencement of deliveries and service thereunder, is unmistakable; and we believe the effect of the oral agreements subsequently made, as found, must have been overlooked in any view of the requisites for validity of the contract which may have been entertained. The contention of counsel in support of the conclusions of law, that the foregoing findings (16 and 17) must be accepted as decisive that the "minds of the parties did not meet" upon the terms of a contract, notwithstanding the oral agreements expressly found, is plainly untenable, as we believe.

The reviewable question of law arises, therefore, whether the failure to specify a day for commencing performance before entering upon the service leaves no express contract between the parties under the established facts. Those facts are that there was no agreement upon a contract—no meeting of minds upon the terms—under the letters and memorandum alone, that the parties agreed upon the terms of service therein proposed in subsequent oral agreements, and that, when so concluded, each party had entered upon performance of such terms, and they mutually agreed that no "formal written contract" was necessary, "as they were doing business" under such written terms. The preliminary writings were thus adopted as evidence of contract terms; but no express contract arose until their oral agreements were reached. As the time from which the contract was to run was then fixed, by previously commencing service (September 12th), no specification was needful, either written or oral, to make the agreement effective as a contract for the year thus defined. We are of opinion, accordingly, that the findings of failure to specify such date are immaterial, and that the judgment must be reversed.

The facts found by the trial court, however, establish, not only the existence of a contract, but complete performance by the plaintiff of all its terms to be performed on its part. While the defendant delivered less than half the 5,000,000 bushels of grain for which elevation and storage was required under the contract, it is expressly found that storage room was reserved from other use in the plaintiff's elevator which provided for storage of the entire amount contracted for during the year, and (in effect) that its expenses necessarily incurred therein were the same for handling the amount of grain actually elevated and stored as would have been required for the entire 5,000,000 bushels so provided for. Thus all issues of fact are determined to authorize recovery by the plaintiff for such performance of the contract as an entirety, and to fix the amount recoverable therefor—namely, the principal sum of \$15,065.67, as the balance of contract price found to be unpaid. If the trial court is satisfied, however, upon application for further hearing on the question of damages alone, that testimony tendered on that behalf may require correction of these findings as to elevation expenses, tending to reduce substantially the amount recoverable, testimony thereupon may be heard and supplemental findings be made in respect thereof, and of the amount of damages recoverable accordingly, within the foregoing rule.

The judgment is reversed, therefore, and the case remanded to the Circuit Court, with direction to enter judgment upon its findings of fact, in conformity with the foregoing opinion.

BOX v. POSTAL TELEGRAPH-CABLE CO.

(Circuit Court of Appeals, Fifth Circuit. October 5, 1908. Rehearing Denied December 15, 1908.)

No. 1,646.

1. Telegraphs and Telephones (§ 54*)—Delay in Transmission of Message—Limitation of Liability.

A provision printed on a telegraphic message blank that "to guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison," and that unless so repeated the company shall not be liable for "mistakes or delays in the transmission or delivery or for nondelivery" beyond the amount received, is a reasonable and valid part of the contract made when a message is delivered for transmission on such blank; but it does not relieve the company from the duty to send an unrepeated message with reasonable promptness, nor from liability for damage caused by negligent delay in transmission alone, and which could not have been prevented by repeating it.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 43; Dec. Dig. § 54.*]

2. Telegraphs and Telephones (§ 73*)—Delay in Transmission of Message —Action for Damages.

Plaintiff delivered a message to defendant telegraph company for transmission at 6 p. m., explaining to the agent that it was of great importance

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and must be delivered before 12 o'clock to save a contract for a purchase of property, the option on which would expire at that time. He gave the agent his telephone number, which was indorsed on the message, and requested to be notified when the message had been delivered. At 8 o'clock he called up the office and was informed that the message had been delivered. In fact, it was not sent until the next morning, when the option had expired, defendant claiming that its office at the point of delivery had been closed before the message could be sent, but the evidence on that question was not conclusive. There were other means of communication between the two places. Held, in an action to recover damages, that the evidence was such as to require the submission of the case to the jury, and that the direction of a verdict for defendant was error.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.*]

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

T. B. Watkins (Stone & Sivley, of counsel), for plaintiff in error. Wm. C. Dufour, H. Generes Dufour, and Henry Mooney (D. A. Scott, of counsel), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. C. B. Box brought this suit against the Postal Telegraph-Cable Company for \$20,000 damages alleged to have resulted from delay in the transmission and delivery of a message.

On October 13, 1905, Earl Brewer signed and delivered to the plaintiff in error, who will hereafter be called the plaintiff, an option on stock held by Brewer in the Dixie Cotton Company and on notes of the company for \$7,500. The Dixie Cotton Company was a corporation owning land improved and equipped for planting. The notes held by Brewer were secured by a mortgage on the property, and, together with the stock, represented Brewer's interest in the property of the Dixie Cotton Company. The option, by its written terms, expired on Monday, October 16th, at 12 o'clock p. m. On that day, the plaintiff sent the following telegram to Brewer:

"Memphis, Tenn., October 16, 1905.

"Earl Brewer, Friar's Point, Miss.:

"Will you extend option until Saturday. Wire answer. C. B. Box."

Brewer did not wire answer, as requested, but answered by telephone that he would not extend the option, and that unless it was accepted by 12 o'clock that night he would not sell. For the purpose of closing the contract, the plaintiff, about 6 o'clock p. m., delivered the following telegram to the agent of the defendant in error (hereafter called the defendant), whose duty it was to receive messages:

"Oct. 16, 1905.

"To Earl Brewer, Friar's Point, Miss.:

"I will buy your interest in farm price named option. C. B. Box."

On the message was printed a request to send it, and a statement that it was to be sent subject to certain conditions that appear on the blank forms used by the defendant company. So far as it is material, the conditions will be quoted later. The plaintiff explained to the de-

For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant's agent who received the telegram at its Memphis office that its delivery to Brewer before 12 o'clock that night was important, and that it would cause plaintiff a loss of \$12,500 if it was not delivered. The defendant's agent at Memphis attempted to send the message that evening, but could not do so, because, it appears, that at the time the attempt was made no operator was in the office at Friar's Point. The plaintiff left his telephone number with the defendant's agent who received the message, and requested that notice be given him when the message was delivered. No notice was given the plaintiff of the failure to transmit the message. The plaintiff made inquiry by telephone at the defendant's Memphis office at 8 o'clock p. m., and was told by some one answering the call that the message had been delivered. This was not true. But the message was transmitted and delivered to Brewer the next morning about 9 o'clock, after the option had expired. Brewer replied by telegram as follows:

"Friar's Point, Miss., 17th Oct.

B. Box, Care W. K. Burton & Co., Memphis, Tenn.:

"Your telegram received 9 o'clock this morning came too late. I had made other arrangements.

Earl Brewer."

While there was conflict on the subject, the evidence on the part of the plaintiff tended to show that he was damaged \$12,500 on account of his failure to close the trade by accepting the option before it expired. There was much evidence offered on both sides, material portions of which will be quoted hereafter. The trial court directed a verdict for the defendant.

The first and main contention in defense of the action of the trial court is that the plaintiff failed to have the message repeated, and that his right of action is barred by the following part of the contract printed on the back of the telegram:

"To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half of the regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the Postal Telegraph-Cable Company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, beyond the amount received for sending the same."

The defendant made a tender of \$1 to cover the amount received

by it from the plaintiff.

Primrose v. W. U. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, is relied on as sustaining this defense. That case was a suit brought by the sender of a cipher unrepeated message. The message was not transmitted as delivered to the company. A material word in the cipher was omitted, another word with a different meaning being substituted, which caused the plaintiff to be damaged. It was apparent from the record in that case that if the plaintiff had paid the additional charge to secure the repetition of the message the damage to him would not have occurred. The court held that the rule in question was reasonable and valid, and that the plaintiff, having failed to have the message repeated, could not recover. This case settles the validity and binding effect of the rule in question, and is an answer in this court to all authorities cited which hold that the rule is void as

against public policy. The question we have to deal with is whether or not the case before us comes within the control of the rule.

The rule is not intended to secure a timely effort to send the message, but to make more certain its accurate transmission. The company is under obligation to send the message with reasonable promptness for the regular rate when it receives such rate and accepts the message. It could not, for example, willfully or negligently fail to send, or unreasonably delay the sending or attempting to send, the message, and defend on the plea that only the regular rate was paid and not the additional fee for repetition. The first lines of the rule show its meaning plainly:

"To guard against mistakes or delays, the sender of the message should order it repeated; that is, telegraphed back to the originating office for comparison."

The message must, of course, be sent before it can be repeated; it must be sent and repeated before any comparison could be made. Although the regulation purports to be made to guard against mistakes or delays, it should be construed to refer to such mistakes and delays as could be corrected or avoided by repetition and comparison; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. And it is held that it does not apply where "no effort was made to put the message on its transit." Birney v. N. Y. & W. P. Tel. Co., 18 Md. 341, 81 Am. Dec. 607. It is difficult to believe that this stipulation was intended by the parties to be applicable to a case in which the conduct of the company made it impossible for the message to be repeated. We believe it would be wholly unjust and not within the intention of the contracting parties to permit this rule to exonerate the company from liability for a failure which, like the one here charged, would not have been prevented by repeating the message. Jones on Telegraph & Telephone Companies, § 379; 2 Thompson on Negligence, § 2424, and cases there cited; W. U. Tel. Co. v. Henderson, 89 Ala. 510, 520, 7 South. 419, 18 Am. St. Rep. 148; W. U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Barnes v. W. U. Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791.

In W. U. Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105 the court reaffirmed the doctrine of the Primrose Case, and, at page 663, observed, in refusing to apply the regulation in question, that "there was no mistake in the transmission of the message, and there was no breach of the agreement."

The message in the case at bar was delivered to the company about 6 o'clock p. m. on October 16th, and it was not transmitted till the next morning. It was correctly sent and received. Its repetition would have had no effect on the case. The alleged damage was caused by no mistake or delay that repetition would have corrected. The message was held in the receiving office till the option it was sent to close had expired. We think that, on the facts, the regulation as to repeated messages has no application.

It is claimed that the court was justified in directing the verdict

because the message was received at Memphis after the hour of closing at Friar's Point, "and that it was within the rights of the defendant corporation to establish reasonable office hours at its various offices, and that the defendant was not under obligation to the public to keep all of its agents advised of the hours of the respective offices." The court having directed a verdict for the defendant, the plaintiff has the right to ask us to consider the case in the light of the evidence which is most favorable to him. We are not called on to quote and comment on all the evidence, nor to decide what the verdict should be, but we are to decide only whether there was sufficient evidence, if believed by the jury, to sustain a verdict in the plaintiff's favor. The testimony of W. B. Marley, in charge of the office at Friar's Point, was that he "was supposed to go on duty at 7 o'clock in the morning and stayed on duty until excused by the dispatcher and all trains were by, which was usually 6 or 6:30 o'clock in the afternoon." But on cross-examination the witness said that he frequently stayed in the office after night and took messages, "when I have to meet that freight train when it is 'way late.'" On the 16th of October Mr. Marley says that he left the office at 6:20 in the afternoon. Mr. Box testified that he delivered the message at the Memphis office "about 6 o'clock in the afternoon." A copy of the message offered in evidence is indorsed: "Time filed 6:20 p. m." J. F. Wilson testified for the company that he had supervision of the transmission of messages from Memphis, and that for the purpose of sending the message in question "we called Friar's Point at intervals of ten or fifteen minutes all along until after 8 o'clock," beginning the calls at about 6:35 p.m. It will be remembered that Mr. Box had previously sent a message asking to have the option extended. This fact, together with the explanation made by him to the Memphis agent of the nature and importance of the telegram, would make it the duty of the company's agent to inform him if it was known that there was any obstacle to the speedy transmission of the message. The fact that the Memphis agents received the message for immediate transmission tends to show that they believed the Friar's Point office to be open. It would be unjust to them and to the company to believe otherwise, for, under the circumstances, we cannot assume that they would receive the message, knowing that the Friar's Point office was closed and that it could not be transmitted till next day. After a careful examination of the evidence, we are unable to say that it shows certainly that the office hours at Friar's Point had expired or that the office was closed when the message was received at Memphis for transmission. That question, if material, was for the jury.

There is another view of the case that seems to us to make it improper to direct the verdict for the defendant on the ground now considered. When the plaintiff delivered the message at the Memphis office and paid for its transmission, he says he had a conversation with the defendant's agent:

"I went to the window, and the man waiting on the window received the telegram, and I tendered him the message and told him that it was a very important message; that I had an option on some valuable property that expired that night at 12 o'clock, and that unless I could get this telegram de-

livered by 12 o'clock that night my option would expire, and I would lose \$12,500; and so I told him I wanted to send it at the regular rates and everything, and asked him what it would be, and he told me 25 cents. Now, I asked him if he would call me up at my residence and let me know the time of the delivery of that message, that I wanted to know what time it was delivered, and he said he would, and I told him my phone number, and he turned right over on the back of the original telegram and put down my phone number out at my residence, number 2973A.

"Q. Who did you say put that down? A. The operator, or the gentleman receiving the telegram in the office. * * *

"Q. Well, sir, did you have any communication further with him about that at any other time subsequent to this time? If so, what was it? A. Well, about 8 o'clock that night I hadn't heard from him, and I wanted to know about the telegram; so I called the Postal Telegraph office up by phone, and they answered, and I told the gentleman answering about the message in question, the message I had sent to Mr. Brewer at Friar's Point, and wanted to know what about it, whether they had delivered it or what about it, and he said, 'Wait a minute and I'll see.' He went off and was gone from the phone a few minutes, and came back and said that the telegram had been delivered.

"Q. What time was that, now? A. That was about 8 o'clock that night."

The evidence shows that if the defendant had notified the plaintiff that it was unable to send the message—that it had called the Friar's Point office and found it closed-there being other channels of communication, the plaintiff probably could have closed the option by using one of them. It is not denied that the defendant failed to give notice of its inability to transmit the message on the night of October 16th. The plaintiff's telephone number had been left with the defendant's agent and was indorsed on the back of the telegram, so that notice could be given him when the delivery was made. Not hearing from the operator at 8 o'clock, he called by telephone to inguire about the message, and was informed that it had been delivered. The defendant being employed and paid to transmit the message, and being informed of its importance and the necessity for dispatch, and being furnished with the plaintiff's telephone number, we think the most obvious suggestion of diligence and good faith required it to notify the plaintiff that it had been unable to deliver the message. If the jury should believe that the defendant's agent knowingly represented to the plaintiff that the message had been delivered when it had not been transmitted, it would, to say the least, authorize the inference of a want of good faith and a disregard of the plaintiff's rights. Under the circumstances, it was unquestionably the duty of the defendant to notify the plaintiff of the failure to deliver the message. This view is sustained by many authorities. Pac. P. Tel. Cable Co. v. Fleischner, 66 Fed. 899, 4 C. C. A. 166; Swan v. W. U. T. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; Jones on Telegraph & Telephone Companies, § 277; 2 Thompson on Negligence, § 2399; 2 Joyce on Electric Law, § 744a. We are of opinion that the court erred in directing the verdict.

The judgment is reversed, and the case is remanded for a new trial.

In re QUINN.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1908.)

No. 90 Original.

BANKBUPTCY (§ 341*)—PROOF OF SECURED CLAIM—SECURED DEBT ALLOWABLE AND VALIDITY OF SECURITY DETERMINABLE BEFORE CONVERSION INTO MONEY UNDER SECTION 57H.

The District Court and the referee in bankruptcy, upon the presentation by a creditor of the customary proof of a secured debt which is objected to by the trustee on the ground that the security claimed constitutes a voidable preference, may hear and decide the issue and allow the claim as a secured or an unsecured debt before the alleged security is converted into money, under the provisions of section 57h (Act July 1, 1898, c. 541, 30 Stat. 560, 561 [U. S. Comp. St. 1901, p. 3443]), and this is the preferable practice because it enables parties to know the extent of their interests before the property is sold.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 341.*] (Syllabus by the Court.)

Petition for Review of the Order of the District Court of the United States for the Southeastern Division of the Eastern District of Missouri.

Wilson Cramer, for petitioner.

T. D. Hines (Alex. P. Stewart and Moses Whybark, on the brief), for respondent.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

SANBORN, Circuit Judge. This case presents this single question: May the referee and the District Court, upon the presentation of the proof of a secured debt in accordance with form No. 32 (32 C. C. A. xxxi, 89 Fed. xiii), and upon a challenge by the trustee of the trust deed, which evidences the security as a voidable preference, determine the validity of the security and allow the claim as a secured debt before the value of the security is determined by converting it into money in the manner prescribed by section 57h of the bankruptcy law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 560, 561 [U. S. Comp. St. 1901, p. 3443])? The court below, without considering the merits of the controversy, answered this question in the negative, and set aside an order of the referee which sustained the creditor's claim to the security and allowed it as a secured debt, upon the sole ground that the order was premature and unauthorized. This ruling is assailed by a petition to review.

The bankruptcy law provides that the proof of a claim shall consist of a statement of it and of the securities held for it under oath (57a), that creditors holding securities shall not be entitled to vote or be counted at creditors' meetings unless the amounts of their claims exceed the value of their securities (56b), that the value of their securities shall be determined by converting them into money and a dividend shall be paid only upon the unpaid balance (57h), that the first meeting of creditors shall be not less than 10 nor more than

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

30 days after the adjudication (55a), that the judge or referee shall preside, and before proceeding with the other business may allow or disallow the claims of creditors there presented and may publicly examine the bankrupt at the instance of any creditor (55b), that claims of secured creditors may be allowed to enable them to participate in the creditors' meetings held prior to the determination of the value of their securities for such sums as to the court seem to be owing above the value of their securities (57e), that objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit (57f), and that the claims of creditors who have received preferences shall not be allowed unless such creditors surrender them (57g). If the security which the creditor claimed in this case constituted a voidable preference, he had the right to surrender it, to have his claim allowed as unsecured, to receive dividends upon it, to vote, and to be counted as a creditor. Stevens v. Nave McCord Co., 150 Fed. 71, 75, 76, 80 C. C. A. 25. He presented the usual proof of a secured claim. trustee objected to its allowance because the trust deed which evidenced the security was filed within four months of the date of the filing of the petition in bankruptcy, and was made when the grantor was insolvent, with knowledge of the petitioner that it was intended to give a preference thereby. In this way the issue was squarely raised between the creditor and the trustee whether the petitioner had obtained a valid security or a voidable preference. Counsel argue, and the court so held, that the referee should not have heard and decided this issue because the security had not been converted into money under section 57h, and because there may have been other creditors who claimed or had a lien upon the same security and who did not participate in the hearing. But section 57h does not require securities to be converted into money before the court determines whether they are valid or voidable or before claims for them are allowed, but only before dividends upon such claims are paid. And if other persons who claimed or had liens upon this security were not parties to the proceeding either by representation by the trustee or by virtue of sections 57d, 57f, 57c, and 57k, they will not be bound by the judgment of the referee or of the court, and their claims will be open to subsequent adjudication. The question here is not whether others who neither appeared nor made any claim herein have or claim liens upon the security involved in this controversy, but whether or not the referee heard and decided the issue which the trustee had raised at the right time and The question was whether the security claimed was valid or voidable. If it was valid the petitioner was entitled to have it applied to the payment of his claim: if it was void or voidable he had the right to surrender his claim to it and to receive dividends upon his unsecured claim. Why should the property claimed as security be converted into money under section 57h before the pending controversy, whether it constituted any security or not, had been decided? The bankruptcy law does not require it. On the other hand, it directs that objections to claims shall be determined as speedily as convenient (57f), and that securities shall be converted before dividends only. There is no doubt that the bankruptcy court has ample authority to convert the property

of the bankrupt of which it has obtained lawful possession into money before determining the liens upon it, but the practice of determining the validity of such liens and of allowing the claims of creditors to them before the sale of the securities wherever that can be done conveniently is not forbidden by the law, and it is the preferable, the more reasonable, and the more beneficial method of procedure where the property is not perishable and expensive to keep, because it enables parties to know the extent of their interests in the property before its sale and to protect those interests more easily and securely. Byrne v. Jones (Ĉ. C. A.) 159 Fed. 321, 327.

The conclusion is that the District Court and referee in bankruptcy, upon the presentation by a creditor of the customary proof of a secured debt which is challenged by the trustee on the ground that the securities claimed constitute a voidable preference, may hear and decide the issue and allow the claim as a secured or an unsecured debt before the alleged security is converted into money pursuant to the provisions of section 57h, and this is the preferable practice because it informs parties of the extent of their interests before the property

The merits of this case should be considered and determined by the court below upon the return of the record to that court. They are not now here for review, and they will not be considered. The order of the District Court which disapproved and set aside the order of the referee allowing the claim of the petitioner is vacated, and the case is remanded to that court for further proceedings not inconsistent with the views expressed in this opinion.

NOTE.—The following is the opinion of Dyer, District Judge, in the court

DYER, District Judge. This is a proceeding for review of an order made by Alexander Ross, Esq., referee in bankruptcy, allowing the claim of Hugh R. Quinn in the sum of \$27,600, and directing that said claim be "allowed as a proferred secured claim entitled to priority"

preferred secured claim entitled to priority.

It appears from the certificate of the referee that the claimant, Quinn, filed proof of this claim before the referee, setting up that the bankrupt was indebted to him in the sum of \$27,600 for money loaned, evidenced by a promissory note in said sum, and that said indebtedness was secured by a deed of trust upon certain real property of the bankrupt. In his proof of claim the claimant does not state the value of the security alleged to be held by him, nor does he allege that the value of such security has been determined in any of the modes prescribed in section 57, par. "h," of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]). The trustee of the bankrupt estate filed written objections to the allowance of Mr. Quinn's claim, and asked that said claim be disallowed, because the deed of trust given by bankrupt to said claimant constituted an unlawful preference, and also because said deed of trust was given by the bankrupt with intent on its part to hinder, delay, or defraud its creditors. The claimant filed an answer to the objections of the trustee, the general effect of which was to deny the charges made by the trustee. The referee, after hearing the evidence submitted upon the issues raised by the trustee's objections to the claim, found that the deed of trust given by the bankrupt to the claimant was valid, constituted "a first lien on all the property in said trust deed described," and ordered that said claim be "allowed as a preferred secured claim entitled to priority.'

The evidence submitted at the hearing before the referee was directed to the question of the validity of the security held by the claimant, and the referee, proceeded upon the theory that upon the proof of debt made it was competent

for him to determine the validity of the deed of trust and to allow the claim as a secured claim entitled to priority. The proceedings had before the referee seem to me to involve an entire misconception of the provisions of the bankrupt act relating to the presentation and allowance of the claims of secured creditors. By section 57, pars. "e" and "h," of the act it is provided that:

"Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetingsheld prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over

and above the value of their securities or priorities.

"The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

In view of the foregoing provisions of the statute, the referee should have disallowed the claim of Mr. Quinn, as presented, because it appeared from the proof of debt that the creditor claimed to hold security for the indebtedness alleged to be due him, and that the value of such security had not been liquidated, so as to admit of the allowance of the claim for any determinate sum.

From the action heretofore taken by the parties to this controversy, it is evident that further proceedings will be had before the referee in relation to the status of Mr. Quinn's claim, and, consequently, it will not be out of place to indicate the practice appropriate to the situation here presented. Although the referee's certificate contains no explicit statement in reference to the matter, it is a fair inference from the evidence that the trustee is in actual possession of the property here in controversy. The property in controversy being in the possession of the trustee, the referee has jurisdiction in the first instance to determine the validity of the deed of trust as between the claimant and the trustee in bankruptcy. In re Rochford, 10 Am. Bankr. Rep. 608, 124 Fed. 182, 59 C. C. A. 388; In re McMahon, 17 Am. Bankr. Rep. 530, 147 Fed. 684, 77 C. C. A. 668; Chauncey v. Dyke Brothers, 9 Am. Bankr. Rep. 444, 119 Fed. 1, 55 C. C. A. 579.

The validity of the deed of trust may be determined by the referee in any one of several different proceedings which may be had before him. If the value of the property embraced in the deed of trust is clearly less than the amount of the creditor's debt, then the validity of the deed should be determined in limine, so that, if the deed is sustained, the trustee in bankruptcy will be relieved from the burden and expense of administering property in which general creditors have no interest or equity. In cases where the amount of the debt exceeds the [value] of the property claimed to be held as security for the debt, the validity of the creditor's lien may be determined upon a petition by the trustee for an order on the creditor to show cause why the lien should not be declared invalid as against the trustee. In re Rochford, supra. On the other hand, where the validity of the incumbrance is questioned, and where it is believed that there is, or may be, some surplus or equity in the property, even though the incumbrance thereon be held valid, the referee has jurisdiction, upon the application of the trustee, and after proper notice to all persons claiming liens thereon, to order the property sold free and clear of liens, with leave to the persons claiming liens to propound their claims against the proceeds of the sale. This practice has the approval of the Court of Appeals for this circuit, and the proper method of procedure in such cases is set forth in the following cases: In re Granite City Bank, 14 Am. Bankr. Rep. 404, 137 Fed. 818, 70 C. C. A. 316; In re New England Piano Co., 9 Am. Bankr. Rep. 767, 122 Fed. 937, 59 C. C. A. 461; In re McMahon, 17 Am. Bankr. Rep. 530, 147 Fed. 684, 77 C. C. A. 668; Carroll v. Young, 9 Am. Bankr. Rep. 643, 119 Fed. 576, 56 C. C. A. 380.

The evidence in this case tends to show that the Sturdevant Bank, the Merchants' Laclede National Bank, and perhaps other persons, hold deeds of trust covering a part of the property embraced in Mr. Quinn's deed of trust. Although these deeds of trust were not recorded until after Mr. Quinn recorded his deed of trust, the trustee at the hearing sought to elicit evidence tending

to show that Mr. Quinn had actual notice of the execution and existence of one or more of these incumbrances when he received his deed of trust. In view of this situation it is evident that, if any of these deeds of trust are valid as against the trustee in bankruptcy, there may be conflicting claims as to priority between Quinn and other creditors claiming liens upon the bankrupt's property, and hence it would seem peculiarly appropriate in this case for the trustee to sell the property covered by the several deeds of trust, and permit all the alleged lienors to propound their respective claims to the proceeds, so that the validity of all asserted liens may be determined. The result of the referee's order made herein is to give Mr. Quinn a first lien upon the proceeds of the bankrupt's property, when, even if his lien is valid as against the trustee in bankruptcy, it may nevertheless be subordinate to the liens of other creditors of whose incumbrances Mr. Quinn had notice when he loaned the money secured by his deed of trust.

I do not wish anything said herein to be construed as intimating any opinion as to the validity of Mr. Quinn's deed of trust as against the trustee in bankruptcy. The determination of that issue cannot be properly had herein, and must be postponed until that question is presented in an appropriate way. It may not be amiss, however, to remark that the present record does not present all the facts essential to an intelligent determination of the validity of the Quinn deed of trust. The certificate of the referee fails to show whether the bankrupt was solvent or insolvent within the meaning of the bankrupt law when it executed and delivered the deed of trust to Quinn. Furthermore, the referee improperly excluded evidence sought to be elicited by the trustee in relation to the existence of prior incumbrances upon the property of the bankrupt and in relation to Mr. Quinn's knowledge of such incumbrances.

For the reasons above stated, the order of the referee must be disapproved and set aside, and an order entered disallowing Mr. Quinn's claim in the form in which it is presented, and granting the parties leave to take such further

proceedings herein as they are advised is proper in the premises.

E. B. SMITH & CO. v. COLLINS et al.

(Circuit Court of Appeals, Third Circuit. November 21, 1908.)

No. 13, October Term, 1908.

1. Principal and Agent (§ 152*)—Reorganization Committee of Bondholders—Time Limit Affixed to Signatures of Reorganization Agreement.

Where, in signing, with others, an agreement depositing railway bonds with a reorganization committee pending foreclosure proceedings, certain bondholders affix a time limit after their signatures, a sale by the com-

mittee after that time was unauthorized and passed no title.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 152.*]

2. PRINCIPAL AND AGENT (§ 170*)—RIGHTS AS TO THIRD PERSONS—RATHIFICATION BY ACQUIESCENCE OF PRINCIPAL OF SALE BY AGENT.

The failure of certain owners of bonds of a railroad company, who had placed the same in the hands of a reorganization committee with power to sell them for a limited time, to make any objection to a sale made by the committee after the expiration of such time, of which they were at once notified, until after the bonds had been used by the purchasers in a purchase of the property more than three months later, was a ratification of the sale by acquiescence.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 641; Dec. Dig. § 170.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

W. A. Glasgow, Jr., and Henry C. Boyer, for plaintiffs in error. Reynolds D. Brown, for defendants in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. There are several peculiar things about this case. It was brought without the knowledge of the parties whose wrongs it is supposed to redress; the action is joint, although the injury to each of the two legal plaintiffs is necessarily individual and sole; it is brought, not against the agents of the plaintiffs, who in the first instance did the wrong by selling their bonds without authority, but against third parties, who dealt with them innocently and without notice, however they may be unable to set that up; and it proceeds, through the medium of two successive use parties, for the benefit of one who apparently did not come in till a year after everything had been done, and whose right to assert the wrongs of those whom he undertakes to represent it is somewhat difficult to under-These things may not be particularly assigned for error, but the court below directed a verdict, so that the whole record is involved, and these lie on the surface. The other features will appear as we proceed.

The action is trespass, counting in trover, and sounding in damages, for the alleged conversion by the defendants of certain electric railway bonds. These bonds, with those of numerous others, were deposited by the plaintiffs, Collins and Arps, with a reorganization committee, pending foreclosure proceedings—Collins having \$6,000 and Arps \$1,000—and were sold by the committee to Groner and Taylor, who represented the defendants; the defendants in turn using them on a sale of the road to satisfy their bid as purchasers. The sale of the bonds by the committee was consummated January 27, 1906, and the same day a notice in writing was mailed to the various owners that a sale had been effected at 40 cents on the dollar, the price agreed upon, with the right, if any one so chose, to exchange his bonds for new bonds of the reorganized company. In the meantime, Collins, if not Arps, had sold and assigned to Zell, the first use plaintiff, his bonds in the hands of the committee, turning over the receipt which had been given for them, with the right to make demand therefor. The purchase by Zell of Collins was agreed to about the middle of January, but was not completed until February 3d, at which time the money was paid, and the same day Zell also bought and paid for the bond of Arps; the price in each instance being 331/3 cents on the dollar. These bonds, with those of others, were sought to be acquired by Zell, the same as by the defendants Smith & Co., for the burpose of using them in buying in the road, with regard to which they were prospective rivals. The sale of the road was May 3 1906, the defendants being the successful purchasers, and the amount realized was sufficient to pay the bonds in full. This suit is based upon the fact that in executing the agreement to deposit their bonds with the reorganization committee Collins and Arps added, after their signatures, "'til Jan. 1, '06," and "'til '06," respectively, thus putting a time limit, as it is claimed, on their concurrence, after which, according to this, a sale by the committee was unauthorized and conveyed no title, the bonds remaining the property of the owners and passing to Zell by his purchase; the use of them by the defendant Smith & Co. to comply with their bid amounting to a conversion, which made them

liable in damages for their value.

The construction of the agreement which is so contended for, and which was adopted by the court below, in our judgment, is the correct one. The time limit imposed extended to the whole instrument, and was not confined to a part of it, being the same as though written into the body of it. After January 1, 1906, therefore, however short the time may seem for effecting the purpose of the agreement after its execution, the reorganization committee were without authority to dispose of the plaintiffs' bonds as they did, and if there was nothing more in the case we should be compelled to hold that the defendants took no title. We also agree that Collins and Arps were not required at once to recall their bonds from the committee nor to notify them of that of which they were informed by the express terms of the agreement, and that they could leave their bonds in the committee's hands for a reasonable time without the risk of having them disposed of.

But, immediately after effecting a sale, the committee, as we have seen, mailed notices of it to Collins and to Arps, along with the others whom they represented, which notice was presumptively received by each shortly afterwards; and that Zell knew of it within a day or two there can be no question. All the parties concerned were thus made aware of the action of the committee and the disposition which they had made of the bonds, as well as the contemplated use of them to buy in the property, and it thereupon became their duty to disavow, within a proper time, that which had been done in their names, unless they intended to accept and abide by it. Otherwise they ratified it by apparent acquiescence. Bredin v. Du Barry, 14 Serg. & R. (Pa.) 27; Auge v. Darlington, 185 Pa. 111, 39 Atl. 845. Instead of this, however, there is evidence that they did not repudiate it, if at all, until long afterwards, after the sale of the road and the use of the bonds by the defendants in the purchase of it. It was assumed otherwise by the court below, and a verdict for the plaintiffs directed on the strength of it. But that is not the record, as we understand it, and that there may be no mistake we quote the evidence. Thus Mr. Arps testifies:

"Q. Are you, Mr. Arps, one of the plaintiffs in the suit of Collins and Arps against Edward B. Smith & Co., pending in the Circuit Court of the United States for the Eastern District of Pennsylvania? A. I did not know that I was. * * * I was not aware that I was bringing suit against anybody. * * * Q. Did you demand back from the committee at any time after the 1st of January, 1906, the bond which you had delivered to them? A. I don't think that I did. Q. Did you, at any time prior to the assignment of your pool receipt, notify the committee that they had acted without authority in selling your bond, and repudiate the contract which they had made? A. No."

To the same effect, substantially, is the testimony of Mr. Collins:

"Q. Did you ever notify the committee that they had no right to sell your bonds and repudiate the contract? A. No; I don't think I did. Q. Did you,

at any time after January 1st and before making the assignment to Mr. Zell, call on the committee for the redelivery to you of the bonds which you had deposited with them? A. I don't remember that I ever did. * * * Q. Mr. Collins, have you ever at any time repudiated the contract made by the pool committee with Messrs. Groner and Taylor of January 25th and advised them of such repudiation? A. I don't think so. I don't think I ever have. I don't recall it."

So Mr. Cobb, one of the committee:

"Q. Did Mr. Arps or Mr. Collins advise you or the committee, so far as you know, that the contract made by you with Groner and Taylor of January 25th, in so far as their bonds were concerned, was unauthorized? A. I don't remember their doing so. Q. Did Mr. Arps or Mr. Collins make any demand on you between January 1st and January 25th * * * for these bonds which they had deposited previously with your committee? A. No; no one did."

And Mr. Groner, who with Mr. Taylor bought the bonds for Smith & Co.:

"Q. Did you ever hear from Mr. Arps or Mr. Collins any objection to that contract being made with you? A. Never in the slightest degree."

And Mr. Taylor, also:

"Q. When did you first find out that any claim was made by assignees of Arps and Collins that they were entitled to these \$8,000 of bonds? A. Some time about the 5th or 6th of February Mr. Groner and myself received a notice from Mr. Zell setting up a claim to some of the bonds. Q. Did you know whether those were Arps' and Collins' bonds? A. I could not say of my own knowledge. Q. When was the first you heard of those bonds? A. Claiming them in terms, designating them? Q. Yes. A. Some eight or nine months, I should say, subsequent to this transaction."

Even Mr. Burr, whose testimony is particularly relied on by the plaintiffs, is no more conclusive:

"Q. In the early part of 1906 whom did you represent, if anybody, who had any interest in this Bay Shore Terminal controversy? A. I represented Mr. Zell and Mr. Van Dyke. Q. At or about that time did you or did you not have any talks with Mr. Norris, of the defendant firm? A. I had two or three conversations in early February, 1906. Q. Did you have any talk with him at or about that time with reference to what we call here the Collins and Arps bonds or receipts? A. I had a conversation with him, not naming them by name, but referring to the fact that the power of attorney contained several bondholders who had limited the time within which the power should operate."

This last is denied by Mr. Norris, who says that according to his best recollection no objection was made by Mr. Burr to the validity of the sale to his firm on the ground that the power of the committee had run out and that he had never heard of it until the present suit. But, giving Mr. Burr's testimony its full force, as there were others besides Collins and Arps who had affixed time limits to their signatures, there was no particular significance in what he said upon that subject. And much less, even if it was more to the point than it is, was there anything like a repudiation of the sale of the bonds by the committee; the only thing being a possible question of its validity.

The only other evidence of any apparent relevance is the written notice given by Zell, in which he made formal demand for these bonds, excepting them out from other bonds which he represented or was possessed of. But that notice was not until January 11, 1907, nearly a year afterwards, which was altogether too late, of course, to avoid

the effect of the intermediate acquiescence. If there was anything bearing on the subject in the bill in equity filed by Zell to March term, 1906, in the common pleas of Philadelphia, which is referred to in the notice, it has not been brought to our attention, and, indeed, the bill in equity, not having been offered in evidence, is not before us.

We are unable to see how, upon this showing, a verdict for the plaintiffs could have been directed. It may be that, if found by the jury upon submission to them of the question of acquiescence, such a verdict would have been sustainable. But upon that we express no opinion. The right to recover is recognized, as, indeed, it must be, as depending on the rights of Collins and Arps, and, if so, their failure to act, unless excused, is fatal. And even if this be saved by what was done by Zell, the assignor of Van Dyke, in that behalf, and he, by his purchase of the bonds and the transfer to him of the receipts of the committee, acquired the right to pursue and recover them wherever found, and to prosecute any one dealing with them as for a conversion, still even as to him the question of ratification was for the jury and could not in our judgment be taken from them.

Some stress is laid on the fact that the money to be paid by the defendants for the bonds has not yet been turned over, being held at their instance by the trustees, awaiting the result of this litigation. But that does not relieve the situation. It may enable the defendants to protect themselves to that extent in case they are held liable here; but it does not change the fact or the effect of the previous acquies-

cence.

The judgment is reversed, and a venire facias de novo awarded.

ROUNTREE v. ADAMS EXPRESS CO.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1908.)

No. 2,774.

1. Courts (§ 315*) — Federal Courts — Diversity of Citizenship — "Joint-Stock Company."

Where diversity of citizenship was the basis of federal jurisdiction in a suit to restrain defendant from prosecuting an action in the state court, and a bill alleged that complainant was a "joint-stock company" duly organized and existing under the laws of the state of New York and a citizen of that state, and that defendant was a citizen of Missouri, where the suit was brought, jurisdiction was not shown, since a "joint-stock company" is not a corporation but a partnership, and it could not be presumed that the members were all nonresidents of Missouri.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.*

For other definitions, see Words and Phrases, vol. 4, pp. 3816, 3817.

Diverse citizenship as ground for federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

2. Courts (§ 289*)—Federal Courts—Jurisdiction—Interstate Commerce.

A bill by an express company to restrain a messenger's wife from suing a railroad company for her husband's death because of the messenger's contract to save the express company and any of its contracting railroads

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

harmless from any liability resulting from personal injuries to him, etc., did not state a case arising under Const. U. S. art. 1, § 10, relating to interstate commerce, or under the fourteenth amendment of such Constitution, so as to entitle complainant to sue in the federal courts on that ground.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 289.*

Jurisdiction in cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Mining Co., 35 C. C. A. 7.]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

H. R. Rountree was the husband of the defendant below, and the appellant here, and at the time of his death was an express agent in the employ of the complainant and appellee. While thus engaged he was killed in a collision which occurred in the state of Kansas. He entered upon his employment uncer a contract which bound him: First, to execute and deliver to the person or corporation owning or operating the railroad upon which he might be injured, a good and sufficient release, under his hand and seal, of all claims, demands, and causes of action arising out of such injury. Second, he ratified all contracts made by the Express Company with any railroad company, and particularly the St. Louis & San Francisco Railroad Company, upon which he was to run, relative to the ultimate liability of the express company to save the railroad company harmless from damages occasioned to said Rountree through negligence of said railroad or its employes, and did expressly agree to be bound by said agreement as fully as if he were a party thereto. Third, he assumed all risks of accidents and injuries which he might sustain in the course of his employment, occasioned or resulting from the gross or other negligence of any corporation engaged in operating any railroad, or of any employe of any such corporation, or otherwise. Fourth, he agreed to indemnify and save harmless the express company of and from any claims which might be made against it by any corporation under any agreement with the express company, theretofore or thereafter made, arising out of any claim made by said Rountree on his part, or by or on the part of his legal representatives, or any damages sustained by him or them by reason of any injury to him, or by reason of his death. Fifth, he bound himself, his heirs, executors, and administrators, for the payment to the express company, upon demand, of any sum which it might thereafter be compelled to pay in consequence of any such claim, or in defending the same. The appellant here, Mrs. Amy J. Rountree, instituted an action against the St. Louis & San Francisco Railroad Company in the proper court of the state of Kansas to recover damages for the death of her husband. The bill avers that the action is now pending, and that the plaintiff therein intends to prosecute the same to judgment, and that in case judgment is recovered the railroad company threatens to sue the complainant in this suit on a contract entered into by the complainant with the railroad company to indemnify that company and save it harmless from all such claims. It is further averred that both Rountree and his estate and the defendant are insolvent, and that, if it is compelled by the railroad company to pay the threatened judgment, it will suffer irreparable The bill asked that Mrs. Rountree be decreed to execute and deliver to the St. Louis & San Francisco Railroad Company a good and sufficient release. under her hand and seal, of all claims and causes of action arising out of the injury or death of the said H. R. Rountree, and for a perpetual injunction restraining the said Amy J. Rountree, her agents and attorneys, from prosecuting said action against the St. Louis & San Francisco Railroad Company. An answer was filed to this bill, admitting the contract above described, and raising numerous issues to which it is not necessary to refer specifically. The cause was submitted upon bill and answer, and resulted in a decree in favor of the complainant, to review which this appeal is sued out.

^{*}For other cases see same topic & \$ Number in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

E. F. Ware (Biddle & Lardner, Edwin Frieze, and Ware, Nelson & Ware, on the brief), for appellant.

William C. Scarritt (Elliott H. Jones and Edward L. Scarritt, on

the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. We cannot enter upon the consideration of any of the interesting questions raised in this case and argued by counsel with distinguished ability, for the reason that it appears upon the face of the bill that the trial court was without jurisdiction of the cause. The basis of jurisdiction is the diversity of citizenship of the parties. The bill alleges that the Adams Express Company is a "joint-stock company" duly organized and existing under the laws of the state of New York, and a citizen of that state, and that the defendant is a citizen of the state of Missouri. The averment that the complainant is a joint-stock company is not equivalent to the statement that it is a corporation. This precise question was presented to the Supreme Court in the case of Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800. That was a suit brought by the United States Expresss Company in the name of its president. It was described, as the complainant here is, as a joint-stock company, organized under and by virtue of a law of the state of New York, and a citizen of that state. The court of its own motion took cognizance of this defect, and reversed the judgment below, with direction to dismiss the case. Speaking to this point, the court said:

"On looking into the record, we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is that the United States Express Company is a joint-stock company organized under a law of the state of New York, and is a citizen of that state. But the express company cannot be a citizen of New York within the meaning of the statutes regulating jurisdiction unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation; in fact, the allegation is that the company is not a corporation, but a joint-stock company—that is, a mere partnership. And, although it may be authorized by the laws of the state of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court."

A similar question was presented in the case of Great Southern Fire Proof Hotel Company v. Jones, 177 U. S. 450, 20 Sup. Ct. 690, 44 L. Ed. 482. The defendant there was a limited partnership organized under a statute of Pennsylvania, and clothed with many of the attributes of a corporation. In fact, those limited partnerships so nearly resemble a corporation that the Circuit Court of Appeals of the Sixth Circuit in Andrews Brothers Company v. Youngstown Coke Co., Limited, 86 Fed. 585, 30 C. C. A. 293, held them to be corporations for the purpose of conferring jurisdiction upon the federal courts. But the Supreme Court, in the case of Great Southern Fire Proof Hotel Company v. Jones, declined to accept this interpretation, and refused to extend the presumption that the stockholders of a corporation are citizens of the state under which it is organized, to cover such limited partnerships, and reversed the case, with direc-

tions to dismiss it for want of jurisdiction. The same rule is again enforced, upon a full review of the authorities, in Thomas v. Board of Trustees, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160.

The complainant in the bill attempts to save the jurisdiction of the court by alleging that the contracts between it and the railroad company, and also between it and Mr. Rountree, were made and entered into for the purpose of carrying on commerce among the states, and claims the protection of the clause of the Constitution dealing with interstate commerce, and also section 10 of article 1 of the Constitution; and also the fourteenth amendment. It is quite manifest, however, that this is not a case arising under either of those provisions of the federal Constitution. Re Metropolitan Receivership, 208 U. S. 90, 109, 28 Sup. Ct. 219, 52 L. Ed. 403. It is therefore the duty of this court to reverse the judgment below, and direct that the suit be dismissed for want of jurisdiction, and it is so ordered.

NOTE.—The following is the opinion of Smith McPherson, District Judge, filed in the court below:

SMITH McPHERSON, District Judge. The complainant asks for a writ of injunction enjoining the respondent from prosecuting an action at law against the St. Louis & San Francisco Railway Company, now pending in the state district court of Cherokee county, Kan., to recover damages as the widow of R. H. Rountree, who was killed by an express car on said road being wrecked in Cherokee county, Kan., February 14, 1906. The defendant insists that by reason of section 720 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581) in no event can this court order the writ. That statute in effect is that an injunction by a United States court shall not issue to stay proceedings in any court of a state.

This is not an action to enjoin the Kansas state court. That court is one of general jurisdiction, having all the powers of any court, both at law and in equity. It is of equal dignity and power with this court. That court allows any defense, legal or equitable, or both, including affirmative equitable relief in an action at law; but in my opinion section 720 has no application whatever. This action is brought to obtain alleged equitable relief. If a like bill in equity to this could be maintained in the state court of Dade county, Mo., where defendant herein resides, then this bill can be maintained; for surely this court has equal powers, although no greater, than has a state court, on proper allegations of diverse citizenship, or those showing a federal question.

Complainant is doing a general express business over the lines of said railway, through and across Missouri, Arkansas, Kansas, Indian Territory, and Texas. In 1902 it entered into a contract with the railway for carrying its cars and messengers, and as a part of the consideration thereof it was agreed that the express company would save the railway company harmless by reason of the injury to, or loss of life of, any express messenger on account of injuries or deaths occasioned on the railway. In January, 1904, R. H. Rountree entered into a written agreement with the express company to the effect that he, if employed, would assume all risks of accidents and injuries, including acts of negligence of the railway, while in or about his business as express messenger, and that both he and his legal representative would save the express company harmless from any claims that the railway company might make against it by reason of an injury or death arising from the operation of said express cars, and such agreement was a part of the consideration of his employment as messenger; and while so employed in an express car on the line of said road in February, 1906, in Cherokee county, Kan., the express car in which he was at work as messenger was wrecked, resulting in his death soon thereafter. No letters of administration were taken out, and the widow brought suit as above stated. The railway company pleaded the two contracts, which on demurrer were held by the Kausas court to constitute no defense, because, as is said, of being against public policy. The bill herein charges the estate of R. H. Rountree to be insolvent, and at the argument it is conceded that the widow is insolvent.

This court judicially notices the statutes of Kansas, as well as the holdings of its courts, from which it is to be said that in that state a contract attempting to limit the common-law liabilities of a carrier, or a contract against negligence, is void; and it is likewise to be said that this court, sitting n Kansas, would observe the statutes of that state, and would follow the holdings of the state courts construing its statutes. These things being so, there can be no doubt of the correctness of the holding of the Kansas state court in eliminating the alleged defenses pleaded in the action of Mrs. Rountree against the railway. These matters are stated thus broadly, and, as I believe correctly, and as much so as stated by defendant's counsel at the hearing herein, because it was urged that the purpose of this application is to obtain rulings by this court contrary to the rulings of the Kansas court in the law action referred to. I do not so understand the purpose of this bill. It may or may not be so that in the end the Kansas state courts would give the relief herein prayed. That is a question wholly academic, a discussion of which could serve no purpose. My attention has not been called to any decision of the Kansas courts on the question herein presented.

One question here is as to the validity of the contract between the express company and the railway company. At the argument it was practically conceded that such a contract is valid, and that the express company can be compelled to reimburse the railway company for all damages it may have to pay Mrs. Rountree; and, whether conceded or not, this court must so hold. Railroad v. R. R. News Co., 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545; Phoenix Ins. Co. v. Erie Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873. And it is likewise so that the contract between Rountree and the express company was and is a valid and enforceable contract. Railroad v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; Railroad v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513. A part of that agreement was supported by a valid and ample consideration, that he would give full releases and acquittances for all claims arising in favor of himself or estate for any injury to him, or by reason of his death occasioned by the railway while at his work as such express messenger.

At common law an action for a death occasioned by a wrongful or negligent act could not be maintained. Such a recovery can only be had, regardless of where the suit may be brought, under a statute allowing it of the date where the negligent or wrongful act was committed. But the Kansas statute allowing such recovery allows it only if the person might have "maintained an action had he lived." Gen. St. 1901, § 3871. Whether the cause of action accrued to Rountree is not certain, as the bill is quite indefinite as to that point; the allegation being that shortly after the wreck he died. But whether he was instantly killed, or survived for such time that the cause of action accrued to him, I do not regard as important as to the decision now to be made, because, if no cause of action could have been maintained by him if he had lived, neither his widow nor legal representative can maintain an action. Railroad v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; Hecht v. Railroad, 132 Ind. 507, 32 N. E. 302; Southern, etc., v. Cassin, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694.

If an administrator had been appointed, then the action in the Kansas court would have been by him, and the recovery payable on distribution to the widow. In that case the administrator would recover from the railway, and the railway would recover a like sum from the express company, and the express company the same sum from the estate of decedent. So that as the net results of three lawsuits the widow would take nothing on distribution of the estate. The insolvent estate would commence with nothing and would have nothing at the conclusion. Why have such idle but expensive litigation? The question is not what another Kansas court would hold. The Cherokee county, Kan., district court in the law action for damages cannot determine the matter for obvious reasons. The railway company cannot plead the contracts, because of a lack of privity. Plaintiff cannot make the express company a defendant, because the express company committed no tort. If the express company files an intervention in that case, such a pleading will be stricken from

the files on motion of Mrs. Rountree, as the court will hold the express company to be an intermeddler or mere interloper. So that, if the express company is to be granted relief, it must be in an independent action in equity; and the two contracts being valid, and Mrs. Rountree being only entitled to recover provided Mr. Rountree could have recovered, had he lived, and this court having jurisdiction over Mrs. Rountree, the conclusion follows that she should be enjoined from prosecuting the law action, obtaining a recovery, and placing a recovery beyond reach, to the damage of complainant.

The case must be treated as though Rountree had lived and gave releases,

as he, for a valuable consideration, agreed to give.

LEWIS et al. v. SITTEL.†

(Circuit Court of Appeals, Eighth Circuit. November 7, 1908.)

No. 2,724.

1. APPEAL AND ERROR (§ 338*) — TIME FOR IN COURT OF APPEALS OF INDIAN TERRITORY.

Six months was the time within which a writ of error or an appeal could be taken subsequent to March 3, 1905, to review a judgment of the United States Court in the Court of Appeals of the Indian Territory.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 338.*]

2. APPEAL AND ERROR (§ 322*)—INDISPENSABLE PARTIES TO, MUST BE JOINED.

All the parties to a suit or proceeding who appear from the record to have an interest in the order, judgment, or decree challenged must be made parties thereto or given notice equivalent to summons and severance before a national appellate court will proceed to a decision of the case upon the merits. A joint judgment debtor is such a party, and the writ will be dismissed in his absence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795-1797; Dec. Dig. § 322.*]

3. Appeal and Errob (§§ 329, 338*)—Refusal to Join Omitted Party Three Months After Expiration of Time to Sue Out Weit Sustained in Absence of Due Diligence.

In the absence of proof of reasonable diligence to obtain the consent of a joint judgment debtor to a writ of error until more than three months after the expiration of the time to sue out the writ, held:

(a) The prosecution and amendment of a writ of error from the Court of Appeals of the Indian Territory to the United States court was governed by the rules and practice of the Circuit Court of Appeals of the Eighth Circuit, under Act March 3, 1895, c. 1479, § 12, 33 Stat. 1681 (U. S. Comp. St. Supp. 1907, p. 208), subsequent to March 3, 1895, and not by chapter 40, Mansf. Dig. Ark. (chapter 17, Ind. T. Ann. St. 1899).

(b) That court was not guilty of any abuse of discretion or of committing any error of law under either the practice prescribed by the Arkansas statutes or under the rules and practice of the United States Circuit Court of Appeals by reason of its denial of the application to join the

omitted debtor or of its dismissal of the writ.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §§ 329, 338.*]

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 104 S. W. 850.

[•]For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

§ Rehearing denied January 9, 1909.

R. A. Smith, for plaintiffs in error. Samuel A. Wilkinson, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. On July 13, 1905, in an action pending in the United States court for the central district of the Indian Territory, a judgment was rendered that the plaintiff, Edward D. Sittel, recover of the defendants, Allen Wright, O. W. Argo, and Yancey Lewis, the possession of a certain lot of land, \$425 damages, and the costs of his suit. On July 22, 1905, upon the petition of Wright and Lewis, to which Argo was not a party, a writ of error was allowed by the United States Court of Appeals in the Indian Territory to review that judgment. On May 12, 1906, Sittel moved the Court of Appeals of the Indian Territory to dismiss the writ because Argo had not been made a party to it. Wright and Lewis answered that the reason why Argo had been omitted was that he was not a resident of the Indian Territory when the writ was sued out and his residence was unknown, but that it had lately been discovered, and they and Argo prayed that he might be joined a party plaintiff in the proceeding, but the court declined to grant the application and dismissed the writ, and this ruling is assigned as error.

In the appellate courts of the United States the rule is that all the parties to a suit or proceeding, who appear from the record to have an interest in the order, judgment, or decree challenged by the appeal or writ of error, must be made parties to the proceeding or must be given a notice equivalent to summons and severance before the court will proceed to a decision of the merits of the case, and this to the end that the successful party may be at liberty to enforce his judgment, decree, or order without delay against those parties who do not desire to have it reversed, and that the appellate court may not be required to decide the same question more than once upon the same record. Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Hardee v. Wilson, 146 U. S. 179, 181, 13 Sup. Ct. 39, 36 L. Ed. 933; Davis v. Mercantile Trust Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563; Gray v. Havemeyer, 3 C. C. A. 497, 505, 53 Fed. 174, 182; Farmers' Loan & Trust Co. v. McClure, 78 Fed. 211, 213, 24 C. C. A. 66, 68; Dodson v. Fletcher, 78 Fed. 214, 215, 24 C. C. A. 69, 70.

The Court of Appeals in the Indian Territory held that the time for suing out its writ of error was limited to six months after the judgment was rendered in the trial court by the Act of March 3, 1905, c. 1479, § 12, 33 Stat. 1081 (U. S. Comp. St. Supp. 1907, p. 208), but counsel for the plaintiffs in error argue that this was an error, and that their application to make Argo a party should have been granted and their writ should have been sustained because the time for procuring and the manner of prosecuting writs of error from that court were those prescribed by Mansfield's Digest for such writs from the Supreme Court of Arkansas, and not those which conditioned writs from the United States Circuit Court of Appeals of the Eighth Circuit to the United States Circuit Courts. The time for suing out a writ of

error from the Supreme Court of Arkansas to its subordinate courts was three years, and in case the party procuring such a writ satisfied the court, by due proof on affidavit, that the consent of a party who ought to have been joined could not have been procured by reason of his absence from the state, that court was authorized to allow the prosecution of the writ without his joinder. Mans. Dig. Ark. c. 40, §§ 1276-1281 (Ind. T. Ann. St. 1899, c. 17, §§ 778-783). The contention is that these provisions of the statutes of Arkansas fixed the time and manner of prosecuting the writ from the Court of Appeals of the Indian Territory in this case because Congress by the act of March 1, 1895, chapter 145, § 11, 28 Stat. 698, enacted that that court should have such jurisdiction, powers, and superintending control over the courts in the Indian Territory as the Supreme Court of Arkansas had over the courts of that state, and that the provisions of chapter 40 of Mansfield's Digest relating to the jurisdiction and powers of the Supreme Court of that state, to appeals and writs of error, and to the trial and decision of causes were extended over the Indian Territory so far as they were applicable. If the congressional legislation had stopped here, the position of counsel might have been tenable. But before the writ of error from the Court of Appeals in the Indian Territory was allowed in this case, the act of March 3, 1905, c. 1479, § 12, 33 Stat. 1081 (U. S. Comp. St. Supp. 1907, p. 208), had provided:

"That hereafter all appeals and writs of error shall be taken from the United States courts in the Indian Territory to the United States Court of Appeals in the Indian Territory, and from the United States Court of Appeals in the Indian Territory to the United States Circuit Court of Appeals for the Eighth Circuit in the same manner as is now provided for in cases taken by appeal or writ of error from the Circuit Courts of the United States to the Circuit Court of Appeals of the United States for the Eighth Circuit."

Counsel invoke the conceded rule that repeals by implication are not favored, and that, where sections of earlier and later acts can by any reasonable construction stand together, they must so stand (Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190), and persuasively argue that the manner of securing the writ does not include the time for securing it, and that both the time and the manner of the prosecution of writs from the Court of Appeals of the Indian Territory remained the same after as before the passage of the act of 1905. But the purpose of all construction of statutes is to ascertain and carry into effect the real intention expressed by the legislative body which originated them, and when this clearly appears from the terms of the statute technical rules and definitions may not prevail over it. The word "hereafter" in section 12 of the act of 1905 strongly indicates the purpose of the Congress to provide that after the passage of that act appeals and writs of error should be taken and prosecuted in a different manner from that in which they had been sued out and carried on prior to that time. Under the former practice defeated parties were permitted to obtain writs from the Court of Appeals of the Indian Territory at any time within three years after judgments in the trial courts against them, and writs from this court at any time within six months after judgments of the Court of Appeals of the Indian Territory against them, so that, when to these possible delays was added the necessary time which courts ought to take to carefully examine and rightly decide important cases, more than three years after the date of the judgment of the trial court might be consumed lawfully in reaching a final judgment. The power of a disappointed litigant to secure so long a delay had become a crying evil, and in many cases had resulted in a practical denial of justice. It is true that the act of 1905 provided only that writs of error from the Court of Appeals in the Indian Territory should be taken in the same manner as they were then taken from the Circuit Court of Appeals of the Eighth Circuit to the Circuit Courts, and that it contained no mention of time. But the word "manner" has various meanings. It signifies the mode of proceeding in any case or situation, the method by which a desired result is obtained, and its purport is broad enough to include all the limitations of time as well as of form by which writs of error from this court to the Circuit Courts were conditioned. One of these limitations was that the writ must be sued out within six months after the rendition of the judgment in the trial court (Act March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552]), and in view of the unnecessary delay of litigation and of the injustice which the Arkansas practice entailed, of the broad signification of the word "manner" and of the manifest purpose to make a substantial change in the practice, the conclusion is that the intention of Congress in the enactment of the statute of March 3, 1905, and the legal effect of that act, were to conform both the time for and the practice in the prosecution of writs of error from the Court of Appeals of the Indian Territory to those which were then applicable to the taking and prosecution of writs of error from this court to the Circuit Courts of the United States: It is unnecessary to hold that the effect of the act of 1905 was to repeal any part of the act of 1895, and that is not this decision. The legal effect of this conclusion is not that the provisions of the act of 1895 were repealed, but that they remained applicable to appeals and writs of error taken before March 3, 1905, but were rendered inapplicable to those thereafter secured. The result is that the time within which the writ of error from the Court of Appeals of the Indian Territory could be lawfully taken in this case was six months after the judgment in the trial court. And when that time expired Argo, who was an indispensable plaintiff in error, had not been made a party to the proceeding below.

But counsel present another contention. They argue that although the time to sue out the writ had expired, yet when Argo and the two plaintiffs in error named in the writ applied to the Court of Appeals of the Indian Territory to permit him to become a party to the proceeding, that court had the power, and it was its duty, to grant the application and to proceed to hear the case upon its merits. They say that the provisions of chapter 40 of Mansfield's Digest prescribed the power and duty of that court, and that if they did not, and if these were the same as those conferred and imposed upon this court under similar circumstances, the plaintiffs in error were in either case entitled to the relief they sought. Conceding, without deciding, that the Court

of Appeals of the Indian Territory had the power here claimed, neither of the plaintiffs in error had any absolute legal right to the joinder of Argo after the expiration of the time fixed for suing out the writ. Their application to the court was not for the enforcement of a right; it was an application to the discretion of that court to permit them to amend their writ, and the denial of that application is reviewable here for an abuse of discretion only. The Arkansas statute itself, upon which counsel chiefly rely, provides that if any persons living against whom a judgment has been rendered are omitted from the writ of error sued out to challenge it the writ shall be dismissed unless one or more of such persons be allowed by the court to proceed (chapter 40, § 1280), but that, if the parties prosecuting the writ satisfy the court by due proof on affidavit that the consent of the omitted party could not be had by reason of his absence from the state, the prosecuting parties may be allowed to proceed without joining him (section 1281). The writ in this case was sued out on July 22, 1905. The six months expired on January 22, 1906. The first application to make Argo a party was made on May 12, 1906, and the only proof offered to sustain it was the affidavit of Lewis and Wright that Argo "was at the time of the trial, and of the rendition of the judgment, and of the filing of the petition for writ of error, and of the allowance of the writ of error, and of the issuance of the citation, and is not a resident of the Indian Territory so that his consent at such time to join in said writ of error could not be obtained; his residence at all such dates being to the said Allen Wright and to the said Yancey Lewis unknown. and that lately the residence of said Argo has been discovered, and his consent to join in this proceeding by writ of error has been obtained." There was no proof or statement that Argo was or had been absent from the state, or that any endeavor had been made to find him, or that he could not have been readily found and his consent or refusal to join in the writ procured at any time between July 22, 1905, when the writ was sued out, and "lately"—whenever that may have been. Arkansas statute authorized the maintenance of the writ in the absence of a necessary party only when the court was satisfied by due proof on affidavit that his consent could not be had by reason of his absence from the state. The proof here presented fails to satisfy that the consent of Argo to join in that writ could not have been obtained within the six months after the judgment by reason of his absence from the Indian Territory. It undoubtedly in the same way failed to satisfy the Court of Appeals of the Indian Territory. The prosecution and amendment of the writ were not governed by this statute of Arkansas. but by the rules and practice of this court in such cases by virtue of the act of March 3, 1905; but the rules and practice of this court were not more favorable to the plaintiffs in error than the Arkansas statute (Dodson v. Fletcher, 79 Fed. 129, 24 C. C. A. 466), and under neither that statute nor the rules and practice of this court was the Court of Appeals of the Indian Territory guilty of any abuse of discretion or of committing any error of law, either in its refusal to permit Argo to be made a party to the writ, or in dismissing it.

Nevertheless the merits of the case have been carefully examined,

and there was in our opinion no prejudicial error in its conduct or trial, and on that ground also the judgment should not be reversed.

The judgment of the Court of Appeals of the Indian Territory must therefore be affirmed, and it is so ordered.

HOOK, Circuit Judge, concurs with the affirmance on the merits.

LAUREL OIL & GAS CO. v. GALBREATH OIL & GAS CO. (Circuit Court of Appeals, Eighth Circuit. October 29, 1908.)

No. 2.720.

1. Courts (§ 435*)—Appeal from Courts in Indian Territory Governed by Act of March 3, 1905, and Not by Arkansas Statutes and Practice. Subsequent to March 3, 1905, appeals and writs of error and proceedings therefor and therein to review the decisions of the United States courts of the Indian Territory were governed by 33 Stat. 1081, c. 1479, § 12 (U. S. Comp. St. Supp. 1907, p. 208), and the practice in the national courts, and not by the statutes of Arkansas or the practice in its courts. [Ed. Note.—For other cases, see Courts, Dec. Dig. § 435.*]

2. COURTS (§ 356*)—CONFORMITY ACTS INAPPLICABLE TO PROCEEDINGS TO REVIEW DECISIONS OF COURTS—APPEAL.

Acts of conformity by which the pleadings, practice, and forms of proceedings in United States courts in civil causes are assimilated to the pleadings, practice, and forms of proceedings in state courts are inapplicable to appeals, writs of error, bills of exceptions, and other proceedings to secure reviews of decisions of those courts. The latter are governed by the acts of Congress and the rules and practice of the federal courts. [Ed. Note.—For other cases, see Courts, Dec. Dig. §§ 356.*]

3. Courts (§ 356*)—Probate Proceedings are Proceedings in Equity—Bill of Exceptions Unnecessary to Review Them.

Proceedings in the United States courts in the exercise of the customary jurisdiction of probate courts are proceedings in equity. They are reviewable by appeal and not by writ of error, and no bill of exceptions is necessary to bring the evidence, affidavits, and other proceedings therein upon the record, because they are a part of it.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 356.*]

4. Judicial Sales (§ 1*)—Guardian and Ward (§ 95*)—Definition—Sale of Guardian Without Authority of Court is Not.

A judicial sale is a sale authorized by a court which has jurisdiction

to grant such authority.

An order which empowers a guardian, who desires to lease the property of his ward, to file a proper petition, and refers such petition to a master to take and report testimony and his conclusions for the action of the court, does not empower the guardian to sell or lease such property, and a sale thereof by him without authority is not a judicial sale, and it vests in the purchaser no rights in law or in equity.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 1; Dec. Dig. § 1;* Guardian and Ward, Dec. Dig. § 95.*

For other definitions, see Words and Phrases, vol. 4, pp. 3867-3870.] (Syllabus by the Court.)

Appeal from the United States Court of Appeals in the Indian Territory.

See, also, In re Berryhill's Estate, 104 S. W. 850.

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William P. Z. German (William T. Hutchings, on the brief), for appellant.

Preston C. West (William M. Mellette and Edward R. Jones, on the

brief), for appellee.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

SANBORN, Circuit Judge. This is an appeal by the lessee from a decree of the United States Court of Appeals in the Indian Territory which affirmed a decree of the United States Court for the Western district of that territory, wherein that court refused to confirm an oil and gas lease of the land of an Indian minor made by her guardian, and confirmed a lease of that land to the appellee for a higher rental. The appellee moved to strike from the record all the testimony and affidavits, and to dismiss the appeal because, under the practice in the state of Arkansas, proceedings in the probate courts not evidenced by the pleadings, orders, and judgments can be considered in the Supreme Court of that state only when they are presented by bills of exception, and there is no such bill in the record in this case. Perkins v. Du Val, 31 Ark. 236; James v. Dyer, 31 Ark. 489. Counsel quote the provisions of certain acts of Congress passed in 1889, 1890, 1891, and 1895, which conform the pleadings and practice and forms of proceedings in civil causes in the United States courts in the Indian Territory to the pleadings, practice, and forms of proceedings in like causes in the courts of record of the state of Arkansas, which confer upon the United States court in the Indian Territory the jurisdiction of a probate court, which extend the laws of Arkansas relative to guardians, curators, and wards over the Indian Territory, and which prescribe the jurisdiction of the United States Court of Appeals in the Indian Territory and the method of procuring writs of error from it and taking appeals to it; and they argue that by virtue of these acts appeals must be taken and writs of error must be sued out and prosecuted to review the exercise by the United States courts in the Indian Territory of probate jurisdiction in the same way that they are prosecuted to review like proceedings in the courts of Arkansas. But after these various acts had been passed, and before any of the appeals had been taken in this case, Congress enacted:

"That hereafter all appeals and writs of error shall be taken from the United States courts in the Indian Territory to the United States Court of Appeals in the Indian Territory and from the United States Court of Appeals in the Indian Territory to the United States Circuit Court of Appeals for the Eighth Circuit in the same manner as is now provided for in cases taken by appeal or writ of error from the Circuit Courts of the United States to the Circuit Court of Appeals of the United States for the Eighth Circuit." Act March 3, 1905, c. 1479, § 12, 33 Stat. 1081 (U. S. Comp. St. Supp. 1907, p. 208).

This act conferred the power and fixed the jurisdiction of the Court of Appeals of the Indian Territory and of this court in cases arising in the United States courts in that territory. The method of review here prescribed is not a matter of form or of practice, but a matter of power and jurisdiction. It is not affected by acts conforming the

pleadings, practice, and forms of proceeding in the trial courts to those in the state of Arkansas. City of Manning v. German Ins. Co., 107 Fed. 52, 57, 46 C. C. A. 144, 148, 149; Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, 49 C. C. A. 229, 235, 111 Fed. 81, 87. In this court and in the Supreme Court of the United States a judgment at law may not be reviewed by appeal, nor a decree in equity by writ of error. Highland Boy Gold Mining Co. v. Strickley, 54 C. C. A. 186, 189, 116 Fed. 852, 855, and cases there cited. A proceeding by a guardian to sell the lands of his ward is not a proceeding at law. It was originally within the jurisdiction of the chancery courts of England, and in the national courts it is a proceeding in equity. An appeal, therefore, was the only method by which the decree below could be reviewed in the United States courts, and no bill of exceptions is requisite to bring upon the record all the proceedings in equity in the trial court. They constitute a part of the record of that court, and are properly returned to this court for consideration upon an appeal. The motion to strike them from the transcript and the motion to dismiss the appeal are denied. Morrison v. Burnette, 83 C. C. A. 391, 394, 154 Fed. 617, 619, 620.

We turn to the merits of the case. On December 8, 1905, the United States Court for the Western district of the Indian Territory made a general order in these words:

"Now on this day upon due consideration by the court:

"It is considered and ordered by the court that, whenever a guardian desires to lease the lands of his ward for oil, gas, or mining purposes, he shall file in the office of the clerk of this court, in which such guardianship proceedings are pending, a proper petition. That all such petitions are ordered at once referred to the master in chancery of this district, to be at once transmitted to him, by the clerk, and such master is directed to examine the same and take such testimony relating thereto as he may deem fit and proper, and report his findings and conclusions, together with the testimony, to the court for its action.

"That this order shall be entered of record in the office of the clerk of this court at Sapulpa, Wewoka, Okmulgee, Eufaula, and Wagoner."

On January 18, 1906, the guardian filed a petition in that court in which he alleged that he had entered into an oil and gas lease with the appellant for a term of 11 years and 6 months, and prayed for an order of the court "authorizing and directing him to make said lease and approving the same as herewith submitted." On March 26, 1906, the master in chancery filed a report that on the 17th day of January, 1906, he took certain testimony which showed that the terms of the lease submitted on the 18th of January, 1906, were just and fair; that he afterwards caused a notice to be published that on the 5th day of March, 1906, he would receive sealed bids for an oil and gas mining lease of the land of this ward; that on that day the appellant offered a bonus of \$300 and a royalty of one-tenth, and Francis M. Selby a bonus of \$1,680 and a royalty of one-tenth; that the appellant had deposited with him a certified check for \$300, and Francis M. Selby had deposited with him a certified check for \$1,560; and he recommended that an order be made directing the guardian to execute a lease to Francis M. Selby. The appellant filed exceptions to

this report because the master did not recommend the making of the lease to it. The court first ordered the guardian to make the lease to Francis M. Selby, but it subsequently set aside this order, directed a resale, and finally confirmed a sale of the lease to the Galbreath Oil & Gas Company for a bonus of \$9,000 and a one-tenth royalty, and declared that to be the highest and best bid for the lease. That lease has been made, confirmed by the court and by the Secretary of the Interior, and this appeal challenges the right of the court to refuse to direct the guardian to execute the lease of January 18, 1906, to the

appellant.

The contention of counsel is that the appellant was the purchaser of the lease at a judicial sale, that it bid the fair value of the property and paid \$300 to the master on the day it was executed, and that as there was no fraud, accident, or mistake in the transaction it had the legal right to a confirmation of the sale, and it was error for the court to decline to enforce this right and to lease the oil and gas to another. That this conclusion might follow if the premises were sound may be conceded. Files v. Brown, 59 C. C. A. 403, 407, 408, 124 Fed. 133, 137, 138; Morrison v. Burnette, 83 C. C. A. 391, 397, 398, 154 Fed. 617, 623, 624. But was the appellant a purchaser at a judicial sale? It is an indispensable attribute of such a sale that it must be made by authority of some court or judge that has jurisdiction to make or to direct it. It may be made by a guardian, a master, a marshal, or by any other agent of the court properly authorized, and it may be absolute or subject to subsequent confirmation. But the court must be the vendor, and the officer must have received from it his authority to offer the property for sale, to receive bids for it and to sell it, either absolutely or subject to the subsequent approval of the court, or it is not a judicial sale. The lease to the appellant was sold by the guardian on January 17 or on January 18, 1906, and the only authority he claims to have had from the court is the general order of December 8, 1905. That order goes no farther than to provide that "whenever a guardian desires to lease the lands of his ward for oil, gas or mining purposes, he shall file * * * a proper petition," that all such petitions shall be referred to the master, who shall take relevant testimony and report his findings and the evidence to the court for action. The guardian shall file a proper petition for what? Evidently for leave to sell a lease, not for confirmation of a sale of it which he has already made and which the court has no legal right to reject or disapprove. Counsel state in their brief that it had been the practice in the courts of the Indian Territory for the guardians to first make sales of leases of this nature, to procure testimony before the master in support of them, and then to apply to the court for their confirmation. If so, it was a practice unauthorized by any order of the court or by any evidence in this record, and it was not followed by the guardian here, for the praver of his petition was not for a confirmation of the sale or of the lease he had already made, but for anorder "authorizing and directing him to make said lease and approving the same as herewith submitted." The sale of the lease to the appellant was the act of the guardian without the authority of the

court. It was in no sense a judicial sale. It was nothing but an offer of the appellant to purchase a lease of the court on the terms stated in the guardian's petition. It conferred none of the rights of a purchaser upon the appellant, and the court committed no error in its rejection.

The decrees of the courts in the Indian Territory must be affirmed,

and it is so ordered.

TUMLIN v. BRYAN.

(Circuit Court of Appeals, Fifth Circuit. November 10, 1908.)

No. 1,836.

1. BANKRUPTOY (§ 167*)—VOIDABLE PREFERENCE—SUIT TO RECOVER.

In a suit by the trustee in bankruptcy of a partnership to recover payments made to a creditor as a preference, to authorize a recovery, it must be shown that the firm and the partners also were insolvent when the payments were made.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 167.*]

2. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCE—INTENT OF DEBTOR.

To render a payment made by a bankrupt to a creditor voidable as a preference under Bankr. Act July 1, 1898, § 60b, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), it must appear that it was in fact intended to give a preference, and that the creditor had reasonable cause to believe that it was so intended; and mere suspicion or slight proof is not sufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 252; Dec. Dig. § 166.*]

Appeal from the District Court of the United States for the Northern District of Georgia.

Victor Lamar Smith (Janes & Hutchens and Smith, Hammond & Smith, on the brief), for appellant.

William P. Hill and J. L. Mayson, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

SHELBY, Circuit Judge. This is a suit by T. J. Bryan, as trustee in bankruptcy of A. B. Tumlin Company, a partnership composed of A. B. Tumlin and M. K. Pounds, against W. L. Tumlin, to recover \$3,430, the amount of six payments made by the bankrupts within four months of bankruptcy. The first of the payments was made July 26, 1906, and an involuntary petition was filed against the firm October 5, 1906. The payments were made to discharge a debt of the firm, shown by its note and a chattel mortgage. The bill contained the usual averments seeking to recover the payments as voidable preferences under the bankruptcy act. The defendant answered denying the material averments of the bill. There was an order of reference and a report in favor of the complainant. The defendant excepted to the report, and his exceptions were overruled by the District Court, and a decree entered in favor of the trustee for the aggregate amount

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the payments and interest. The defendant, by exceptions to the report and by assignments of error here, contends that the report and decree are not sustained by evidence, because (1) it was not proved that at the time the payments were made the debtors were insolvent, and (2) that at the time the payments were made the defendant did not have reasonable cause to believe that the debtors intended thereby to give him a preference.

The burden of proof is on the complainant, and, unless he shows by sufficient evidence the elements of a voidable preference, he is not entitled to recover. He must prove that the bankrupts (1) while insolvent, (2) within four months of the bankruptcy, (3) made a transfer of their property, i. e., a payment of money, (4) and that the creditor receiving the payment was thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and it must also be proved (5) that the person receiving the payment, or to be benefited thereby, had reasonable cause to believe that it was thereby intended to give a preference. Bankr. Act, § 60, cls. "a" and "b" (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]).

There is no denial that the payments alleged were made, and that

they were made within four months of the bankruptcy.

The case turns on the contention of the defendant that there is no sufficient evidence to sustain the decree showing that the bankrupts were insolvent at the time the payments were made, and that the evidence does not show that the defendant had reasonable cause to believe that the payment was intended to give a preference. A person is deemed insolvent within the meaning of the act "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Bankruptcy Act, § 1a (15). The complainant, as a witness for himself, in answer to a question which assumed that he had "gone through the books and familiarized himself with the condition of the affairs of A. B. Tumlin Company," testified that "they were insolvent, in my opinion"; the answer referring to their condition on July 1, 1906, about the time the payments in question were made. He was not asked what property the firm owned, nor its value, nor the amount of the firm's debts. The schedules filed by the bankrupt firm December 27, 1906, are relied on as showing insolvency of the firm in July, 1906. If from these schedules and the dates of accounts listed it be conceded that the firm's indebtedness in July, 1906, may be ascertained, and that other schedules show the property owned by the firm at the time of the bankruptcy, this is not sufficient. It is not shown what property was owned by the firm in July, 1906, at the date of the payments, nor is the value of the property then owned by it proved.

And, besides, we find no evidence showing what property was owned by the individual members of the bankrupt firm in July, 1906. In a claim for exemptions filed by the attorneys for the members of the firm there is a statement that they owned no property except the partnership property. That petition is sworn to October 23, 1906. If

that affidavit is admissible against the defendant in this suit, it is insufficient to show the pecuniary condition of the members of the bankrupt firm in July, 1906. As each member of the partnership is liable individually for the partnership debts, it seems to follow that, to show such insolvency as to entitle the trustee to recover, the insolvency of the members of the firm should be proved. If a condition exists whereby all diligent creditors may obtain payment in full, it seems useless and unjust to sustain a suit against a defendant who has only collected what was due to him. It is true that a partnership may be treated as an entity, separate from its individual members, for the purpose of its adjudication as a bankrupt (Bankruptcy Act, § 5a; In re Meyer et al., 98 Fed. 976, 39 C. C. A. 368; In re Mercur, 122 Fed. 384, 58 C. C. A. 472); but, in a suit to recover a preference, it is not only the insolvency of an intangible entity, but the insolvency of its responsible component parts, that lies at the foundation of the right to relief. If the component parts of the firm may be made to pay the firm's debts, the suit lacks reason and substance, and it cannot be held that the defendant has obtained a greater percentage of his debt than other creditors of the same class. If the members of the firm are solvent, all creditors may be paid in full. If the individual members of the partnership are not shown to be insolvent at the date of the payments, the preference is not voidable. Vaccaro et al. v. Security Bank of Memphis et al., 103 Fed. 436, 43 C. C. A. 279. See, also, In re Blair et al. (D. C.) 99 Fed. 76; Davis et al. v. Stevens et al. (D. C.) 104 Fed. 235; In re Forbes et al. (D. C.) 128 Fed. 137; In re Perley & Hays (D. C.) 138 Fed. 927.

To sustain the decree, it must appear that there was evidence to show that the defendant had reasonable cause to believe that it was intended by the payments in question to give a preference. Bankruptcy Act, § 60b. The reasonable implication of the statute, it has been held, is that the debtor himself must have intended the preference. In re First National Bank of Louisville, 155 Fed. 100, 84 C. C. A. 16; Hardy v. Gray et al., 144 Fed. 922, 75 C. C. A. 562. A careful reading of the evidence does not lead us to the conclusion that the defendant believed the firm to be insolvent. But a belief that a debtor is insolvent is a very different thing from the belief referred to by the statute— "reasonable cause to believe that it was intended" by the payments to give a preference. It may often happen that one, though in fact insolvent, will continue his business and make payments in the usual way, without a thought of preferring one creditor to another, and with the hope and belief that he would finally be able to pay all. If these payments were made by the firm, without the thought of injuring other creditors, and in the belief that it would be able to pay them all, the defendant cannot be charged with reasonable cause to believe that a preference was intended. When a debtor pays, and a creditor receives, the amount of a just debt, the natural presumptions are in favor of the good faith of the transaction. To let the mere fact of the bankruptcy of the debtor within four months make the transaction involved voidable would be to create uncertainty and uneasines? as to the probable result of every settlement between debtor and creditor. Reasonable cause to believe that a preference was intended cannot be held to be proved by circumstances that would merely excite suspicion. And circumstances may seem suspicious after the bankruptcy occurs that would not appear unusual at the time of their occurrence, and would then have presented no "reasonable cause" on which to found a belief of intended preference. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof or mere suspicion. Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640.

The fact that one of the payments was made in notes payable to and indorsed by the firm was fully explained. The defendant was satisfied to receive the notes bearing interest, for he would have placed the money at interest if he had been paid in cash.

We are of opinion that the evidence does not sustain the decree.

The decree of the District Court is reversed, and the cause remanded, with directions to dismiss the bill.

POUNDS v. BRYAN.

(Circuit Court of Appeals, Fifth Circuit. November 10, 1908.)

No. 1.837.

Appeal from the District Court of the United States for the Northern District of Georgia.

Victor Lamar Smith (Janes & Hutchens and Smith, Hammond & Smith, on the brief), for appellant.

William P. Hill (Mayson & Hill, on the brief), for appellee.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

SHELBY, Circuit Judge. On the authority of the foregoing opinion in Tumlin v. Bryan, Trustee, 165 Fed. 166, the decree in this case is reversed, and the cause remanded, with directions to dismiss the bill.

LARRABEE v. McGUINNESS.

(Circuit Court of Appeals, Third Circuit. November 27, 1908.)

No. 17, October Term, 1908.

MASTER AND SERVANT (§ 274*)—INJURIES TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ADMISSIBILITY OF EVIDENCE OF OBSERVATIONS MADE AFTER ACCIDENT.

In an action by a chambermaid in a hotel against the proprietor to recover for an injury caused by plaintiff's falling down an elevator shaft which she entered through a door partially open, supposing it to be a room, on the issue of contributory negligence it was error to exclude evidence offered by defendant of conditions as to light as observed by witnesses who afterward examined the place, where there was evidence that such conditions were substantially the same as at the time of the accident, and at least as favorable to plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 274.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the District of New Jersey.

Edmund Wilson, for plaintiff in error. John H. Backes, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The plaintiff was a chambermaid in the employ of the defendant, who kept a hotel at Lakewood, N. J., and fell down the baggage elevator shaft from the third sleeping story to the basement, receiving serious injuries. The hotel was principally used as a winter resort, and the plaintiff went to work there August 21, 1905, before the season opened, the accident occurring September 1st, when the upper stories were still unoccupied. On the day in question she was set to cleaning these up by the defendant's housekeeper, preparatory to the fall business, and in the course of her duties went to the third sleeping floor, where, after unlocking and opening up the first room that she came to—raising the windows, and throwing back the shutters to let in light and air—she proceeded to the next door to the left, in the hallway, supposing that it led into another bedroom. Unfortunately, but unknown to her, it was the opening into the elevator shaft, the door of which had been left ajar by the man in charge, to air it out and dry it. He had endeavored to protect and barricade the way by putting across the opening the headboard, footboard, and springs of an iron bed, and this opposed the plaintiff's progress when she attempted to enter. But the place was dark, and supposing they were a mere obstruction, she pushed by them, putting them sufficiently aside to enable her to do so, and was precipitated to the bottom of the shaft, breaking the bones of her right arm so that it had to be amputated at the shoulder, and otherwise crippling and injuring herself. The jury gave a verdict for \$7,000, thus in effect finding that the defendant was negligent in not sufficiently guarding the elevator opening, and absolving the plaintiff from any want of care in walking into it in the dark without knowing what there was before her.

The facts on which the defendant's negligence was predicated being practically undisputed, the real issue was the contributory negligence of the plaintiff, and whatever bore upon it was therefore of importance. There are cases, as there are considerations, which would possibly justify us in holding as a matter of law that walking, as the plaintiff did, into a dark place where, as she says, she could not see and did not know what she would encounter, was negligence per se, precluding a recovery. But without stopping upon that, it certainly was material to show to the fullest extent the conditions with which she was confronted, and to that end the defendants offered to prove by several witnesses the observations which they had made on the spot as to what could have been seen by the plaintiff upon the occasion in question if she had been careful to do so. This was ruled out upon the ground that the conditions were not the same at the time of the observations as they were at the time of the accident, and that the evidence was

conflicting. That they should be substantially the same, and that the court should be reasonably satisfied of this, is of course unquestioned. 17 Cyc. 285. But that there should be complete correspondence in every particular, or that this should appear beyond controversy, would seem to be holding the rule too strictly.

In the present instance the accident occurred about 11 in the morning. The first part of the day had been clouded and showery, but it had cleared and the sun was shining. The hallway on which the elevator shaft opened ran east and west, and was lighted by a large window at the eastern end; and a few feet from the door of the shaft, on the north side of the hall, was an alcove, also having a large window. The alcove window had no shutters, and there was evidence that those of the hall window were open at the time of the accident, the light from without the building being thus admitted freely. The hall and the alcove windows were the principal, if not the only, sources of light, none other getting in except as it came through the transoms over the doors of the sleeping rooms when the shutters of these rooms were open. The experiments made by the defendant's witnesses were conducted on the morning of a day similar in character to the day of the accident, so that the light conditions outside were practically identical, and, the alcove window having no shutters, the light from there was unobstructed upon both occasions. The only question is whether the shutters on the hall window were open, as they were the day of the accident, and whether those of the different sleeping rooms were thrown back, the doors being closed, as to which there is no evidence. The absence of the bed frame and bed springs, by which the elevator entrance was obstructed, is claimed to be another point of dissimilarity. And it is also urged that the observations of the witnesses were made from across the hall, and not immediately at the elevator, after coming, as the plaintiff did, from the adjoining room, with its light blinding her. These are the different circumstances relied upon to justify the exclusion of the evidence offered. But in our judgment they indulge in over-refinement. The observations of the defendant's witnesses took the place of a view, and were material to a correct understanding of the situation. If the jury could have gone in person to the place, they would have seen for themselves. But this being impracticable, the only thing left was to describe it as it appeared to the eyes of others; and this involved all that was or could be seen by them. The most serious discrepancy is the absence of evidence as to whether the shutters on the window at the east end of the hall were open or closed when the witnesses were there. But we do not regard this as vital. If open, the conditions were the same; while, if closed, the circumstance favored the plaintiff, the hall being darker when the tests were made, with less ability for any one to see, than at the time of the accident.

It is said that the rejected evidence was in the nature of an experiment, which it was for the court to reject or allow in its discretion. But we do not think it is altogether to be so regarded. It was descriptive, rather, the witnesses being called to tell what they saw or could see there. Even treating it, however, as an experiment, it was a

most important one, going to the root of the case, the rejection of which was a denial of material proof to which the defendant had established a right, and to which, therefore, he was entitled.

The judgment is reversed, and a new trial awarded.

SCOTT et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 17, 1908.)

No. 1,521.

 CONSPIRACY (§ 37*) — CONSPIRACY TO COMMIT CRIME — MERGER OF OFFENSE COMMITTED.

An indictment will lie, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to remove distilled spirits on which the tax had not been paid, in violation of Rev. St. § 3296 (U. S. Comp. St. 1901, p. 2136), although it is charged that the purpose of the conspiracy was accomplished.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 68-70; Dec. Dig. § 37.*]

2. CRIMINAL LAW (§ 1192*)—APPEAL AND ERROR—DISPOSITION OF CAUSE—AFFIRMANCE—JUDGMENT.

On affirmance of a judgment of conviction in a criminal case, the Circuit Court of Appeals may, at least with the consent of the United States Attorney, authorize the trial judge to modify the sentence imposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3231; Dec. Dig. § 1192.*]

In Error to the Circuit Court of the United States for the Northern District of Georgia.

For opinion below, see 139 Fed. 697.

Sion A. Darnell and R. R. Arnold, for plaintiffs in error.

E. A. Angier and Geo. L. Bell, Asst. U. S. Attys., F. C. Tate, U. S. Atty., and John W. Henley, for the United States.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PER CURIAM. It appears that John N. Scott, Moses Adams, Fred Fields, B. F. Adams, A. Adams, and J. H. Adams were indicted for conspiracy to defraud the United States of internal revenue taxes payable upon large quantities of distilled spirits, and upon trial were convicted and thereupon sentenced as follows: John N. Scott to pay a fine of \$1,000 and to be imprisoned in the United States penitentiary at Atlanta for the term of 15 months, Moses Adams to imprisonment in the common jail at Fulton county for the term of 6 months and to pay a fine of \$500, B. F. Adams to be imprisoned in the common jail of Fulton county for the term of 6 months and to pay a fine of \$100, A. Adams to be imprisoned in the common jail of Fulton county for the term of 6 months and to pay a fine of \$100, John Henry Adams to be imprisoned in the common jail of Fulton county for the term of 2 months and to pay a fine of \$100, and Fred Fields to be imprisoned in the common jail of Fulton county for the term of 6 months and to

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pay a fine of \$100. After failure of a motion in arrest of judgment, the said parties sued out this writ of error, assigning some seven different specifications of error on the part of the trial court.

In this court only two assignments of error are insisted upon, as follows: First, that the special demurrer to the indictments should have been sustained, on the ground that the overt acts were not sufficiently pleaded and that the statement of facts constituting the offense were too meager, and that the indictments state only the general conclusions of the pleader; second, that the indictment, on the evidence set forth therein, should have been under section 3296 of the Revised Statutes (U. S. Comp. St. 1901, p. 2136), which makes the offense of removing, and not under section 5440 (U. S. Comp. St. 1901, p. 3676), which merely defines the offense of conspiracy.

Neither one of the assignments relied upon is well taken. The indictment sufficiently charges a conspiracy and the overt act as required by the statute. Offenses under section 3296 and under section 5440 are misdemeanors. That the prosecution was under section 5440, wherein the government assumed the burden of proving a conspiracy, as well as the unlawful removing of distilled spirits, which of itself is punishable under section 3296, cannot have prejudiced the plaintiffs in error. And it may be noted that the government, while able to prove all the defendants guilty of conspiracy, might not be able to prove them all guilty of unlawful removing. It follows that the judgment of the Circuit Court should be affirmed.

And this would be ordered without further remarks, were it not that we have been presented with a petition as follows:

"John N. Scott et al., Plaintiffs in Error, v. United States, Defendant in Error. "No. 15,921. United States Circuit Court of Appeals, Fifth Circuit.

"To the Honorable the United States Circuit Court of Appeals for the Fifth

"The plaintiffs in error in the case above stated petition the court, in case the judgment of the lower court is affirmed, to send the same back with directions to the lower court to exercise its discretion in modifying any sentence which may formerly have been imposed upon the plaintiffs in error.

"The plaintiffs in error represent to the court that the case is a proper one for a modification of the sentence; that the plaintiffs in error are willing to restore any and all taxes which might have been wrongfully withheld from the government; that the case is one under all the circumstances which calls for a modification of the sentence; and plaintiffs in error refer to the entire record in the case as justifying this claim, and also to the uniform good character of the plaintiffs in error.

"[Signed]

Reuben R. Arnold,

"Attorney for Plaintiffs in Error.

"Service of foregoing application by copy acknowledged, and we agree that the court may, in case the judgment of the lower court is affirmed, pass such order as to the modification of the sentence as to it may seem proper.

"[Signed]

"[Signed]

F. C. Tate, "U. S. Attorney. John W. Henley, "Asst. U. S. Attorney."

The suggestion is made that if the case can be remanded to the Circuit Court, with authority to the trial judge to readjust the sentences, a compromise advantageous to both parties can be made. For authority for this court to affirm a sentence and yet remand, with instructions to the trial judge to exercise his discretion in modifying any sentence formerly imposed, we are referred to the cases of Angle v. United States (C. C. A.) 162 Fed. 264, United States v. Wynn (C. C.) 11 Fed.

57, and Bates v. United States (C. C.) 10 Fed. 92.

Unquestionably cases may arise in which similar authority may well be exercised, if the court has before it (and from the record) the circumstance to warrant action. For instance: If the case shows that a motion for a new trial on newly discovered evidence should be passed upon, or that a sentence is erroneous as beyond the statute, or the trial judge himself suggests that a mistake has been committed which he desires to correct. See section 701, Rev. St. U. S. Perhaps we could grant the relief asked for in this case under the authorities suggested; but we prefer to base our action upon the consent of the government, as shown by the acknowledgment appended to the petition above given.

The judgment of the Circuit Court is affirmed, and the cause is remanded to the Circuit Court, with instructions to the trial judge herein to exercise his discretion in modifying any sentence which has here-

tofore been imposed upon the plaintiffs in error in this case.

SHAW V. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1908.)

No. 1.818.

1. Post Office (§ 48*)—Offenses Against Postal Laws—Embezzlement of Letter by Employe—Indictment.

The provisions of Rev. St. § 5467 (U. S. Comp. St. 1901, p. 3691), making it a criminal offense for an employé in the postal service to embezzle a letter, necessarily implies that the letter must have come into his possession in his official character; and an indictment thereunder which fails to allege such fact is fatally defective.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 77; Dec. Dig. § 48.*]

2. Indictment and Information (§ 75*)—Sufficiency of Accusation—"Then and There."

The words "then and there" as used in an indictment merely bring forward prior averments of date and venue, and do not otherwise enlarge the description of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 75.*

For other definitions, see Words and Phrases, vol. 8, pp. 6946-6948, 7815.]

In Error to the District Court of the United States for the Western District of Kentucky.

W. M. Smith, for plaintiff in error.

George Du Relle, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The indictment in this case charged the respondent Shaw, in three counts, with having violated the pro-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

visions of section 5467 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3691). The first count was founded upon the first clause of that section, and charged him with having, while he was employed by the United States as a railway postal clerk, feloniously secreted and embezzled a certain letter containing articles of value. The second count need not be stated, as the respondent was found not guilty as to that. The third count was founded upon the second clause of the statute, and charged the respondent with having stolen articles of value from a letter which had come into his possession while in such employment. The respondent was convicted by the verdict of the jury upon the first and third counts. But the District Attorney waived judgment upon the third count, and the court thereupon proceeded to pass sentence upon the first count, and the sentence was that the respondent be imprisoned at hard labor in the penitentiary for a year and a day. We shall therefore take notice of the first count only, and the proceedings on the trial.

The particulars of the charge made in the first count were that the respondent was at a time stated employed by the United States as a railway postal clerk, at Louisville, Ky., "and did then and there unlawfully and feloniously secrete and embezzle a certain letter which had then and there come into his possession, and was then and there intended to be conveyed by mail of the United States, and which then and there contained articles of value, to wit, twelve dollars in money of the United States." The respondent filed a general demurrer that the count did not "state facts sufficient to constitute any offense against the laws of the United States." The demurrer was overruled,

and the respondent excepted.

It is urged that this count of the indictment is bad in that it fails to charge with sufficient legal certainty that the letter came into the respondent's possession by reason, or because of, his employment in the postal service; and we think that upon demurrer it should have been so held. It is a necessary implication of the statute that the letter should have come to the carrier in his official character. It is only a matter of inference, and not of necessary consequence, that it came into his possession as a postal carrier. It may have been delivered to him as a mere private person to be taken to the post office. or picked up by him on the street and was being taken to the post office, or perhaps to be returned to the sender whose name and address were on the envelope; and other not extraordinary circumstances may have attended his coming into the possession of the letter as a private individual. His possession acquired in any of these ways would be sufficient to meet the allegation of the indictment in this particular, and yet there would be no violation of the statute. statement that the act was done "then and there" is nothing more than an allegation of time and place, and brings forward into the context a repetition of what had already been stated as the date and venue of his employment. United States v. Cook, 17 Wall. 174, 21 L. Ed. 538; United States v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

But the District Attorney argues that this uncertainty may be help-

ed out by the words in the second clause of the section describing another offense, that of stealing a letter "which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever." The suggestion is that the words "in any other manner whatever" may be carried back and inserted (for interpretation) into the description of the offense defined in the first clause of the statute. But we think this would be an inexcusable license in the construction of penal statutes. If any inference were permissible, it would be that the addition of the comprehensive words in the second clause were added for the purpose of including cases which would not be included by the previous language in that clause, which were the same as those used in the first clause, a wholly unnecessary proceeding if the previous language was supposed by Congress to be broad enough to include all manner of possession. The substantial difference in the language creating the different offenses is significant, and points undeniably, as we think, to the interpretation of the language used to constitute the offense attempted to be charged in the first count of this indictment. It has been settled that upon the proper construction of this section of the statute—and it seems to us the obvious meaning—each clause defines a separate offense, and the whole is to be read as if the word "or" were inserted at the beginning of the second clause, and the same penalty is denounced for the violation of either. United States v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; Hall v. United States, 168 U. S. 632, 18 Sup. Ct. 237, 42 L. Ed. 607.

Our conclusion being that the indictment is bad in respect to a material averment, there is no occasion to consider the other assignments of error.

The judgment is reversed, with direction to sustain the demurrer and enter judgment dismissing the proceeding.

INTERSTATE LIFE ASSUR. CO. v. DALTON.

(Circuit Court of Appeals, Sixth Circuit. November 23, 1908.)

No. 1,804.

1. Appeal and Errob (§ 997*) — Review—Findings of Fact—Effect of Motions for Direction of Verdict.

The effect of motions by both parties for the direction of a verdict is to withdraw the case from the consideration of the jury and submit it to the court to find the facts; and an appellate court in reviewing the action of the lower court is limited to a consideration of the correctness of its finding on the law, if there is any evidence in support of the finding of

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. § 997.*]

2 Insurance (§ 184*)—Validity of Contract—Discrimination Between Insurants—Kentucky Statute.

Ky. St. 1903, § 656, which prohibits any life insurance company from making any distinction or discrimination between persons insured in the amount of premiums or rates charged to persons of the same class and

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

equal expectation of life, etc., does not invalidate a policy because the agent returned to the insured a part of the first premium paid, which belonged to himself as a commission.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 184.*]

3. Insurance (§ 443*) — Cause of Loss — Life Insurance—Death in Violation of Law.

To defeat a recovery on a life insurance policy on the ground that at the time of his death the insured was carrying a concealed weapon in violation of Ky. St. 1903, § 1309, it must be shown not only that the offense was being committed, but, further, that it brought about the death of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. 1149 ; Dec. Dig. 443.*]

In Error to the Circuit Court of the United States for the Western District of Kentucky.

Charles Martindal, for plaintiff in error.

R. A. Miller, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The case below was a suit to recover on a \$10,000 life insurance policy, which the defendant below wrote on the life of the plaintiff's husband.

It appears that the deceased, Dalton, was accidentally shot and killed within a year after the writing of the policy. The payment of the policy was resisted on the grounds: First, that the insurance company did not receive the entire amount due for the first premium, but only \$20 thereof in cash, and in lieu of the balance accepted a note which was never collected, thus being guilty of the offense prohibited by section 656 of the Kentucky Statutes of 1903, forbidding any rebating; and, second, that the insured came to his death while violating section 1309 of the Kentucky Statutes of 1903, prohibiting him from carrying concealed upon his person a deadly weapon. At the conclusion of the testimony, both parties moved the court for a directed verdict. The court, after considering the motions, delivered an opinion overruling the motion of the defendant below and sustaining that of the plaintiff, and directed a verdict in favor of the latter for the amount sued for.

The effect of the result of these motions was the withdrawal of the case from the consideration of the jury, and a submission of it to the court, the latter being requested to find the facts; and this court in reviewing the action of the lower court is limited to a consideration of the correctness of its finding on the law, if there is any evidence in support of the finding of fact. Anderson v. Messenger, 158 Fed. 250, 85 C. C. A. 468; Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; City of Defiance v. McGonigale, 150 Fed. 689, 80 C. C. A. 425.

With respect to the claim that the premium, with the exception of \$20, was rebated, which invalidated the policy, the court below found, as a matter of fact, that under the testimony the claim was not sus-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—12

tained. Section 656 of the Kentucky Statutes of 1903, forbidding discrimination and rebates, reads as follows:

"No life insurance company doing business in Kentucky shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for the policies of life or endowment insurance, or in the dividends or other benefit payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance. Every company, or officer or agent thereof, who shall violate the provisions of this section, shall be fined in any sum not exceeding five hundred dollars, to be recovered by action in the name of the commonwealth, and, on collection, paid into the state treasury."

The testimony would bear the construction that the general course of business pursued by the insurance company was such that the agent was entitled to a certain percentage of the premiums, which he retained as his own, and which in this case was much larger than the so-called rebate. It was possible for the court to find that the insured paid to the agent the customary premium, and that the latter returned to him a part of his commission, and also paid to the insurance company the full amount of the premium due to it on such an insurance. It might be that another construction would be a more reasonable one, but that would not justify the reversal of the finding of the court upon a question of fact. The finding of the court must be interpreted as a finding that the agent gave to the insured a part of his own money, and not a part of any money belonging to the company. We do not think that such a case is within the prohibition of the statute.

With regard to the second, the court took the view that there was no evidence in the record to show that Dalton lost his life while carrying concealed upon or about his person a deadly weapon. There was no testimony whatever to show that the deceased was carrying the pistol, whose discharge brought about his death, concealed upon his person. There is nothing to show that the pistol was concealed; and, if it was concealed, there is nothing to show that the death of the deceased was due to its concealment. Now, to sustain this defense it is necessary to show that the offense of carrying a concealed weapon was being committed, and, further, that that offense brought about the death of the deceased.

Judgment affirmed.

MUSKOGEE LAND CO. v. MULLINS.

(Circuit Court of Appeals, Eighth Circuit. November 20, 1908.)

No. 2,742.

1. EVIDENCE (§ 437*)—PAROL EVIDENCE TO INVALIDATE WRITTEN INSTRUMENT— ILLEGALITY.

Parol evidence is always competent to show that a written contract, fair and lawful on its face, is in truth contrary to law, morals, or public

[Ed. Note,—For other cases, see Evidence, Cent. Dig. §§ 2027-2029; Dec. Dig. § 437.*]

2. TRIAL (§ 141*)—DIRECTION OF VERDICT.

Where there is no substantial conflict in the evidence, the disposition of the case becomes a matter of law for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. §

3. Indians (§ 16*)—Lands—Validity of Lease. Under Act June 30, 1902, c. 1323, § 17, 32 Stat. 504, which provides: "Creek citizens may rent their allotments for strictly nonmineral purposes for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes. * * * Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity" -a lease for two years of such allotted lands, purporting to be for agricultural purposes, but shown to have been in fact for grazing purposes, although not made by the allottees, but by one claiming under them, is void. and its validity may be denied by the lessee.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. §

In Error to the United States Court of Appeals in the Indian Territory.

See 104 S. W. 586.

N. B. Maxey (Charles F. Runvan, on the brief), for plaintiff in error.

Robert F. Blair, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. This was an action brought by the Muskogee Land Company against the defendant to recover rent for certain premises reserved to it by the terms of a written lease. Defendant remained in possession one year out of the term of two years created by the lease, and refused to occupy the premises or pay rent for the second year. To recover this rent was the object of this suit. The court directed a verdict for defendant. Was that error?

The defense was that the lease is void, because in violation of section 17 of the act of Congress of June 30, 1902 (32 Stat. 504, c. 1323), which is as follows:

"Creek citizens may rent their allotments for strictly nonmineral purposes for a term not to exceed one year for grazing purposes only and for a period

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Any agreement not to exceed five years for agricultural purposes. * * * or lease of any kind or character violative of this paragraph shall be absolutely void, and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its validity."

The land company held the premises under some kind of right derived from allottees of the Creek Nation, the terms and conditions of which do not clearly appear in this record. It made a lease to Mullins, on its face purporting to be for agricultural purposes; but Mullins contends that its real purpose was to enable him to make use of the demised premises, in violation of law, for grazing purposes only. The land company contends that the face of the lease expressed the truth, and that the real purpose of the parties was to create in the lessee a lawful term of two years for agricultural purposes only.

On this controlling issue of fact the writing is not conclusive. Parol evidence is always competent to show that a written contract, fair and lawful on its face, is in truth contrary to law, morals, or public policy. Lingle v. Snyder, 87 C. C. A. 529, 160 Fed. 627. We have carefully examined the evidence preserved in the record, and are irresistibly brought to the conclusion that the lease in question was a subterfuge made to circumvent the law. There is no substantial conflict in the proof. It admits of only one reasonable interpretation and conclusion. In such circumstances the disposition of the case upon the evidence became a question of law for the court. Bell v. Carter

(C. C. A.) 164 Fed. 417.

We are unable to agree with the interpretation placed on the act of Congress by the land company, to the effect that its lessors, the Creek citizens, alone could avoid the lease for illegality. The act of Congress inaugurated a public policy specially applicable to wards of the Nation, as the Indians, even after allotment, are held to be; and it is our duty to so apply the law as to subserve that policy so far as we may lawfully do so. The act in question is couched in emphatic and comprehensive language. It declares "any agreement or lease of any kind or character violative * * * shall be absolutely void." Either intentionally or unintentionally proof was not made of the terms of the contract or lease between the Creek citizens and the land company. Accordingly we are at liberty to draw inferences unfavorable to the party claiming under it and whose duty it was to make a showing of its contents. If the lease now in controversy between the land company and Mullins was not authorized by the owners of the land the Creek citizens, in their contract with the land company, it was unwarranted, and constituted a violation of the spirit of the act of Congress in question. If it was authorized by them it constituted a violation of the letter of the law and is void. No mere circumlocution can be permitted to accomplish an ulterior and unlawful purpose. The general rule invoked by the land company prohibiting a tenant from denying the title of his landlord has no application to this case. The act of Congress which alone authorized any lease of the lands of Creek citizens prohibited leasing for grazing purposes for terms in excess of one year, and by way of emphasizing and making effectual the declared public policy it in express terms took away resort to

estoppel or ratification as a protection to one seeking to evade its provisions. It enacts that:

"Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner and no rule of estoppel shall ever prevent the assertion of its invalidity."

Nothing can be plainer than that an intentional violator of the law cannot invoke the equitable principle of estoppel for the purpose of protecting him in such violation. Defendant, therefore, is not estopped from denying the validity of his landlord's title, or from asserting the invalidity of his contract as actually made with the land company.

The conclusions already stated render the consideration of the question whether the natural guardian or father of Indian children can lease their allotments unnecessary. Even if we were disposed to decide this question, the facts disclosed by the record are too

meager to permit us to do it in this case.

The trial court committed no error in directing a verdict for defendant, and the judgment of the United States Court of Appeals in the Indian Territory, affirming that of the trial court, is accordingly affirmed.

WILLARD v. CHICAGO, B. & Q. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1908.)

No. 1,426.

1. Removal of Causes (§ 111*)—Jurisdiction of Federal Court-Grounds must Appear of Record.

The jurisdiction acquired by a federal court by removal is strictly limited to the statutory grounds, and rests solely on the state of facts and controversy of record as brought from the court of original cognizance, and neither acquiescence of the parties nor the action of the state court can enlarge the statutory jurisdiction of the federal court nor divest that of the state court.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 111.*]

2. Removal of Causes (§ 29*)—Diversity of Citizenship—Joint Action.

A joint action brought in a state court of Illinois against a lessor and a lessee railroad company to recover for a personal injury incurred in the operation of the road, in which joint negligence and liability are

a lessee railroad company to recover for a personal injury incurred in the operation of the road, in which joint negligence and liability are charged, is not removable by the lessee on the ground that it is a foreign corporation and in the exclusive use and operation of the railroad and alone liable, if there is any liability, for the injury complained of, and that its codefendant, a resident corporation, was fraudulently joined, in view of the established rule in Illinois which authorized the joinder and joint recovery in such cases in the state courts.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. $\$ 69; Dec. Dig. $\$ 29.*]

3. Removal of Causes (§ 36*) — Petition for Removal — Allegation of Fraudulent Joinder.

An averment of fraudulent joinder in a petition for removal is without force unless proven.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The plaintiff in error, as administrator of the estate of Harold R. Wellman, was the plaintiff below in this action, brought in the city court of Aurora, Ill., to recover of the defendant corporations for alleged joint negligence in the operation of their railroad in Illinois, causing the death of the intestate; and the declaration filed in that court expressly charges such defendants with joint liability, in a plea of trespass on the case. Application for removal of the suit to the federal court was made on behalf of the defendant Chicago, Burlington & Quincy Railway Company, as an Iowa corporation, and its petition avers (in substance) that the controversy was "wholly between citizens of different states"; that the defendant Chicago, Burlington & Quincy Railroad Company was an Illinois corporation, owning the railroad in question prior to 1901, when it leased to the petitioner all its property and all rights "except the lessor's franchise to be a corporation"; that the petitioner has ever since operated and managed such railroad, with no possession or use thereof in the lessor defendant; and that such lessor corporation "was fraudulently and improperly joined as a party defendant in this cause for the sole purpose of defeating the right" of removal thereof to the federal court. The cause was then removed to the trial court; motion was made by the plaintiff to remand, but was subsequently withdrawn; and the plaintiff then filed additional counts to the declaration, averring in each the relation of the defendants, respectively, as lessor and lessee of the railroad, operation thereof by the lessee corporation, and negligent acts on the part of such lessee causing the injury in suit. On plea of the general issue, the trial proceeded, resulting in direction of verdict for the defendants and judgment accordingly, with this writ of error prosecuted by the plaintiff to reverse such judgment.

Coll. McNaughton, for plaintiff in error. David J. Peffers, for defendants in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). On this writ of error the fundamental question arises, whether the trial court obtained jurisdiction of the cause, as brought from the state court, on petition and order for removal to the federal court; and such inquiry cannot be set aside to examine the contentions upon the merits, in reference to the direction of a verdict in favor of each defendant, at the conclusion of the plaintiff's testimony. The case was removed under a declaration in trespass, which distinctly charges the two defendant corporations with joint negligence and joint liability, in causing the death of the intestate; and on petition of one of the defendants, as a foreign corporation, averring that it was the lessee of the other defendant (Illinois corporation) in the exclusive use and operation of the railroad and alone liable for the alleged injury, if liability arose, and that the resident corporation "was fraudulently and improperly joined as a party defendant." With no evidence of record in the state court, aside from these pleadings, we are of opinion that jurisdiction for trial of the controversy as one "wholly between citizens of different states," within the removal act of March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 507), and amendments, was not acquired by the trial court. Jurisdiction of such cases in the federal court is strictly limited to the statutory ground, and rests solely on the state of facts and controversy of record, as brought from the court of original cognizance, so that the rule is inflexible that acquiescence of the parties (M., C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462), failure to press motion to remand, or other proceedings in the federal court, after removal, are without force to enlarge the statutory authority of the federal court in causes so brought. Alabama Southern Ry. v. Thompson, 200 U. S. 206, 213, 26 Sup. Ct. 161, 50 L. Ed. 441 and cases reviewed; Offner v. Chicago & E. R. Co., 148 Fed. 201, 202, 78 C. C. A. 359.

The right of the plaintiff is indisputable to sue the defendants in the state court—averring their joint liability, if so advised—and to have adjudication upon such claim in that forum, unless due cause for removal to the federal court is there established; and such right is neither lost by an unauthorized removal, nor abandoned by the plaintiff's procedure thereafter in the federal court, through amended declaration or otherwise, to make the best of the condition thus arising. Whether removal is ordered or denied in the state court does not settle the subsequent jurisdiction, which rests on the state of facts there exhibited and not upon the ruling of the court; with federal cause for removal established by the petitioner, jurisdiction is transferred ipso facto, while failing such evidence jurisdiction remains in the state court, irrespective of any order there entered. The cause presented in the state court by the declaration was joint, expressly charging joint negligence and liability-plainly tendering no issue of several negligence, and not provable for several liability—so that the controversy was not removable on such election of plea, in the absence of unmistakable proof of bad faith in the joinder, as a fraud upon the court and parties. In reference to the averment of fraudulent joinder, contained in the petition for removal, it is sufficient to remark that no facts are stated in its support, and the mere deduction or legal conclusion of the pleader so stated, under the well-settled rules of pleading (Fogg v. Blair, 139 U. S. 118, 127, 11 Sup. Ct. 476, 35 L. Ed. 104), is without force unless proven. This averment, however, is not only unsupported by facts, but the good faith of the plaintiff, in such joinder of the lessor corporation, is fully vindicated by the conceded fact of an established rule in Illinois which authorizes joinder and joint recovery, under such circumstances, in the state forum. See Chicago & G. T. Ry. Co. v. Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75. That the general doctrine is otherwise—that joint recovery against a lessor, under the conditions stated in the petition, is denied in the federal courts, by numerous authorities cited in opposition—cannot debar the plaintiff of his right of action (and such benefit as the local rule may afford) in the state court, nor authorize removal of his suit under the federal statutes, as above construed by the ultimate tribunal.

For want of jurisdiction in the trial court, therefore, under the removal proceedings, the judgment is reversed, and the cause remanded to the Circuit Court of the United States for the Northern District of Illinois, with direction to remand the same to the city court of Aurora,

Kane county, Ill.

PIKE'S PEAK HYDRO-ELECTRIC CO. v. POWER & MINING MACHINERY CO.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1908.)
No. 2,626.

CONTRACTS (§ 163*)—CONSTRUCTION—WRITTEN AND PRINTED PROVISIONS.

In a contract to furnish and install certain machinery, made on a printed form prepared by the contractor, a provision written in that "time is of the essence of this contract" held to control a provision of the printed part that the contractor should not be liable for damages on account of delays, and to entitle the other party to maintain an action for damages resulting from the failure of the contractor to perform the contract within the time limited therein.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. $745 ; \ \mathrm{Dec.\ Dig.} \ 163.*]$

Appeal from the Circuit Court of the United States for the District of Colorado.

K. C. Schuyler (W. F. Schuyler, on the brief), for appellant. John R. Smith and John F. Shafroth, for appellee.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. The principal question in this case is whether the appellee is liable in damages for failure to perform a contract within the time limited, and it depends upon the proper construction of stipulations in the contract which are apparently contradictory. The Pike's Peak Hydro-Electric Company was about to build a plant for generating electric power near Manitou, Colo., and to make use of the waters on the east slope of Pike's Peak at a high elevation by conducting them through a precipitous pipe line several thousand feet down the mountain side to the water wheels below. It entered into negotiations with the Holthoff Machinery Company, of Wisconsin, for the delivery and installation of "a riveted hydraulic pipe line." After preliminary conferences and discussions the representatives of the two companies reached a conclusion, and a contract was made which took the form of a proposition by the machinery company and an acceptance thereof by the electric company. The proposition was prepared by the machinery company upon a printed form in general use in its business. The special provisions relating to the work to be done for the electric company, its character, the time when shipments from Wisconsin to Colorado were to begin and be concluded, the completion of the installation thereafter, the total price to be paid by the electric company, the distribution of the payments, and other particular details were inserted in typewriting in the blank spaces of the printed form. Among the written insertions was the following:

"It is agreed that the payment of 25 per cent, of contract price within 15 days after the acceptance of this proposal is made on condition that deliveries will be made as specified, and that time is of the essence of this contract."

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the body of the printed matter were these provisions:

"We assume no liability for damages on account of delays, nor will we make any allowance for repairs or alterations, unless same are made with our written consent or approval. We will furnish or repair any material which is proved within one year after starting in to have been defective at the time we furnish it, but no liability shall attach to us on account of damages or delays caused by such defective material."

Also:

"This contract is contingent upon strikes, fires, accidents, or other delays unavoidable or beyond our reasonable control."

The electric company made the first payment of 25 per cent. of the contract price as provided by the written clause above copied, but the hydraulic pipe line was not delivered and installed for more than a year after the time specified, and damages are claimed for the delay. The present appellee took the place of the machinery company in the contract and is subject to its obligations.

The different provisions of a contract are to be so construed that effect may be given to all of them, if it is possible to do so, having due regard to the subject-matter and the clear purposes of the parties; but where a contract is prepared upon a printed form, and there is a conflict between a provision in print and one in writing that cannot be harmonized or reconciled, the latter prevails over the former, as being that to which attention was more directly given, or as being expressive of the final intent of the parties. The appellee contends that the provision in writing that time was of the essence of the contract and the one in print that no liability for damages on account of delays was assumed can be reconciled, so that effect may be given to each. It says: There are two distinct remedies for the breach of a contract of which time is of the essence: First, the right of rescission; second, the right to compensatory damages. That the written provision, standing alone, would authorize the adoption of either remedy by the electric company; but that the purpose of the printed provision was to take away the right to recover damages, leaving unimpaired the right to rescind. We very much doubt that such a construction as this would ever occur to one not skilled in the niceties of the law, and we think, if such had been the intent of the contracting parties, it would not have been expressed in terms so uncertain and ambiguous. Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, is relied on by appellee. It was there held that time is of essence in the contracts of merchants, and the failure of a vendor to comply with provisions in a contract of sale fixing times for delivery authorized a vendee to repudiate the contract. But, if applicable at all, the case makes against the appellee here, because in the contract before us the times of deliveries and completion are definitely specified, and if the provision as to time being of the essence be confined to the remedy of rescission it is surplusage. See Alpena Portland Cement Co. v. Backus, 84 C. C. A. 444, 156 Fed. 944. In other words, time of delivery in contracts like that in Norrington v. Wright is regarded as of the essence, though not affirmatively expressed as being so.

The second printed provision, that the contract should be contingent upon strikes, fires, accidents, etc., casts doubt upon appellee's construction. Its evident purpose was to make an exemption from liability for delays resulting from the causes specifically enumerated. To be consistent, therefore, the contention of appellee must be as fol-Standing alone, the written clause authorized either rescission or damages for delay in performance. The first printed clause took away the right to damages, but left that of rescission; while the second printed clause took away the right of rescission for delays caused by strikes, fires, accidents, etc. This is much too refined to be adopted. Regarding the position of the parties, the objects sought by them, and the entire context of their contract, it is altogether clear that no such construction was in the mind of any one who had to do with the transaction. It is to be observed that in making its contention the appellee detaches the clause, "We assume no liability for damages on account of delays," from the remainder of the sentence, which deals with repairs and alterations, and from the remainder of the paragraph, which relates to defective materials. Giving to the provision that deliveries will be made as specified and that time is of the essence of the contract the comparative importance it is entitled to. because in writing, and also bearing in mind that the instrument to be construed is the work of the machinery company, and the rule that doubts in construction should be resolved more strongly against him who prepares the contract, we think the exemption from liability for damages may more reasonably be said to relate to delays made necessary by repairs or alterations.

The trial court, having construed the contract differently, did not consider the matter of damages caused by delay in performance; and, though the record here contains much testimony upon that subject, we refrain from examining it. The Circuit Court is primarily the trier of the facts, and in a case of this character we are entitled to the benefit of its judgment. We also refrain from considering the questions of minor or subordinate importance before the principal issues in the case have been heard and disposed of.

The judgment is reversed, and the cause is remanded for a rehearing upon the same testimony, or with such additional testimony as the trial court may allow to be taken.

UNITED STATES v. F. A. MARSILY & CO.

(Circuit Court of Appeals, First Circuit. November 17, 1908.)
No. 788 (1,923).

1. Customs Duties (§ 28*)—Products from Petroleum Originating Abroad—Following the Decisions of the Circuit Courts of Appeals in Other Circuits.

In accordance with the practice in the First Circuit, the decision of the Circuit Court of Appeals for the Second Circuit in United States v. R. F. Downing & Co., 146 Fed. 56, 76 C. C. A. 376, with reference to Tariff

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685), as applied to the products of petroleum, followed.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

2. Courts (§ 96*)—Comity—Concurrence with Courts of Like Status.

This Circuit Court of Appeals will ordinarily concur in the decisions of Circuit Courts of Appeals in other circuits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 327; Dec. Dig. § 96.*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

There was no opinion below. The Circuit Court affirmed the decision of the Board of United States General Appraisers, which had reversed the as-

sessment of duty by the collector of customs at the port of Boston.

The article in controversy (paraffin) was made in Belgium from Russian petroleum. The latter country imposes a duty on both crude petroleum and its products when imported from the United States, while Belgium imposes a duty on neither oil nor product. Under these circumstances the collector assumed that the law (set forth in the opinion herein) did not permit the importation to escape countervailing duty entirely, and accordingly proceeded to impose on the paraffin in dispute a duty equal to that imposed by Russia on paraffin exported from the United States.

William H. Garland, Asst. U. S. Atty. (Asa P. French, U. S. Atty., on the brief).

Walter F. Welch and Albert H. Washburn (Edward S. Hatch and Hatch & Clute, on the brief), for importers.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This case depends upon the construction to be given to the following portions of paragraph 626, forming a part of the free list of the Tariff Act of July 24, 1897, c. 11, § 2, Free List, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685):

"Provided, That if there be imported into the United States crude petroleum, or the products of crude petroleum produced in any country which imposes a duty on petroleum or its products exported from the United States, there shall in such cases be levied, paid, and collected a duty upon said crude petroleum or its products so imported equal to the duty imposed by such country."

The importation in this case was what is designated as "liquid paraffin," being one of the products of crude petroleum. The petroleum originated in Russia, and was shipped from Russia to Belgium, where it was advanced to the state of the importation in question. The Board of General Appraisers held that the case was governed by the decision of the Circuit Court of Appeals for the Second Circuit in United States v. Downing, 146 Fed. 56, 76 C. C. A. 376, and it was admitted that, so far as the questions before us are concerned, the essential facts are the same. The Circuit Court sustained this ruling, whereupon the United States appealed to us.

On examining the record, we find no reason why we should depart on this proceeding from the practice adopted by us, by virtue of which we ordinarily concur in the decisions of the Circuit Court of Appeals

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in other circuits, as stated by us in Gill v. Austin, 157 Fed. 234, 235, 84 C. C. A. 677, in an opinion passed down November 21, 1907.

The judgment of the Circuit Court is affirmed.

In re WHEELER.

WHEELER v. SIEGEL, COOPER & CO.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1908.)

No. 1,447.

BANKRUPTCY (§ 415*)—RIGHT OF BANKRUPT TO DISCHARGE—FINDING OF REF-EREE—REVIEW BY COURT.

Where the correctness of the finding of a referee that a bankrupt was entitled to a discharge depended entirely upon her credibility as a witness in correcting her testimony previously given, and her later testimony, which was given before him in person, was not contradicted nor impeached by any inherent defect, it was error for the court not to accept such finding.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 415.*]

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Illinois.

Robert B. Clark, for appellant.

Augustus Binswanger, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The appellant, a citizen of Illinois, went to San Francisco, residing there about eighteen months, and until the time of the great earthquake April 18th, 1906. Returning to Chicago, she filed on the 28th of July, 1906, her petition asking that she be adjudged a bankrupt. Subsequently she was adjudged a bankrupt, the proceedings going to the point of her application for discharge, whereupon objections were filed on the ground that she had not been a resident of Illinois for the greater part of six months preceding the filing of the petition—the question of fact turning on whether she actually returned to Chicago May 1st, 1906, as in part of her testimony she says she did, or April 27th, preceding, as in a later and supposedly corrected portion of her testimony she says she did. The District Court refused to grant her the discharge. If, as a matter of law, the words in the Act "the greater part of six months" mean just three months, and no less, and if as a matter of fact, she returned May 1st, the order below was right; but if as a matter of fact she returned on April 27th, the order was wrong, and should be reversed.

At the hearing in which her first testimony was taken, the appellant testified that her business was destroyed by the earthquake in San Francisco; that she left a few days afterwards, stopped off for a little while in Omaha, and arrived in Chicago on the 1st day of May. It was upon the strength of this testimony, that the court below refused her the discharge. Thereupon she moved the court to be al-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lowed to further testify, which motion having been granted, she testified that she left San Francisco on the evening of the earthquake, April 18th, 1906, arrived in Omaha the Sunday morning following, and in Chicago the Wednesday following that Sunday, which would

make April 27th the day of her arrival in Chicago.

If appellant, as a witness, is to be believed—that is to say, if she be a witness honestly wishing to tell the truth—the second testimony being a correction of the first, and not being impeached by any inherent defects, would of course be taken by the court as presumptively the truth. The whole case therefore turns upon her credibility—upon whether, all things considered, the court should have believed her when she thus professedly corrects her previous testimony. Neither upon the occasion of her giving evidence the first time, nor the second time, did she appear in person before the District Court. In both instances the testimony was taken personally by the Referee, and the finding of the Referee that he believes her corrected testimony, presumptively is based, to some extent at least, upon the impression produced on his mind by the witness personally before him.

In cases of this kind, where there is nothing in the evidence pointing one way or the other, we think it our duty to accept the findings of the branch of the court before whom the witness personally appeared, and who on that account, had superior opportunity to determine her credibility. In this case that branch of the court is the Referee, who under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), is given power, in the first instance, to find the facts; and all things considered, we think

it was error in the District Court not to accept that finding.

The order of the District Court refusing to grant the discharge is reversed, and the case remanded with instructions to enter an order granting the discharge.

AMERICAN STEEL & WIRE CO. v. KEEFE.

(Circuit Court of Appeals, Third Circuit. November 18, 1908.)

No. 2

MASTER AND SERVANT (§ 168*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—INCOMPETENT FELLOW SERVANT.

A master is not relieved from liability for an injury to a servant through the act of an incompetent fellow servant, retained with knowledge of his incompetency, because such act was directly contrary to orders given him, where it was also an act which would not have been done by a competent person, although no such order had been given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 334-351; Dec. Dig. § 168.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

David A. Reed, for plaintiff in error.

Rody P. Marshall, for defendant in error.

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

DALLAS, Circuit Judge. This writ of error has brought up the record of an action by the defendant in error against the plaintiff in error to recover damages for personal injury to the plaintiff below, caused, as alleged, by negligence of the defendant below. The negligence imputed to said defendant is that it retained in its employment as the operator of a certain crane, an incompetent person, though it knew of his incompetence, and notwithstanding its promise, upon the complaint of the plaintiff below, to remove him and put a competent man in his place. As was said in the opinion filed by the learned trial judge:

"The verdict of the jury must be taken as establishing the craneman's incompetence, that he knew the plaintiff was up in the crane rigging, and that he started the crane without directions from him."

Therefore these facts have rightly been conceded in this court; but it is contended that no recovery should have been allowed, because, as is argued, the plaintiff's injury was not due to the craneman's incompetence, but to his disobedience of an order not to start the crane while the plaintiff below was in the rigging. The distinction thus sought to be drawn cannot be made the basis of decision in this case. If the person whose act in starting the crane was the immediate cause of the accident had been a fit person to be intrusted with its control, no direction to him not to set it in motion while another person was in a position of danger could have been necessary. He did that which, had he been competent, he would not have done, though no direction whatever had been given him, and that he did it in the face of an express admonition to abstain from it but makes his incapacity more glaring. Moreover, when the plaintiff below made complaint of the way the crane was run, he said, according to the testimony of the department manager of the defendant below, that "he [the then operator] wasn't capable of running the crane, and he [the plaintiff below] was scared to go upon the crane to do any work on it when it was necessary." It was this complaint that elicited the promise that when a man could be found "that could run the crane" he would be put upon it; and in view of such evidence the jury, we think, could not, without manifest error, have been precluded from finding that the plaintiff was exposed to a risk which the defendant knew would continue to exist so long as the person then in charge of the crane continued to operate it.

The judgment is affirmed.

AMERICAN MATTRESS & CUSHION CO. v. SPRINGFIELD MATTRESS CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1908.)

No. 1.449.

PATENTS (§ 328*)—INFRINGEMENT—MATTRESS.

The Fisher patent, No. 737,916, for a mattress, held not anticipated, valid, and infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The bill in the Circuit Court was to restrain the infringement of Letters Patent No. 737,916, issued to C. A. Fisher, September 1, 1903, for certain new and useful improvements in mattress cushions and the like; the three claims of the patent sued upon being as follows:

1. A mattress or cushion comprising a layer of resilient filling material, fabric arranged on the opposite faces of said resilient layer, said resilient layer and said fabric being quilted together by stitches which confine such resilient material to the required thickness, layers of filling arranged on the opposite faces of the quilted layer, and stitches securing said last-named layers to the quilted layer of filling and fabric, substantially as described.

2. A mattress or cushion comprising a ticking, a centrally-arranged filling, layers of filling arranged above and below the said centrally-arranged filling, sheets of fabric arranged between each of the said layers of filling and having their edges arranged adjacent the upper and lower edges respectively of the ticking, and stitches passing through the upper and lower sides of the said ticking, layers of filling, intermediate layers of fabric and sides of the ticking at an angle thereto, substantially, as and for the purpose specified.

3. A mattress comprising a thick, resilient layer of cotton-batting arranged between sheets of fabric, said sheets of fabric and said cotton-batting being quilted together by stitches which confine said layer of cotton-batting to the required thickness, a thin layer of cotton-batting arranged upon the upper and lower faces of said quilted layer, and sewed directly thereto, substantially as described.

The process described in the patent is as follows:

In my improved process of making mattresses I take the mass of filling material, B-such, for instance, as layers of so-called "elastic felt"-and lay under and over such mass or pile of material a sheet of suitable fabric, such as cotton cloth, each such sheet being of substantially the size of the upper and lower surfaces of the completed mattress. By any suitable means I then compress the material, B, between these sheets of cloth, C, and then with a suitable power sewing-machine I sew the layers of material, B, together between the sheets of cloth, C, by transverse lines of stitching, c. As this stitching is completely covered in the completed mattress, there is no necessity for any particular accuracy or skill in running such stitches or in spacing the lines of stitching apart. When this stitching has been completed, the mass of filling material is confined by the stitches and between the sheets of cloth, C, to a thickness somewhat less than is desired for the completed mattress. I now lay upon the opposite faces of the stitched filling a layer, D, of suitable fabric, such as elastic felt or the like, each such layer being substantially the same in length and breadth as is desired for the finished mattress. This completes the filling for my improved mattress, as shown in Fig. 7. I now insert the stitched filling, with the superposed layers, D, into the ticking or cover it with a ticking in any other convenient manner and then secure the ticking and the filling to each other by lines of stitching, E, around the ticking and near the edges thereof. This stitching may be most effectively done by passing it diagonally through the ticking and filling on sides parallel with the edges of the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mattresses and a short distance back therefrom, such stitching passing diagonally from the upper and lower surfaces of the mattress through the ticking and filling and out again through the sides of the mattress, as best shown in Figs. 8 and 9. It will be observed that a mattress so made can be made to exactly fill a ticking of any size or dimension, that the resilient material is more securely confined than in the old way, that no skilled tufting-work is required, and that the mattress so made has absolutely smooth surfaces. Of course it is not absolutely essential, although in my judgment it is much better to complete the mattress by sewing the ticking to the filling, and, on the other hand, the finishing layers, D, might be sewed directly into the ticking and not be sewed to the filling, B. Such modifications do not constitute a departure from the spirit of my invention, but are contemplated thereby.

The bill was dismissed for want of equity; the Circuit Court, in its opinion, holding that the patent was invalid. The further facts are stated in the

opinion.

Otto R. Barnett and Percival H. Truman, for appellant. George L. Wilkinson, for appellees.

Before GROSSCUP and BAKER, Circuit Judges, and LANDIS, District Judge.

GROSSCUP, Circuit Judge (after stating the facts as above). The mattress described in the patent is made up of a series of layers of cotton, wool or other elastic fabric; the inner layer being compressed by means of stitches running clear through it, and the outer layers being held to the inner layer by means of stitches on the side. The effect of this arrangement is to give a smooth surface; to avoid the necessity of expensive covering to that part through which the stitches run; and to make a mattress that will neither expand nor curl up when put on the bed. And it seems to have been commercially a success.

The principal anticipating device—the Chaney patent—is one in which the internal mattress was put in a bag and then inserted inside of another bag—a bag within a bag. Now though the Chaney patent calls for a mattress having a tufted inner filling, and removable outside layers, it is essentially different from the conception of the Fisher mattress, because in the latter, the only bag or envelope is the final sheeting—a conception clearly set forth in the description, and embodied, we think, in the claims sued upon, when the claims are read in connection with the description; and it is exactly because of this difference, that the Fisher mattress meets its purpose of always remaining smooth, and never curling up, and thereby has become a superior mattress. The Circuit Court, we think, erred in holding that the Fisher mattress was anticipated.

It is urged upon us that inasmuch as the bill of complaint was brought in a district in which the defendants are not inhabitants, the burden of proof was upon the complainant to show a complete act of infringement in such district—otherwise the Circuit Court for that district would be without jurisdiction to hear the cause; and the case of Gray v. Grinberg et al., 159 Fed. 138, 86 C. C. A. 328, along with other cases, is cited. The usual rule is that whether a defendant shall be required to defend in a court other than the Circuit Cofor the district of which he is an inhabitant is a question of privilege that he may insist upon or waive, at pleasure. Gray v. Grinberg is

not opposed to this rule. The question in that case was, whether as a matter of procedure, the defendant had waived that privilege—whether by the bill alleging that infringing acts had been committed within the district, an issue of fact involving the question of privilege was not thereby tendered—an averment of fact that the defendant, wishing not to waive, but to exercise his privilege, had not the right to traverse by answer.

We need not enter, however, into this question of procedure, for the proof before us satisfies us—all the circumstances being taken into consideration—that acts of infringement were actually committed within the district where the suit was brought, and before the

suit was brought.

The decree of the Circuit Court is reversed, and the case remanded with instructions to proceed further in accordance with this opinion.

CLIFFORD v. CAPELL.

(Circuit Court of Appeals, Third Circuit. November 10, 1908.)

No. 8.

PATENTS (§ 218*)-LICENSES-LIABILITY FOR ROYALTIES.

In an action by a patentee on a license contract to recover royalties, the plaintiff is entitled to recover royalties on articles made and sold by defendant, shown to be substantially those of the patent, although not purporting to have been made thereunder, and claimed by defendant not to be covered thereby.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 330-334; Dec. Dig. § 218.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Paul H. Gaither, and Charles E. Whitten, for plaintiff in error. John O. Petty and R. B. Petty, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and ARCH-BALD, District Judge.

BUFFINGTON, Circuit Judge. In the court below George M. Capell, the patentee of a device for ventilating coal mines, brought suit against William Clifford to recover the amount alleged to be due upon a written agreement whereby Clifford covenanted to make and sell fans of the patented device, keep accounts of the fans sold, and pay for each such fan a stipulated sum. Clifford was to have the exclusive agency to sell such fans, and was not to "sell, deal in, make, or cause to be made, or be otherwise financially or professionally interested in, any ventilator or fan used for any purpose to which the Capell fan may be applied." By the contract Clifford also agreed to "keep or cause to be kept by himself and sublicensees regular accounts of all sales of fans in proper books at his own place of business, such accounts to contain full particulars, with names and addresses of buyers,"

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—13

etc. He kept such book, and the verdict in this case covered no fan which was not so entered in his royalty book. Substantially all of the tans, hereafter styled "Clifford fans," and which constituted \$4,291 of the verdict of \$10,548.74, were entered in the royalty book and were furnished on contracts which called for Capell fans. When asked on the trial why he had entered these Clifford fans in the Capell royalty book, Clifford replied: "I supposed I would have to pay royalty on them." A verdict in double form was taken, the general verdict being "that the defendant is indebted to the plaintiff for royalties as claimed from June 9, 1905, to March 30, 1907, and \$380, making a total of \$10,548.74, without interest, subject to the opinion of the court as to some of the fans being Clifford fans," and attached to such verdict was a finding agreed on by counsel, viz.:

"We find that the defendant is indebted to the plaintiff on account of royalties as follows: Royalties from June 9, 1905, to March 30, 1907, with interest to this date, \$10,548.74, of which amount \$4,291 is for royalties on fans designated by the defendant Clifford fans. * * * The amounts of royalties on said Clifford fans to be deducted from the said sum of \$10,548.74, if the court be of opinion that the defendant is not liable in this action under the contract on fans other than fans admitted to be Capell fans."

Subsequently the defendant's counsel moved the court:

"That the said sum of \$4,291 be deducted from the verdict of \$10,548.74, found by the jury in accordance with the special construction of the said contract, so that the verdic shall be for the sum of \$6,257.74; that being the amount of royalty upon fans manufactured under the Capell patent."

Exactly what the question raised by the verdict was is uncertain. The plaintiff's counsel contends that it simply raises a question of pleading, to wit:

"Can the plaintiff in any event recover in this action for fans not admitted to be Capell fans?"

On the other hand, defendant's counsel say:

"In order to avoid confusion in the minds of the jurors, counsel for plaintiff agreed that it might be conceded that the fans denominated 'Clifford fans' were not made after the devices shown in the Capell patent, and based his right of recovery, as to the royalty on Clifford fans, upon the legal proposition that all fans manufactured by Clifford were liable for the 10 per cent. royalty provided in the contract."

The charge of the court and evidence are not printed, and we have no light as to the character of the proofs on that subject and how the questions of fact were submitted to the jury; but the court, in its opinion disposing of the motion, states that:

"The testimony shows very clearly that it [the Clifford fan] is in all particulars identical with the Capell fan. The witnesses experienced some difficulty in their attempts to show the differences, and what they do state are apparently quite small and of no substantial effect or importance."

Moreover, the trial judge stated the reserved question was "whether the court be of opinion that the defendant is or is not liable in this action under the contract for royalties or fans other than those admitted to be Capell fans," and held "that plaintiff is not limited in this action under the contract" to a recovery of royalties on "fans admitted to be Capell fans," but can recover royalties also on fans shown to be Capell fans, by whatever name they may be called, and without defendant's admission to that effect." The refusal of the court to reduce the verdict and the entry of judgment for the full amount found is here assigned for error.

After careful consideration, we have found no ground on which to convict the court below of error. The uncertainty of exactly what question was reserved, the absence of ascertained, definite facts on which to warrant a reduction of the verdict, leaves the case void of such data as an appellate court, asked to review the case, should properly have before it. If the verdict means that these fans were substantially like these mentioned in the agreement, clearly the plaintiff was entitled to recover for them in this action. Felix v. Scharnweber, 125 U. S. 58, 8 Sup. Ct. 759, 31 L. Ed. 687; St. Paul Plow Works v. Starling, 127 U. S. 376, 8 Sup. Ct. 1327, 32 L. Ed. 251. The mere fact that defendant alleged they were Clifford fans, and claimed they were not covered by the agreement, would not remit the plaintiff to another suit to determine that question. The contention of the plaintiff's counsel is that there was no dispute in that regard. The opinion of the court confirms that view, and in the absence of the testimony and the charge of the court we are not warranted in accepting the contention of the defendant's counsel that this substantial question of fact, namely, whether the fans were substantially Capell fans, was wholly eliminated from the case. If such was the intention of the parties, the verdict did not make it so clear that this court would have something beyond mere surmise and conjecture in that regard on which to ground a reversal of the lower court's action. Presumably the judge who tried the case, who was familiar with the testimony and heard the arguments of the counsel, was in a position to construe this agreement in accord with what both counsel intended and acted on in the trial of the cause.

In the absence, therefore, of any error being shown us in the action of the trial court in afterwards discharging the rule to reduce the verdict, the judgment is affirmed.

CARNEGIE STEEL CO. v. COLORADO FUEL & IRON CO. (Circuit Court of Appeals, Eighth Circuit. November 11, 1908.)

No. 2,632.

1. Patents (§ 283*)—Suit for Infringement—Equity Jurisdiction.

A bill for an injunction and damages for infringement of a patent having at the time of filing the bill a little less than three months to run, which prays for a preliminary injunction and contains allegations entiting complainant to the same, confers jurisdiction on a court of equity to award an accounting for damages and profits, although no motion for a preliminary injunction was in fact made, and the patent expired before the time the defendant was required to plead.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 283.* Jurisdiction of federal courts in suits relating to patents, see note to Bailey v. Mosher, 11 C. C. A. 313.]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. Equity (§ 3*)—Exercise of Jurisdiction—Discretion of Court.

Where a bill rightfully invokes the equity jurisdiction of the court, it is not within the discretion of the court to refuse to entertain it because of conditions which came into existence after the bill was filed.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 3.*]

Appeal from the Circuit Court of the United States for the District of Colorado.

Mark Breeden, Jr. (Thomas W. Bakewell and Charles MacVeagh, on the brief), for appellant.

Fred Herrington (David C. Beaman and Cass E. Herrington, on the brief), for appellee.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge. This was a bill brought by the Carnegie Steel Company against the Colorado Fuel & Iron Company for an injunction and account, claimed to be the appropriate remedy for the infringement of a patent. The bill was filed in the court below on March 12, 1906. It made a showing that the patent would expire by its own limitation on June 3, 1906; that the public generally had recognized and acquiesced in the validity of the patent, and that its validity had been sustained by the judgment of a court of concurrent jurisdiction in a contested action on its merits; that such judgment had been affirmed by the Supreme Court of the United States, and that the defendant was infringing the claims of the patent. The prayer of the bill was for a preliminary and permanent injunction and for the assessment of complainant's damages, including the profits earned by the defendant in the course of its infringing operations. The complainant filed no special motion for a preliminary injunction, and none was granted. On June 4th, the rule day when defendant was first required to plead to the bill, the patent then having expired, a demurrer was filed, challenging the jurisdiction of the court in equity to grant the only relief then available to complainant, namely, a decree for an account of profits and damages. This demurrer was sustained by the court below, the bill was dismissed, and complainant brings the case here by appeal for re-examination.

It appears that in the usual course of practice the complainant, if otherwise entitled to a preliminary injunction, might have secured it before the patent expired. In view of the foregoing facts, the decisive question is whether the Circuit Court acquired jurisdiction to proceed with the case and grant complete relief by way of an accounting for profits and damages, notwithstanding the fact that no preliminary injunction had been actually granted, and no injunction, preliminary or permanent, could have been granted after June 4, 1906, when the patent expired, and when defendant was first called upon to make its defense. It is well settled that the award of an account for profits and damages is usually incidental to some main equity which gives the patentee his standing in court, like the right to an injunction to restrain continuance of infringement, or some other right distinctly equitable in its nature, and therefore that equity will not entertain a bill for a

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

naked account of profits and damages against an infringement. Root v. Railway Co., 105 U. S. 189, 215, 26 L. Ed. 975; Deere & Weber Co. v. Dowagiac Mfg. Co., 82 C. C. A. 351, 153 Fed. 177. If, therefore, the present suit, which presents no other main equity than for injunctive relief against an infringement, had been instituted after the expiration of the patent, the Circuit Court would have had no jurisdicton in equity to take an account; and defendant contends that because, in the due course of procedure, the patent having then expired, no injunctive relief could have been granted at the final hearing, and because no motion was made for a preliminary injunction, and none was actually granted before the expiration of the patent, this suit became one in fact for an account of profits and damages only, and falls within the principles announced in the foregoing cases, denying equitable jurisdiction for such purposes.

We are unable to adopt that view. When this suit was instituted the patent had nearly three months to run, and, as observed by Mr. Justice Brewer, then Circuit Judge, in Westinghouse Air Brake Co. v.

Carpenter, 32 Fed. 484:

"It may be and oftentimes is true that the last years or months of a patent are most valuable to a patentee by reason of the fact that the wide-spread information in respect to its value and general introduction into use has created the largest demand for it."

In the present case the right to a preliminary injunction according to the course and principles of equity was made to clearly appear by the bill. There had been a conclusive and final adjudication of complainant's title to the patent and of its validity by the Supreme Court of the United States after a lengthy and spirited contest on the merits of the case (Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 28 Sup. Ct. 698, 46 L. Ed. 968), and there was a clear and unequivocal charge of infringement. In such cases a preliminary injunction, on the motion of complainants, and in the absence of new evidence of a controlling character, is granted quite as a matter of course. Electric Mfg. Co. v. Edison Electric Light Co., 10 C. C. A. 106, 61 Fed. 834; New York Filter Mfg. Co. v. Jackson (C. C.) 91 Fed. 422. We may therefore confidently conclude that the case made by the bill well warranted the grant of a preliminary injunction, and that one probably would have been granted, had a motion to that effect been made.

The suit was then one of equitable jurisdiction when instituted, and under the rules and practice in equity there can be no doubt there was ample time to award a preliminary injunction before the patent expired. These facts, we think, conferred jurisdiction for all purposes, not only for the preliminary injunctive relief, but also for the incidental accounting. Defendant's counsel place special reliance upon the cases of Root v. Railway Company, 105 U. S. 189, 26 L. Ed. 975, and Keyes v. Eureka Mining Co., 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929. The former is a leading case establishing the rule that a bill filed after the patent expires cannot be maintained for an account of profits and damages only, and affords no authority against the maintenance of the present bill founded upon different facts. The latter was a case for the infringement of a patent about to expire, in which the equities of complainants did not entitle them to any relief, but in which some

expressions are found which give color to defendant's present contention. These, when viewed in the light of the peculiar facts of that case, bring it into full accord with the principles laid down in Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392, Beedle v. Bennett, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074, and Busch v. Jones, 184 U. S. 598, 22 Sup. Ct. 511, 46 L. Ed. 707, which we think are decisive of the present case.

In Clark v. Wooster, which was a suit to restrain infringement and recover profits and damages, it was claimed that the court below had no jurisdiction because complainant had a plain and adequate rem-

edy at law. The court said:

"As to the first point, the bill does not show any special ground for equitable relief, except the prayer for an injunction. To this the complainant was entitled, even for the short time the patent had to run, unless the court had deemed it improper to grant it. If, by the course of the court, no injunction could have been obtained in that time, the bill could very properly have been dismissed, and ought to have been. But by the rules of the court in which the suit was brought only four days' notice of application for an injunction was required. Whether one was applied for does not appear. But the court had jurisdiction of the case, and could retain the bill if, in its discretion, it saw fit to do so, which it did. It might have dismissed the bill if it had deemed it inexpedient to grant an injunction; but that was a matter in its own sound discretion, and with that discretion it is not our province to interfere, unless it was exercised in a manner clearly illegal. * * *

If the case was one for equitable relief when the suit was instituted, the mere fact that the ground for such relief expired by the expiration of the patent would not take away the jurisdiction and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort."

In Beedle v. Bennett, a bill to restrain the infringement of letters patent which had but a short time to run, the court said:

"As the patent was in force at the time the bill was filed, and the complainants were entitled to a preliminary injunction at that time, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time before final decree. There is nothing in the case of Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975, to sustain the objection made by the appellant on this account."

To this declaration the court cites Clark v. Wooster.

In Busch v. Jones, likewise a bill to restrain infringement of a patent about to expire by lapse of time, a question of jurisdiction was raised. It was contended that the complainant had an adequate remedy at law, because at the time of hearing it appeared that the only patent before the court had expired, and that no motion for a preliminary injunction had been made prior to the expiration of the patent. The court there said:

"This seeks to determine the jurisdiction of the court by conditions which came into existence after the commencement of the suit, not upon those which existed at the time the bill was filed. * * * What the contract provided was an issue to be made in the case, and pending its decision the preliminary relief by injunction could have been granted. Appellees' contention as to the jurisdiction is, therefore, not justified, and a discussion of the reasons for this conclusion is not necessary. They are expressed in Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392, and Beedle v. Bennett, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074."

Here the Supreme Court placed an interpretation upon its former opinions, and declared the rule to be that jurisdiction in equity in

cases like this depends on conditions as they existed at the time the bill was filed, not on conditions which may come into existence after the commencement of the suit. The same interpretation was given to the decisions of the Supreme Court by the Court of Appeals for the Seventh Circuit in Ross v. Fort Wayne, 11 C. C. A. 288, 63 Fed. 466; by the Court of Appeals for the Third Circuit, in Chinnock v. Paterson P. & S. Tel. Co., 50 C. C. A. 384, 112 Fed. 531; and by the court of Appeals for the Sixth Circuit in United States Mitis Co. v. Detroit Steel & Spring Co., 59 C. C. A. 589, 122 Fed. 863.

Some observations found in Clark v. Wooster concerning the discretion lodged in the trial court in awarding or denying preliminary injunctions are doubtless responsible for the suggestion that, because the trial court refused to entertain jurisdiction of the present case, its discretion was thereby exercised and became and is conclusive. We think this suggestion involves a confusion of the discretion which may be exercised in the matter of awarding preliminary injunctions, which appears to be the subject of the observations by the court in Clark v. Wooster, with the judgment under law which must be exercised in determining a question of judisdiction. The right to exercise discretion presupposes jurisdiction over the case, and the exercise of discretion is the exercise of jurisdiction. The present case does not, in our opinion, depend upon discretion. As no application for a preliminary injunction was presented to the Circuit Court, no discretion was invoked. Our conclusion is that, because this suit was for equitable relief when instituted, the jurisdiction rightfully invoked for the purpose, among others, of securing a preliminary injunction, was not defeated by the subsequent expiration of the patent by lapse of

The decree below is reversed, with directions to overrule the demurrer to the bill and proceed in harmony with this opinion.

DONNER v. AMERICAN SHEET & TIN PLATE CO.

(Circuit Court of Appeals, Third Circuit. November 20, 1908.)

No. 31.

PATENTS (§ 328*)-INVENTION-METHOD OF ROLLING BLACK-PLATE.

The Donner patent No. 620,541, for a method and mechanism for rolling black-plate by means of sets of rolls arranged in a continuous train, discloses nothing new of utility in the art, it having been proved in practice that in continuous rolling the plates in the stack stick together and produce scrap to such a degree as to make such rolling commercially unsuccessful, and no means of preventing such result being shown in the patent. Claim 4 is also void for lack of novelty.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

James K. Bakewell, Charles Neave, and Charles MacVeagh, for appellant.

Kay, Totten & Winter, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

BUFFINGTON, Circuit Judge. In the court below, Percy E. Donner, assignee of patent No. 620,541, granted February 28, 1899, to W. H. Donner, for rolling black-plate, filed a bill, charging infringement, against the American Sheet & Tin Plate Company. In an opinion reported at 160 Fed. 971, that court held the fourth claim thereof valid and infringed. From a decree in pursuance thereof, the latter company appealed to this court.

This patent concerns sheet-rolling mills. In such mills the general and almost universal practice both prior to this patent and since

was and is as recited in the patent, as follows:

"To feed the bars through a set of two-high rolls and then return them over their tops for the next pass, the screws of the rolls being successively adjusted to bring the rolls closer together for each pass. This operation is continued until the iron is too cold to roll, when the packs are returned to the furnace, and being reheated are then given a second series of reductions until they are rolled sufficiently long for doubling, when they are doubled and returned to the furnace, these operations being continued until the desired gauge is obtained."

The succeeding stages of the operation need not be detailed. The object the patentee had in view is stated in the specification as follows:

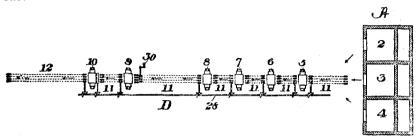
"The object of my invention is to provide a plant and method of working the metal whereby the time and labor consumed in passing the metal back over the rolls is obviated, and the iron reduced more rapidly and without changing the adjustments of the rolls, * * * and to obtain a continuous plant wherein the various sets of rolls are maintained at substantially the same temperature by reason of the metal passing there—through in a continuous or regular manner, thus giving more accurate sheets and reducing the liability of breaking the rolls."

It should here be stated that after the sheets are reduced in gauge by rolling back and forth four times, which is the customary number of initial passes, they are laid one upon the other to form packs. This process is called "matching," and is an intermediate operation in sheetrolling. The entire operation of sheet-rolling, including the preliminary rolling of individual sheets and the subsequent rolling of packs, Donner sought to accomplish by a continuous mill, which is one where the entire process of rolling goes forward continuously and without subjecting the sheets to any return over the rolls so that they may repass through them. Complainant's expert tersely defines a continuous mill as a "plant wherein a separate set of reducing rolls is employed for each reduction." By this process it will be seen there is no adjustment of the rolls for the several passages as in the old process, but a single adjustment takes place for the single passage, which alone is made through each stand of rolls. The advantages incident to a use of a continuous mill the patentee thus enumerated:

"The advantages of my invention will be apparent to those skilled in the art, since the labor and time of reducing the metal are greatly decreased, a greater number of reductions can be given before reheating the pack, and the number of workmen is materially reduced. Since I use one pair of rolls for each reduction instead of making several reductions on one mill, the reductions are more uniform and accurate than where the adjustments are being continually changed. The adjustments of the tensions of the rolls which regulate these reductions are made easy for an unskilled workman, whereas the ad-

justment by the ordinary method heretofore used requires the close attention of a skilled roller. The packs being fed to the rolls in a continuous and regular manner, the rolls are kept at a substantially uniform temperature, and hence at about the same contour or shape, giving more accurate sheets than formerly and avoiding breakage of the rolls by reason of contracting and expanding thereof."

The patentee's particular form of mill, shown in the accompanying cut:



—consisted, in so far as is now pertinent to note, of four sets of two-high rolls set tandem with feed tables or conveyors between each set. At a sufficient distance from the last of the four sets, to allow matching of the sheets, which individually had had the four customary passes, two additional sets of two-high rolls were set tandem. The process up to and including the operation of the last two sets of rolls is thus described:

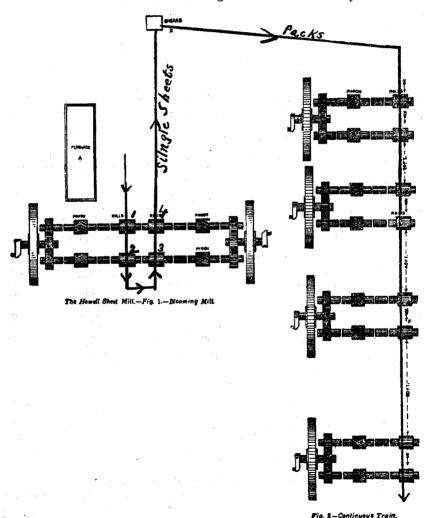
"In the drawings, A represents a heating furnace having chambers 2. 3. and 4, in which the bars are heated. This furnace may be provided with one or as many chambers as desired. When the bars are brought to the proper heat in this furnace, they are taken to a continuous mill D, consisting of several sets of two-high rolls, of which I have shown six sets, arranged in tandem. numbered, respectively, 5, 6, 7, 8, 9 and 10, each set of rolls being provided with a feed-table or conveyor, 11, which is shown as consisting of a series of sprocket-chains passing over positively-driven sprocket-wheels at their ends, though other forms of positively-driven feed-tables may be employed, if desired. I have shown the sprocket-wheels at one end of the feed-table chains as mounted upon a shaft having bevel-gear connections with a shaft, 28, extending alongside the continuous mill, though these chains may be driven by any other desired mechanism. The metal being placed upon the first feed-table passes through the set of rolls 5, and being reduced therein emerges upon the second feed-table, which carries it to the rolls 6, in which it receives a further reduction, and thence passes on in a similar manner through the sets of rolls 7 and 8. The next set of rolls, 9, is spaced a sufficient distance from the set 8 so that the plates may be matched at this point, if desired, the feed-table between rolls 8 and 9 being correspondingly lengthened for this purpose. To stop the plates upon the table between the rolls 8 and 9, I show tilting fingers, 29, arranged between the chains near the end of this table and arranged to be swung into upper position to stop the metal or into lowered inoperative position by a lever, 30. From roll 9 the metal passes through set 10, and on emerging from this set of rolls the metal, which has now been reduced to a suitable gauge for doubling, emerges upon a feed-table, 12."

Upon this device claim 4, which reads as follows:

"In a plant for rolling black-plate, a continuous train in which two of the sets of rolls are sufficiently removed from each other to allow the bars or sheets to be matched between said sets of rolls, substantially as described"—

was granted.

The proofs in this case satisfy us of the great advantages and desirability of the continuous rolling of sheets, but they equally satisfy us that this patentee neither disclosed anything novel in his patent, or showed successful means of continuous sheet-rolling. The continuous mill of Howell, described and illustrated in the "Iron Age" on August 13, 1891, embodied a device containing all the elements of Donner's fourth claim. In this publication was a horizontal section which showed four sets of two-high rolls, which Howell called a blooming mill. Two of these sets were each mounted in separate, parallel, reverse tandem form as shown in the accompanying cut, to which we have added a line showing the course traveled by the sheets:



The published description of Howell's process is as follows:

"With the object of eliminating the item of cost by skilled labor, Mr. Howell proposed a continuous train with its blooming mill, which would be in charge of one skilled man, the other help needed being common labor. In the blooming mill, Fig. 1, the slab or ingot is taken from the furnace 'A,' and is passed through the first set of rolls, as indicated by the arrow, and is put back through a second set, receiving two reductions for each movement until reduced to 1/8 inch thickness. It then goes to the shears 'E,' is cut and packed, and at the same heat is taken to the continuous train, Fig. 2. on a buggie. The passage through the continuous train is indicated by arrows. The train is built in detachment, so as to have control of the speed of the several groups, the strip to leave one set of rolls at about the time it enters the next in order to avoid the complications often incident to continuous mills. system of rolls is in one plane and there is no lifting of the piece, and only the lateral movement of it from the first to the second set of rolls of the blooming train. The blooming and continuous trains are placed in close proximity. The six engines required from this method would not be costly, since the train may be made to run at one-half or one-third of the speed of the engine. The trouble in gearing a continuous train from one engine has been that the speed of each pair of rolls cannot be changed at will to accommodate the stretch of the piece. By having the rolls detached in groups the engines may be speeded to suit the elongation of the strip. With this train strips of suitable widths for making cans may be rolled in long lengths and coiled, instead of boxing While the cost of skilled labor alone on a tin sheet mill by present methods is \$12 for No. 30 W. G., Mr. Howell estimates the cost of this method at not more than \$2."

From this it will be seen that roll No. 1 is a two-high stand through which the sheet passes once, goes forward to rolls No. 2, and passes once. From No. 2 stand the sheet is passed laterally to stand No. 3, through which the sheet passes once and goes forward to rolls No. 4, which it passes once. This is the forward process characteristic of a continuous mill. There is no return or passing of the sheet a second time through the same stand of rolls, and consequently no readjustment of the rolls to make a thinner gauge. This is not only clear from the diagram, but as the article says:

"The entire system of rolls is in one plane and there is no lifting of the piece, and only the lateral movement of it from the first to the second set of rolls of the blooming train."

After receiving the customary four passes, the sheet is reduced to a size suitable for matching, and Howell's plan showed space where such matching could be done before the metal passed in pack form through the other rolls of his continuous mill. From this it will be seen that each element of Donner's fourth claim was present in Howell's device, viz., a continuous mill, two sets of rolls, sufficient space between the sets to permit matching. Howell's device, if used after Donner's patent, would clearly infringe the fourth claim, and, being earlier, it as clearly anticipates. Moreover, as stated above, the proofs satisfy us the patent in suit disclosed no practical method by which sheets could be successfully rolled in a continuous mill. It is true the specification claimed sundry advantages would result from the use of a continuous mill, but the patentee disclosed no means by which those results could be secured, and the use of continuous mills has shown such predicted results did not follow. The proof is that in continuous rolling the packs stick and produce scrap to such a degree as to make such rolling commercially unsuccessful. Cronemeyer, a sheet manufacturer of great experience, says:

"We always knew that packs of sheets could be rolled in a continuous mill; but the question was not whether we could roll it, but whether we could bring out the product economically. * * * The trouble with us always was to get out a product that wouldn't stick. We have had the theory in that respect all right for a long time, but in practice it won't work out. * * * It is the continuous rolling of the pack without creating too much scrap that has been the question which, so far as I know, no one yet solved to-day."

Indeed, this is proved by complainant himself, who, in speaking of a mill of respondent's alleged to use the patented process, says:

"The scrap in the Monongahela continuous mill is very much in excess of that in the practice of the old-fashioned single-stand mills. * * * The difficulty of roll contour had to be contended with, and, as it has taken more or less experimenting to determine just how the rolls of a continuous mill should be turned, there was much scrap produced through what you might say were destroyed packs. I have seen numerous packs stick together so tight that they could not be opened and had to be sheared up as scrap."

Of the difficulties attending the use of a continuous mill, Cronemeyer says:

"We took packs of sheets and rolled them on the stands of rolls, which we had standing side by side, moving them from the first pair, second pair, third pair, and so on, and giving them a pass through the different sets of rolls. Then we brought out the finished pack and tried to open it; that is, tried to separate the sheets. We found that nearly all of them were so tightly stuck together, or nearly welded together, that we could not separate them. This circumstance, we found, was due to the fact that the rolls in the different stands had a different contour, and that pressure was exerted on the sheets in the various places of the sheets; and also to the fact that we did not separate the sheets during the process of rolling, which is customary to do when we roll on the single-stand mill, but which we knew could not be done if we would roll on a continuous mill. * * * The effect would be an excessive amount of scrap and defective sheets; and the process would not be economical; that is, the advantages gained by the greater product which a continuous mill can put out would be largely offset by the amount of scrap."

This roll contour difficulty, at present apparently a fundamental obstacle to successful continuous rolling, Cronemeyer thus explained:

"The surface of the rolls, also, we may try to get them exactly, will always vary more or less nevertheless, because the hot metal coming in contact with different rolls or with the different metal in those sets of rolls will cause different effects. In that way the one roll may have a slightly elevated portion which does not exist in the next roll in the same place, and wherever these elevations exist the sheets will be pressed harder than in other places. The friction, and consequently the heat, is hotter in these places, and consequently the sheets will stick in the spots that have come in contact with such elevation in the second or third roll, while if they pass through the same roll the pressure on that same line of the sheet will always remain the same; but all of this is only a theory of mine, which I could not positively prove; but the fact remains that sheets rolled in the manner described will stick closer together than in the ordinary way."

So, also, a very clear statement of the roll contour difficulty is given by Julian Kennedy, one of the foremost and most reliable of mill engineers in the profession, who says:

"Prof. Langley, in his answer to Q. 9, points out some of the difficulties in rolling tin plate, the most important one being the difficulties incident to main-

taining the rolls at a proper heat so as to preserve their cylindrical form. He speaks of the rolls being turned up slightly concave so that when in regular work the center of the roll will become somewhat warmer than the ends, the roll will acquire as nearly as possible a truly cylindrical form, and claims in general that by using tandem mills the rolls can be kept in a more uniform condition than where the rolling is done on a single stand of rolls. Unfortunately, in practice this does not work out, for the simple reason that in the use of a single stand of rolls it is possible for a certain error in contour to exist without doing very much harm, whereas if the pack as it nears finishing has one pass through a pair of rolls which is either too hollow or too convex, and the next pass through a perfect pair of rolls, very much heavier pressures will be set up in this latter pass either on the edges or the center of the pack, as the case may be, than would be the case if the pack was sent a second time through the first pair of rolls. In other words, if a pair of rolls be, for example, slightly too much convex and a pack be put through these rolls several times in succession, screwing down on the roll each time, there will be manifestly much less tendency to extreme local pressure than there would be where one pass of the pack is through such convex rolls and the next pass through a truly cylindrical pair of rolls. If we take the case of one pair of rolls convex and the next succeeding pair of rolls concave, this bad action is very much intensified; so that with a given error the contour of one set of rolls and an opposite error in the succeeding one-that is, one convex and one concave—the abnormal pressure developed in certain parts of the pack and the tendency toward sticking and buckling incident thereto will be much greater than in the case where a single pair of rolls is used, even if the error in their contour were two or three times as great as in the case of the tandem rolls. Again, he states that with a single pair of rolls it is necessary for the roller to watch carefully and so manipulate the rolls as to keep their contour as nearly correct as possible, which in some cases involves allowing the rolls to cool slightly by slowing the operation of the mill. In the case of tandem rolls, it often happens that one set of rolls should be cooled a little in order to correct its contour, while the succeeding set of rolls should be warmed up a little, or vice versa. For this reason, while sheet-mill men have never doubted that it would be possible to roll packs on different sets of rolls in succession, they have been doubtful as to whether the well-known advantages of increase in output and lightening of manual labor would compensate for the increased amount of scrap and wasters produced by giving each pass in the reduction of a pack in an independent set of rolls; and my observation and all the information that I can gather tells me that up to the present all experimenting which has been done in this direction has not overcome this trouble to the extent of saving more cost due to the more rapid work and less labor as it lost owing to increased sticking and buckling of the plate."

Kennedy sums up his conclusions by saying:

"It is my understanding that they have not as yet been able to show any commercial advantage in the use of these mills over that obtained by the use of the older style of mills, where the pack rolling is done by a single stand."

Moreover, it is to be noted that the patentee in his specification as heretofore quoted claimed that proper roll contour was secured by the uniform temperature incident to the use of a continuous mill. In that respect his specification says:

"The packs being fed to the rolls in a continuous and regular manner, the rolls are kept at a substantially uniform temperature, and hence at about the same contour or shape, giving more accurate sheets than formerly, and avoiding breakage of the rolls by reason of contracting and expanding thereof."

But this statement disclosed nothing new, for in his prior patent, No. 615,535, Donner had made substantially the same statement. There, speaking with reference to irregular temperature and roll con-

tour and of the effect of rolling the packs in a continuous mill, he said:

"My invention overcomes these difficulties; and it consists in roughing in one mill and then passing the metal packs in a regular or continuous manner through a finishing mill or mills so that the finishing rolls will be continuously maintained at about the same temperature. It also consists in passing the metal continuously or regularly through the roughing rolls, thus maintaining these rolls continuously at the same temperature as well as in passing the metal simultaneously or continuously through both roughing and finishing rolls."

Now, concededly, the patent gives no instruction whatever upon the contour of the rolls, or how they should be turned to get good results, and when complainant was inquired of on that point his only answer was:

"I think any one skilled in the art would appreciate the fact that some experimenting along this line would be necessary in actual practice in order to determine the exact amount of concavity for the various sets of rolls to produce the finest possible results."

Taking this as the best and strongest answer that can be made of the statutory requirement that the patentee shall make a written description of his invention or discovery, "in such full, clear * * * and exact terms as to enable any person skilled in the art * * * to make, construct * * * and use the same," we are of opinion, in the face of strong and uncontradicted proof of those skilled in the art, that the problem of roll contour has not been solved—that the disclosures of this patent are not of the practical and useful character the law makes the consideration for the grant of a patent monopoly. The evidence satisfies us the problem of continuous sheet-rolling was neither solved nor disclosed by this patent, and that to sustain this patent would not be to reward invention, but to block further experiment and development, for here, as was said in Deering v. Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153:

"In view, not only of the prior devices, but of the fact that his invention was of doubtful utility and never went into practical use, the construction claimed would operate to the discouragement rather than the promotion of inventive talent."

This patent has left no impress on the art; the patentee or those under him have built and operated no such mill and proved its utility. While the respondent has constructed two continuous sheet mills, one has ceased operations, and the other, while improved by important devices outside the elements of this claim, is evidently experimental in character in that its use emphasizes the failures and defects of Donner's device, which has left no impress on an art, which still continues in sheet-rolling to employ the methods of the old practice.

In accord, therefore, with the views expressed above, we hold the fourth claim invalid, the decree below be reversed, and the case remanded with instructions to dismiss the bill.

AMERICAN TOBACCO CO. v. ASCOT TOBACCO WORKS.

SAME v. KHEDIVIAL CO.

(Circuit Court, S. D. New York. December 3, 1908.)

1. Patents (§ 197*)—Assignment—Form and Sufficiency.

No particular form of assignment of letters patent is prescribed by statute, and any written conveyance duly signed and sufficiently specific to identify the property is sufficient.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 276; Dec. Dig. § 197.*]

2. Patents (§ 310*)—Suits for Infringement—Plea.

Pleas in suits for infringement of patents are allowed when they reduce the matter in controversy to a single point, but not otherwise.

[Ed. Note.—For other cases, see Patents, Cent. Dig. \S 521; Dec. Dig. \S 310.*]

In Equity. Argument on demurrer to part and plea to part of bill of complaint in the first case, and on demurrer to bill in second case.

Philipp, Sawyer, Rice & Kennedy, for complainant. D. Walter Brown, for defendant.

RAY, District Judge. The bill is filed for an injunction to restrain alleged infringement of four several United States letters patent, the invention of each being capable of conjoint use with the others in a single device or machine, and the allegations of the bill are that all are so conjointly used and thereby infringed by defendant in a single machine. The bill contains all the usual allegations of a bill for the infringement of a patent, including title to the patents in suit; but the bill, in substance and effect, alleges title in complainant under and through a writing known as the consolidation and merger agreement of October 19, 1904, under the provisions of which the complainant, the American Tobacco Company, came into existence.

In an equity suit by the United States against the American Tobacco Company, seeking, among other things, an adjudication that such consolidation and agreement are void, in so far, at least, as in restraint of interstate and foreign commerce, and praying a receiver and a winding up of the consolidated company, Judges Lacombe, Coxe, and Noves have handed down opinions in which they hold, in substance, that this consolidation and merger agreement is in violation of the so-called "Sherman Anti-Trust Act" in so far as it affects interstate and foreign commerce. No decree to that effect has been entered, and it follows that there is no adjudication that the consolidation agreement is void, or that the agreement would not pass title to property. The agreement is in writing and duly signed, and therefore, if sufficiently specific to identify the property conveyed thereby, constitutes a valid assignment of the patents in suit. Conceding that there must be a written assignment to carry the title of letters patent, no particular form of assignment is prescribed by the act of Congress.

[•]For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

If a final decree had been entered adjudging the consolidation agreement void, quite likely this court would take judicial notice of its existence, and, should it do so, then under such circumstances the court would be compelled to hold that no assignment existed. This court cannot decide on the strength of the opinions referred to that the consolidation agreement is void. What decree will be entered is at this time uncertain.

The demurrers must therefore be overruled, but defendant may answer in 20 days after being served with a copy of the orders herein overruling the demurrers on payment of the costs of such demurrers.

In the first case above entitled the defendant puts in a plea to the allegations relating to the alleged infringement of letters patent No. 779,411. The bill of complaint, as stated, charges infringement of all four patents by the conjoint use of the four patented devices in a single infringing machine. The complainant owns all the patents. The defendant infringes all the patents by the same act, and the infringements of the four patents were therefore properly charged in the same bill.

Pleas in patent cases are permitted when they reduce the matter in controversy to a single point; not otherwise. The plea here does not bring about that result, but tends to widen and scatter the litigation and cause unnecessary delays and expense. The plea must be overruled. Thresher v. General Electrical Co. (C. C.) 143 Fed. 337, 340-341; Schnauffer v. Aste (C. C.) 148 Fed. 867; Korn v. Wiebusch (C. C.) 33 Fed. 51; Hubbell v. De Land (C. C.) 14 Fed. 471-474.

LIBERMAN'S EX'RS v. RUWELL et al.

(Circuit Court, E. D. Pennsylvania. November 30, 1908.)

No. 11.

PATENTS (\$ 328*)—INFRINGEMENT—CIGAR MACHINE.

The Liberman patent No. 668,921, for a combined cigar-rolling table and wrapper-cutter, covers a combination of old elements with a single new and limited feature, which is the vertical motion of the exhaust-box carrying the cutting knife, and is not infringed by a machine combining the same old elements with a differing feature also old.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

John P. Croasdale, for complainants. Howson & Howson, for respondents.

J. B. McPHERSON, District Judge. This suit is brought upon letters patent No. 668,921, dated February 26, 1901, issued to Isadore Liberman to protect certain improvements in a combined cigar-rolling table and wrapper-cutter. The art relates to a table upon which cigars may be rolled and wrapped, and also to the necessary mechanism for cutting the wrappers and for adjusting the table to the needs of the subsequent process of rolling and wrapping. To cut the wrappers, an

For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

endless knife of an irregularly elliptical form is used, of such size and shape as will cut the leaves in the manner desired. This knife is rigid upon some part of the mechanism, and the operation of producing the wrapper is performed by drawing a roller across its edge, thus, by a slight but sufficient pressure, cutting out the wrapper from the tobacco leaf that has previously been laid upon the knife. Inside the periphery of the knife, and closely adjusted thereto, is a perforated metal plate which moves slightly in a vertical direction under the pressure of the roller. The plate is connected with mechanism for exhausting the air, and by means of suction through the perforations the leaf is held smoothly and evenly in place upon the knife, and also, I believe, small particles of tobacco and other substances are drawn away from the operator. In order that the knife may cut, its edge must be above the surface of the table: but, in order that the cigar may be afterwards conveniently rolled and wrapped, it is desirable that this obstructing projection should disappear, and that the surface of the table should be smooth and uniform. To meet these requirements, namely, the projection of the knife and the evenness of the table's surface, two forms of device have been adopted in the art. In one of these forms the knife is stationary, while the table is raised or lowered, so as in one case to be flush with the knife and thus present a smooth surface for rolling, and in the other case to be depressed below the knife, so as to leave its edge free for the operation of cutting. In the second form, it is the table that is stationary, while the knife is raised or lowered, but the same results are produced as in the form first referred to. Both these varieties of device were well known before the patent in suit was applied for.

The specification—after stating that "the object of my device is to afford improved means for cutting the wrapper of the cigar and maintaining it flat upon the table while the cigar is being formed and rolled"—goes on to declare that the invention (so far as now material) is concerned with a device for raising and lowering the knife:

"My invention comprises improved means for raising the knife above the surface of the surrounding table during the act of cutting the wrapper, and then lowering the same flush with the table to afford a smooth surface for rolling and shaping the cigar."

The operation of the device is then described as follows, the numerals referring to the drawings that accompany the application:

"Upon the exhaust-box 1, which is connected by flexible tube 2 with means for exhausting air, I mount the continuous knife 4, which is adapted to project through the surface of the forming and wrapping table 5, which is apertured to fit closely about said knife. Inclosed within the edges of the knife is the perforated member 6, which lies flush with the upper edges of said knife and is supported on the resilient supports 7, so that said member 6 may be depressed when the roller 8 passes over the leaf resting thereon to permit the knife-edges to cut the leaf. The exhaust-box 1 is vertically movable in the casing 9, and adapted to be raised and lowered by the movement of the cam 10, which is operated by the pedal 11—that is, it is raised to cause the knife to project slightly above the table 5 when a leaf is to be cut, and is lowered to bring the knife exactly flush with the table when the cigar is to be rolled and wrapped thereon."

Of the various parts referred to in this description, the exhaust-box with its flexible tube, the continuous knife, the perforated plate with its resilient supports, the roller and the table, were old and well known. The new feature was the vertical motion of the exhaust-box. The knife was supported upon the box, and of course moved up and down with the corresponding motion of its support. Bearing this in mind, it will be seen that (so far as this controversy is concerned) the four claims involved are practically identical:

"(1) In a cigar-machine the combination of a forming and wrapping table, an endless knife adapted to project through said table and also to lie flush therewith, and vertically-movable air-exhaust and knife-supporting means, substantially as described.

"(2) In a cigar-machine the combination of a forming and wrapping table, an endless knife adapted to project through said table and also to lie flush therewith, means for vertically moving the knife and air-exhaust means con-

nected therewith, substantially as described.

"(3) In a cigar-machine the combination of a forming and wrapping table, an endless knife adapted to project through said table and also lie flush therewith, and a vertically-movable exhaust-box supporting said knife, substantial-

ly as described."

"(5) In a cigar-machine the combination of a forming and wrapping table, an endless knife adapted to project through said table and also to be flush therewith, a vertically-movable exhaust-box supporting said knife, and a perforated plate fitting within the knife, its upper surface flush with the upper edge of the knife and resting upon resilient supports to permit of a slight depression under pressure, substantially as described."

The only matter in dispute is the defendants' infringement. In a former action before this court between the same parties-No. 8 of October sessions, 1906—the patent was adjudged to be valid, and a fruitful subject of controversy was thus removed from the present litigation. The prior art, however, is still of value in helping to determine the scope of the patent, and, indeed, it must be examined in order that the court may know precisely what the patentee invented and how far he is entitled to protection. As I have already stated, everything about his patent was old except the vertical motion of the exhaust-box, and this was only of significance because the knife was attached to the box and partook of its motion. What the patent covers, therefore, is a combination of old elements with a single new feature, and the invention is not infringed by combining the same old elements with a differing new feature, unless the differing feature merely changes the position of certain parts of the patented device without affecting the principle or mode of operation. Where an improvement is narrow in its character, the inventor is ordinarily confined to his specific device and receives little aid from the doctrine of equivalents. If he depends upon a single limited feature (as is the case here), the doctrine will not ordinarily be applied so as to cover a device in which that feature does not appear. These rules are well known, and in my opinion they require the court to decide that the defendants' machine does not infringe. It is conceded that their device does not have a vertically moving exhaust-box supporting the knife, but embodies mechanism that moves the table up or down relatively to the knife; and complainants are therefore obliged to invoke the doctrine of equivalents, and to argue that (since motion must always be relative) it makes no dif-

ference whether the knife moves or the table moves, and that the essential matter to be considered is whether the same result is produced, whichever of these two members is clothed with the power of motion. Unfortunately for this argument in the present case (whatever its fate might be under other circumstances), the movable table of the defendants belonged to the prior art and antedated the patent sued upon by complainants. It is clearly found in the patent issued in March, 1889, upon the application of John R. Williams, and was therefore available for use in 1906 by the defendants or by any other person. To state the case briefly: The defendants' machine is made by combining a certain number of elements, of which all are old and all were at their service. This combination is attacked for the single reason that one of these elements is an equivalent of the only new feature to which the complainants can lay claim. But to forbid the defendants to use the element in question—the movable table—on the ground of equivalency, is to make the complainants' invention superior to a much earlier patent, and thus to take away from the defendants the right to adopt a device that is not only older than their own machine, but is also older than the machine of the complainants, and indeed has become the property of the public. This, I think, cannot be done, and therefore, in my opinion, there is no room in the present case to apply the doctrine of equivalents in the manner contended for. As against the defendants' table and knife, the complainants' device should be confined to the specific description of the patent, and, if it be thus confined, the device of the defendants does not infringe.

A decree may be entered dismissing the bill with costs.

HOWARD v. GRIST.

(Circuit Court, D. New Jersey. December 1, 1908.)

PATENTS (§ 328*) — ANTICIPATION AND INFRINGEMENT — HUB GUARD FOR WHEELS.

The Howard patent, No. 753,264, for a hub guard for wheels, which is attached to the axle, was not anticipated and discloses invention; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Horace Pettit, for complainant.

J. J. Crandall, for defendant.

CROSS, District Judge. The patent involved in this suit is No. 753,264 for a hub guard for wheels. The object of the invention is set forth by the patentee in the following language:

"The object of my invention is to provide a guard for wheels of rolling chairs and similar vehicles whereby contact is prevented between the hub of the wheel and garments of persons who may occupy the chair or those who may be in proximity thereto while the same is being propelled along walks, corridors, roads and other thoroughfares. A further object of my invention is also to prevent foreign materials—such as sand, dust, and dirt—from coming in

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

contact with the hub and its bearing, thereby preserving the same in good condition."

The answer, as will appear from the following extracts, substantially admits infringement; but, if otherwise, the proofs clearly show it. After admitting that the defendant and his father had been engaged in the business of letting rolling chairs for hire for ten years, the answer proceeds as follows:

"And to the extent of the application of the claims of complainant's monopoly to the use which defendant had made of the same on his rollers under his chairs, defendant has been using the same for five years last past, and, further, the same is in no wise novel, but of the commonest expedient to accomplish the end of defendant's business of accommodating the public with chairs with rollers under them. Wherefore defendant avows that, so far as defendant's use of the device patented, the same is void for want of novelty, and that it is void as to defendant for the reason that the same contrivance for the same purpose defendant used more than two years before said monopoly was granted."

The only point remaining for any extended consideration, therefore, is the validity of the patent. No patents have been pleaded or shown in the prior art, but prior use and want of novelty and invention are relied upon to defeat the patent. It comprises three claims, of which claim I only is relied upon, which is as follows:

"A hub guard for vehicles, comprising a shell or cap extending over and inclosing the hub and spoke flange on their outer sides, a nut for retaining the wheel upon the axle, and means for securing said shell or cap to said nut."

It must be admitted at the outset that the patent does not disclose a high order of invention. It is of the simplest character, but withal is neat, practical, efficient, of considerable utility, and a distinct advance upon all other devices in prior use for the same purpose. Moreover, it was of sufficient merit to induce the defendant to discard the use of the prior forms and adopt it for his own use. Then, too, we have the prima facie evidence of validity which arises from the grant of the patent.

But two of the alleged anticipations need be considered. One of them is known as the "pie-plate" guard, which consists of a flat piece of tin, round in shape, five or six inches in diameter, with a hole in the center, and its outer edge crimped or folded. Sometimes this guard was attached by passing the end of the axle through the hole and fastening the guard there by means of a nut screwed on the end of the axle, which nut, however, formed no part of the guard, while in other cases it appears to have been attached to the wheel itself by wiring it to the spokes, the wire passing through holes formed in the outer edge of the disc, and thence around the spokes of the wheel. In either way, however, it was a crude device, and upon its face illy adapted for the purpose desired; for it is manifest that in one phase of its application the oil would escape through the hole in the tin and about the face of the nut almost as readily as it would if the guard were not present, while in the other, since the guard revolved with the wheel, the oil would naturally be thrown outward to the circumference of the disc and then drop or be thrown off.

The other device in the prior art, like the patent in suit, consists of a shallow bell-shaped shell or cap, large enough to extend over the hub and spoke flange when applied to the outer side thereof, but which, instead of being attached to the axle, was attached to the spokes by pieces of wire, which passed around two lips or prongs formed upon opposite sides of its circumference, and thence about the spokes of the wheel. As thus attached, the guard necessarily revolved with the wheel, and in that respect, as well as in its method of attachment. is not only unlike the patented device, but is subject to the same objection that exists in the case of the pie-plate guard when similarly fastened to the wheel. It cannot, therefore, with propriety, be said to anticipate the patent in suit, which skillfully and fully accomplishes the desired purpose.

Notwithstanding what has been above said as to the alleged anticipating devices and their use, it should be noted that the defendant is the only witness who has testified in relation to them. Testimony of this meager character, indefinite and contradictory as it is with respect to dates, cannot be said to prove the facts alleged beyond a reasonable doubt, as is required by the rule laid down in the Barbed-Wire Case, 143 U. S. 275, 285, 12 Sup. Ct. 443, 36 L. Ed. 154. The device in use by the defendant would seem beyond question to be to all intents and purposes the same as that of the patent in suit. It accomplishes the same purpose by the same means in substantially the same way. It is true it avoids the use of the nut, 5; but such avoidance was contemplated by the patentee, for in his specification he says:

"If deemed desirable, the nut, 5, may be dispensed with, and the shell, 8, may be attached directly to the end of the axle, serving the function of both that of the nut and of a guard for the hub."

The complainant's expert testified that claim 1 covered both forms of construction, and I quite agree with him. The complainant welds together in one piece what the patentee says may be so constructed. but which, in figure 2 of the patent, is shown in two parts, held together rigidly by a screw formation. Such an immaterial change in construction does not avoid infringement. The complainant's expert. speaking of the defendant's device as illustrated by an exhibit in the cause, says:

"That it is identical, term for term, structure for structure, with the specific form of invention described in lines 71 to 75, inclusive (quoted above), of the said specification of the letters patent in suit, and also as defined and claimed in the said first claim of the said patent."

More might be said upon this point, were it necessary, which it is not deemed to be, in view of the virtual admissions of infringement in the defendant's answer, already alluded to.

A decree for an injunction and accounting in the usual form will be entered. The complainant is entitled to costs.

SOUTHERN PLOW CO. v. ATLANTA AGRICULTURAL WORKS.

(Circuit Court, N. D. Georgia. November 30, 1908.)

No. 1,290.

1. Patents (§ 310*)—Suits for Infringement—Joinder of Causes of Action.

A bill is not multifarious because it alleges the infringement of two patents by the same structure, where it also alleges that the inventions are capable of conjoint use and are so used by defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 518; Dec. Dig. § 10 *1.

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING—DEMURRER.

It must be clear that a patented device lacks the elements of novelty and invention before a court will so declare on demurrer to a bill for infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 536, 538; Dec. Dig. § 310.*]

3. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING—DEMURRER.

On demurrer to a bill for infringement of a patent, for lack of novelty and invention, the court cannot consider prior patents to ascertain the state of the art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. 310.*

Pleading in infringement suits, demurrer for want of novelty and invention, see note to Caldwell v. Powell, 19 C. C. A. 595.]

In Equity. On demurrer to bill.

Smith & Hastings (John M. Coit, of counsel), for complainant. Dean & Dean and Smith, Hammond & Smith, for defendant.

NEWMAN, District Judge. This is a bill filed by the complainant against the defendant to enjoin infringement by the defendant company of certain patents of which the complainant company is the assignee.

The first is patent No. 815,698, issued to Elias Haiman on the 20th day of March, 1906, and the second is patent No. 807,967, issued to Eugene Rosenbaum on the 19th day of December, 1905. Haiman's patent is for improvement in farming implements, and Rosenbaum's patent is for improvement in cultivators. The claims in the Haiman patent are as follows:

"(1) In farming implements, as a cultivator or harrow, a central beam, laterally-curved braces on opposite sides of said beam rigidly fixed thereto at both ends and having each a series of perforations in its outer curved portion, in combination with a pair of parallel tooth-bars on each side of said beam, transverse carrying-bars in pairs pivoted to said beam on each side and having said tooth-bars pivotally connected therewith, and means to adjustably lock said carrying-bars with the corresponding curved brace through the said perforations therein.

"(2) In an implement, as a cultivator or harrow, a rigid frame comprising a central beam and substantially segmental-shaped braces G fixed to said beam at their ends and provided with a series of holes, 6, in their outer curved portions, in combination with the parallel carrying-bars E and F, one of said bars at each side adapted to be adjustably-locked on the corresponding brace G, and parallel tooth-bars B, on each side pivotally attached to both the carrying-bars E and F, respectively, whereby the parallel relations of said several

^{*}For other cases see same topic & & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bars B, E, and F are maintained through all adjustments and said bars are

rigidly fixed in all adjusted positions.

"(3) In a cultivator, a central beam and parallel tooth-bars, pivotal connections transversely between said beam and bars, and segments for adjusting said bars in respect to said beam and for fixing the beams rigidly in any adjusted position."

The claims in the Rosenbaum patent are as follows:

"(1) A beam, pairs of parallel bars connected pivotally with and extending in opposite directions from the beam, earth-engaging members pivotally connecting the parallel bars and serving to keep them in parallel relation, a circular brace securely connected with the beam, and means for connecting one of each pair of parallel bars adjustably with the circular brace.

"(2) A beam, pairs of parallel bars connected pivotally with and extending in opposite directions from the beam, earth-engaging members connected pivotally with the parallel bars and serving to retain the latter in parallel relation, and means permanently connected with the beam and adapted for temporary engagement with one of each pair of parallel bars to maintain the

latter in any of the positions to which they may be adjusted.

"(3) A beam, pairs of parallel bars connected pivotally with and extending in opposite directions from the beams, earth-engaging members connected pivotally with the parallel bars and serving to retain the latter in parallel relation, a brace connected securely with the beam and engaging the upper sides of the pivoted parallel bars in any of the positions to which the latter may be adjusted to prevent upward displacement of the free ends of said parallel bars. and means for adjustably connecting said bars and brace."

To this bill a demurrer is filed upon two grounds: The first is that neither of the structures described in the letters patent set up by complainant constitutes an invention, and both of them are merely combinations of old elements and collections of old devices, resulting in no new mode or operation and no new function, and that each and all of the elements therein, and the resulting structures and the functions thereof, are old and within common knowledge. The second ground of the demurrer is as follows:

"Because the essential elements and functions of the two patents set up by the plaintiff as the basis of its bill in this case are substantially and almost entirely the same, and one of the said patents is necessarily an interference with the other, according as the date of the alleged conception of the invention of the one precedes that of the other. This defendant says that two valid patents cannot, under the law, be granted for the same thing, and there is no patentable distinction between the claims of the respective patents set forth in the above-stated case."

Taking in inverse order the grounds of demurrer, the defendant claims that the joinder in one suit of claims for infringement of two patents is improper. This practice has been sustained in a number of claims. In Green v. City of Lynn (C. C.) 81 Fed. 387, Circuit Judge Putnam on this subject says:

"The complainant brought a bill in equity for alleged infringements of two patents relating to the same subject-matter, and therefore very properly included in the same suit. A consolidation of this character within reasonable limits is for the interest of the public as well as of private litigants, and should not be discouraged by too stringent rules as to costs or otherwise."

In American Graphophone Company v. Leeds & Catlin Co. (C. C.) 131 Fed. 281, Judge Platt, referring to one of the objections raised by the demurrer to the bill in that case, says:

"That it is multifarious, in that it involves the validity and infringement of two separate patents. The bill avers not only that they are capable of

conjoint use, but that they are used conjointly by the complainant, and that the defendants jointly infringe both patents by their product. In a general sense, the demurrer should be taken to admit so important an allegation; but, as the patents themselves have become a part of the bill, it may be that if, upon inspection, there is a manifest inconsistency between the allegation and the meaning of the patents, a dismissal of the bill would be in order. No such situation appears in the case."

In Edison Phonograph Co. v. Victor Talking Machine Co. (C. C.) 120 Fed. 305, Judge Archbald says:

"The bill is demurred to on the ground of multifariousness, because it involves the validity and infringement of three separate patents; but it is averred in the bill that the three are not only capable of being conjointly used, but that, in the apparatus of the defendant complained of, they are in fact so used. This is a distinct and positive averment, which the demurrer necessarily admits."

In the case at bar one paragraph of the bill is as follows:

"That the said inventions described and claimed in said letters patent No. 815,698 and No. 807,967 are capable of conjoint use in one and the same machine, and are actually so used by your orator and by the defendant herein."

I do not think that this ground of demurrer is meritorious.

The next question considered, but raised by the first ground of the demurrer, is, that both structures described in the letters patent set up by the complainant lack novelty and invention; that they are merely combinations of old elements; the functions thereof are old and within common knowledge. The presumption in favor of devices for which letters patent have been issued by the Patent Office is such that it should be clear that the particular device lacks the element of novelty and invention before the court will so hold, especially on demurrer.

In A. R. Milner Seating Co. v. Yesbera, 111 Fed. 386, 49 C. C. A. 397, Judge Severens, speaking for the Circuit Court of Appeals, says:

"We think the court erred in holding upon demurrer that the patent was void upon its face. It may be admitted that the invention is one of narrow limitations, but we are not prepared to hold that in the circumstances, which may be susceptible of proof, the patent should be held void in the absence of any anticipation, and supported, as it is possible it may be, by evidence that it fulfills a useful purpose, and has been extensively adopted by the public in practical use, and further supported by the presumption of validity arising from the allowance of the patent by the Patent Office, the force of which presumption is augmented by the fact that there was a serious contest in the office, which must have developed the characteristics of the patent, and brought them pointedly into view. It is undoubtedly established law that the court may in a clear case dismiss, upon demurrer, a bill filed to establish a patent and to enforce a remedy for its infringement. Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991. But this court has on former occasions in substance said that this ought only to be done where there is no room for thinking that any evidence could be adduced which would, if put into the case, alter the clear conviction of the court that there is no patentable invention in the production patented. American Fibre-Chamois Co. v. Buckskin-Fibre-Co., 72 Fed. 508, 18 C. C. A. 662; Manufacturing Co. v. Scherer, 100 Fed. 459, 40 C. C. A. 491. Applying these rules to the present case, we are unwilling to sanction the summary dismissal of the bill, for we think it possible that the merits of the case might be more clearly discerned in the light of facts which the evidence may bring out."

In General Electric Company v. Campbell (C. C.) 137 Fed. 600, Judge Cross on this question says:

"Various reasons have been given by the courts in justification of the practice of questioning the validity of a patent by a demurrer, but it is unnecessary to refer to these, since the practice has long been thoroughly well established. It is likewise clearly well settled that a demurrer can be sustained in such cases only where the question of invention is free from doubt. There must be in the mind of the court an absolute conviction of the lack of invention. If there is any doubt whatever on this point, the case should be decided adversely to the demurrant. Moreover, upon demurrer the court will consider only matters shown upon the face of the patent, and matters of common and general information known to the court to be reliable, and to have been published prior to the application for the patent." (Citing a number of authorities.)

In this connection counsel for defendant have brought into court a number of patents antedating the patents now in suit, and they ask the court to consider them in ascertaining the state of the art at the time the Haiman and Rosenbaum patents were applied for and issued. Counsel claim that the court may properly examine these patents and ascertain from them that there is nothing whatever in the claims of novelty and invention made by Haiman and Rosenbaum. A number of authorities are cited, but reliance is mainly placed upon Parsons v. Seelve, 100 Fed. 452, 40 C. C. A. 484. I do not think that even under this authority the court would be authorized in this way to take all of these prior letters patent, or any one of them, as anticipating the two patents now before the court. It would prevent the complainants being heard as to any distinguishing feature in the patents. If these prior patents were properly pleaded in an answer, complainant might be able to show by evidence such new features and such improvement in its devices as that the older patents would not stand in its way.

In American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 C. C. A. 662, Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit says:

"The rule is now well settled that a defendant to a patent infringement bill may raise the question on demurrer whether the alleged invention, as disclosed by the specifications of the patent, is devoid of patentable novelty or invention. Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; West v. Rae (C. C.) 33 Fed. 45. It is also well settled that, in considering the question of the validity of a patent on its face, the court may take judicial notice of facts of common and general knowledge tending to show that the device or process patented is old, or lacking in invention, and that the court may refresh and strengthen its recollection and impression of what facts were of common and general knowledge at the time of the application for the patent by reference to any printed source of general information which is known to the court to be reliable and to have been published prior to the application for the patent. Brown v. Piper, 91 U. S. 38, 23 L. Ed. 200. The presumption from the issuance of the patent is that it involves both novelty and invention. The effect of dismissing the bill upon demurrer is to deny to the complainant the right to adduce evidence to support that presumption. Therefore the court must be able, from the statements on the face of the patent and from the common and general knowledge already referred to, to say that the want of novelty and invention is so palpable that it is impossible that evidence of any kind could show the fact to be otherwise. Hence it must follow that, if the court has any doubt whatever with reference to the novelty or invention of that which is patented, it must overrule the demurrer and give the complainant an opportunity by proof to support and justify the action of the patent office. This is the view which has been taken by the Supreme Court and the most experienced patent judges upon the circuit. New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co., 137 U. S. 445, 11 Sup. Ct. 193, 34 L. Ed. 741; Manufacturing Co. v. Adkins, 36 Fed. 554; Blessing v. Copper Works (C. C.) 34 Fed. 759; Industries Co. v. Grace (C. C.) 52 Fed. 124; Goebel v. Supply Co. (C. C.) 55 Fed. 825; Hanlon v. Primrose (C. C.) 56 Fed. 600; Dick v. Supply Co. (C. C.) 25 Fed. 105; Kaolatype Co. v. Hoke (C. C.) 30 Fed. 444; Coop v. Development Inst. (C. C.) 47 Fed. 899; Krick v. Jansen (C. C.) 52 Fed. 823; Manufacturing Co. v. Housman (C. C.) 58 Fed. 870."

It would not do to take these prior patents, which have been brought into court, examine and consider them, and then ascertain and determine if the state of the art was such as that there was nothing new in the claims made for the two patents in suit here, and that they were consequently nonpatentable at the time applications were made. This would have to be done necessarily without the complainant having any opportunity to be heard as to the claim of novelty and invention and as to any distinguishing features between the old and the new patents. If, however, the bill is answered by the defendant company, and these prior patents are set up as a part of the defense to this infringement suit, then there would be full opportunity given complainant to submit evidence and go fully into the question of patentability and the reasons therefor. I do not think such practice as that which the defendant asks the court to adopt is a proper practice, or that it should be sustained or encouraged.

As I am of opinion that these two patents may be properly pleaded in the same suit, and as I am not satisfied from my own observation and examination, and from what may be considered common knowledge on the subject, that these two patents lack the elements of novelty and invention, the demurrer on both grounds will be overruled, and an order may be taken to that effect.

UNITED STATES v. O'DONNELL.

(Circuit Court, S. D. New York. October 30, 1908.)

1. Post Office (§ 50*) — Offenses Against Postal Laws—Mailing Obscene Matter—Indictment.

On a motion to quash an indictment under Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658), for mailing an obscene, lewd, or lascivious letter, it is the province of the court to determine whether the letter which is the basis of the charge comes within the scope of the statute.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. \S 88; Dec. Dig. \S 50.*]

2. POST OFFICE (§ 48*) — OFFENSES AGAINST POSTAL LAWS — INDICTMENT FOR MAILING OBSCENE MATTER.

An indictment under Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658), which makes nonmailable "every obscene, lewd, or lascivious book * * * letter, writing, print or other publication of an indecent character," which charges defendant with having mailed a letter containing "obscene, lewd

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and lascivious matter," is not broadened in scope by a further characterization of such matter as of an indecent character.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 70; Dec. Dig.

3. Post Office (§ 31*) — Offenses Against Postal Laws — Indictment for MAILING OBSCENE MATTER-"OBSCENE, LEWD OR LASCIVIOUS."

A letter held not to contain matter which was "obscene, lewd or lascivious" within the meaning of Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658), so as to render its mailing an indictable offense thereunder.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 50; Dec. Dig.

For other definitions, see Words and Phrases, vol. 6, pp. 4887-4889; vol. 8, p. 7735.

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

On Motion to Ouash Indictment.

Henry L. Stimson, U. S. Atty.

Marx, Houghton & Byrne, for defendant.

CHATFIELD, District Judge. The defendant sent through the mails a sealed letter, in which he called a third party many unpleasant, scurrilous, and even disgusting names, abused him, and applied various epithets which, if used face to face, would be likely to result in a breach of the peace, and which might have that effect when communicated by letter. The letter has not been set forth in full in the indictment, inasmuch as the District Attorney does not consider it proper to be spread upon the records, but on an inspection of the exhibit it is found to be in many respects similar to the letter forming the basis of the charge in the case of Swearingen v. United States, 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765. Likewise, the letter also resembles that in the Swearingen Case in that there are one or two allusions to unspeakable practices, which the writer of the letter gives as a reason for an alleged expulsion of the person to whom the letter was sent from the writer's house. But these matters would seem to be no more inclined to incite immorality relating to sexual impurity than the language in the Swearingen Case. On the contrary, such language would apparently repel even an abnormal mind.

The government has cited in support of the indictment Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799, in which a question of this sort was held to have been left to the jury, under a proper charge. The Supreme Court there sustained the verdict because the other portions of the charge in question showed beyond doubt the scope of the language to which exception was taken. From the entire charge, it was plain that the statute was applied only within

the limits defined by the Swearingen Case.

The case of Konda v. United States (decided by the Circuit Court of Appeals in the Seventh Circuit, at the April, 1908, term) 166 Fed. 91, states the proposition that whether a particular letter is obscene, lewd, or lascivious is a matter to be left to a jury. But this case has not changed the rule that it is within the province of the court to de-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

termine, first, whether the letter in question comes within the scope of the statute, as the statute, has been construed in the Swearingen Case. See, also, U. S. v. Martin (D. C.) 50 Fed. 921. If the court determines that the particular letter is within the limits of the subject-matter of the statute, there may still be a question of fact for the jury. But in the present case it does not seem that the letter produced as an exhibit could be considered within the statute as interpreted and established beyond argument by the Swearingen decision.

It is necessary, however, to refer to another question in connection with the present motion, which is suggested by the language of the statute and by the form of this particular indictment. The statute in question with respect to this point is as follows:

"Sec. 3893. Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * whether sealed as first-class matter or not, are hereby declared to be non-mailable matter." U. S. Comp. St. 1901, p. 2658.

The indictment under discussion charges that the defendant unlawfully deposited for mailing, etc., "certain non-mailable matter, to wit, a sealed envelope then and there containing obscene, lewd, lascivious and indecent matter, that is to say, a letter," etc. The indictment subsequently charges that the letter contained "obscene, lewd and lascivious language of an indecent character, the said language being so obscene, filthy and indecent that to set forth the same in this indictment would be offensive to the court here, and would defile the records of the said court, and therefore the said language is withheld." In the Swearingen Case, supra, the report states that the indictment charged "that the newspaper article in question was obscene, lewd and lascivious." The Supreme Court, apparently, did not construe or attempt to consider the portion of the statute comprised in the words "or other publication of an indecent character." In the statute as printed, these words are set off by commas, but, even if not entirely disregarded, the punctuation furnishes no help to the interpretation. In drawing the present indictment the pleader has added the charge of "indecency" as an attribute of the "matter" said to be in the letter described, and later he says that the "obscene, lewd and lascivious language" is "of an indecent character." If the subjectmatter of the indictment were charged to be a "publication of an indecent character," it would be necessary to consider whether the word "publication" could be held to include a sealed letter. This question was passed upon in the case of United States v. Chase. 135 U.S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117, which was based upon the statute in its old form before the word "letter" was inserted. The court there held that the words of the old statute could not refer to a letter. If the words "of an indecent character" had been charged with reference to some one of the articles, "book, pamphlet, picture, paper, letter, writing, print, or other publication," and a distinction had been drawn in the indictment, or had been indicated therein, between matter "of an indecent character," as distinguished from matter that must be considered "obscene, lewd or lascivious," as those words were defined in the Swearingen Case, supra, then, again, we should be compelled

to hold that the scope of the statute was no broader than if these words (viz., "of an indecent character") had been omitted. But the present indictment first charges the four objectionable attributes in the conjunctive, and, when stating the matter again, the language is said to be "obscene, lewd and lascivious language of an indecent character." Under such an allegation, no distinction can be drawn between the present indictment and the one in the Swearingen Case.

In fact, it is probable that Congress, when it used the words "other publication of an indecent character," intended to add a broad and comprehensive term, which would include mail matter not described by the words "book, pamphlet, picture, paper, letter, writing and print," such, for instance, as a printed song or engraving. But even then the doctrine of "ejusdem generis" would probably prevent the giving of any broader construction to the words "of an indecent character" than has been held to have been intended by the words "obscene, lewd and lascivious." United States v. Bitty, 208 U. S. 402, 28 Sup. Ct. 396, 52 L. Ed. 543. But be that as it may, until the statute is amended, and although the words "obscene" and "indecent" are capable of having, and are stated by the dictionaries to have, a broader meaning than "lewd or lascivious," this cannot be held to affect the scope of the statute in question, so far as letters, at least, are concerned, inasmuch as the Supreme Court has limited all of these words by their interpretation in the conjunctive sense, and by the statement that they, "as used in the statute, signify that form of immorality which has relation to sexual impurity."

The motion to quash should be granted.

UNITED STATES V. BENEDICT.

(Circuit Court, S. D. New York. November 4, 1908.)

Post Office (§ 31*) — Offenses Against Postal Laws — Mailing Obscene Matter.

A letter considered, and *held* to contain matter of such obscene, lewd, and lascivious character as to render its mailing an indictable offense under Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658).

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 31.*

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.1

On Motion to Quash Indictment.

Henry L. Stimson, U. S. Atty. Hugh Gordon Miller, for defendant.

CHATFIELD, District Judge. The present motion to quash the indictment is based upon the ruling of this court in another case (United States v. Charles O'Donnell, 165 Fed. 218), and upon the limitation of the scope of the words "obscene, lewd, or lascivious," in Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. Comp. St. 1901,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

p. 2658), as settled in the case of Swearingen v. U. S., 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765.

In the O'Donnell Case a letter almost like that in the Swearingen Case was held by this court to be outside of the statute under the tests laid down by the Supreme Court of the United States. The O'Donnell letter contained one word or epithet which had a lewd and lascivious meaning, but which, taken in connection with the whole letter, could not be said to be used in any way except as an indecent, vulgar, and filthy epithet, to throw disgrace upon the person addressed. It could not in any conceivable way be said to be likely to "suggest or convey lewd or lascivious thoughts" or immoral acts to any one. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606. It was unspeakable and repulsive, but just as a person may in private call another person names which would be the basis of an arrest if shouted in the presence of others, or, in other words, just as abuse does not become disorderly conduct unless it tends to affect the public welfare and peace, so offensive, filthy, and vulgar language does not affect the use of the mails when conveyed by a sealed wrapper, unless the language will have or may have an immoral effect, in a sense relating to sexual impurity, upon those into whose hands the written language may come.

The use of indecent language, necessarily of itself defamatory and tending to reflect upon the person addressed, upon a postal card or upon the outside of a piece of mail, is a very different question, and is fully covered by the provisions of section 2 of the act of September

26, 1888 (25 Stat. 496).

But to return to the present letter, which is described by the grand jury as being too obscene, lewd, and lascivious to spread at length in the indictment, it is apparent from an inspection afforded under the bill of particulars, ordered under the authority of Rosen v. United States, supra, that the letter uses terms so frequently which so plainly relate to sexual impurity as to take the letter out of the category of those which are merely vulgar and filthy. The question of "obscenity, lewdness and lasciviousness," as defined by the Swearingen Case, would seem to be met at least to this court's satisfaction, to the extent of being within the scope of the law. At most, the question will be left to the jury under the authority of Rosen v. United States, supra, Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799, and Konda v. United States (C. C. A., 7th Circuit, April, 1908, term) 1.66 Fed. 91, and, if a verdict is rendered adverse to the defendant, an appeal will more satisfactorily draw the line for the A further decision or the amendment of the statute must be had before this court will be able to broaden the scope of the Swearingen Case beyond the decision in the O'Donnell Case above mentioned.

The motion to quash will be denied.

WILLINGHAM v. SWIFT & CO. et al.

(Circuit Court, N. D. Georgia. November 21, 1908.)

REMOVAL OF CAUSES (§ 29*) — DIVERSITY OF CITIZENSHIP — RESIDENCE OF DEFENDANT.

A defendant, sued jointly with another in a state court, who testified that his home was in another state, where he had property and to which he expected to return, did not become a resident of the state and district of suit so as to prevent a removal of the cause by defendants by moving there with his family for temporary purposes of his employment and for an indefinite time.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 69; Dec. Dig. § 29.*]

On Motion to Remand to State Court.

J. A. Boykin, for plaintiff.

Anderson-Felder-Roundtree & Wilson, for defendants.

NEWMAN, Circuit Judge. This suit was brought in the state court by T. A. Willingham against Swift & Co. and W. F. Colladay. The case was removed by the defendants to this court. On this motion to remand the only question presented is whether the defendant Colladay, who was undoubtedly formerly a citizen and resident of the state of Missouri, has become a resident of Atlanta in this, the Northern District of Georgia, so as to defeat the right of removal from the state court to this court on his part, and consequently the right of both defendants, who were sued jointly, to remove the case.

It is attempted to be shown by evidence submitted (his own evidence) that he resided in the city of Atlanta in this district. I do not think the evidence of Colladay shows residence here, but, on the contrary, shows him to be a resident of Kansas City, Mo. He appears to have been here temporarily for some time as an employé of Swift & Co. The evidence shows, I think, that he has not made Atlanta his place of residence. At one point in his testimony Colladay says:

"My home is in Kansas City, Mo., and I intend to return there. I have property and household goods there. I have not brought here anything except just what we need for temporary use."

At another place in his testimony, the questions and answers are as follows:

"Q. I am asking if you always considered Kansas City your home, and always intended to return to Kansas City? A. Yes, sir, I have always considered that my home, and I go there at intervals of three or four months, and my family goes that often.

"Q. How long is it since you were in Kansas City? A. Two or three weeks

ago.

"Q. How often do you go there a year? A. As often as four or five times.

"Q. Your stay in Atlanta is merely temporary, for the purpose of transacting business, and not as a permanent residence? A. It is my home temporarily only.

"Q. You are apt to be transferred from point to point for the purpose of looking after Swift & Co.'s business, but Kausas City is your home, where you vote and pay your taxes? A. That is it exactly."

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This evidence of Mr. Colladay was not controverted in any way. The definition of "residence" given in 24 Am. & Eng. Enc. of Law is this:

"Residence is defined to be the abiding or dwelling in a place for some continuance of time. There must be a settled, fixed abode or intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence."

And again on page 697:

"Residence is lost by leaving the place where one has acquired a permanent home and removing to another place without a present intention of returning, and is gained by remaining in such new place. Whether a party's removal constitutes a change of residence depends upon the party's intention in making such removal."

The following authorities cited by the diligent counsel for the defendant gives an excellent definition of "residence." It is an extract from Shaeffer v. Gilbert, 73 Md. 66, 20 Atl. 434, as follows:

"It does not mean one's permanent place of abode, where he intends to live all of his days, or for an unlimited time; nor does it mean one's residence for a temporary purpose with an intention of returning to his former residence when the purpose shall have been accomplished, but means, as we understand it, one's actual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time."

The term "residence" is flexible, and may be given a restricted or enlarged meaning considering the connection in which it is used. It involves, however, some idea at least of permanency and fixed intention to remain.

In Bicycle Stepladder Co. v. Gordon (C. C.) 57 Fed. 529, Judge Jenkins, in discussing the meaning of the term "inhabitant," and after quoting from Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, says:

"I cannot but hold that ruling to be decisive here. The court, in effect, construes the word 'inhabitant' to be, within the meaning of the act, synonymous with 'resident.' In the light of previous legislation upon the subject of the original jurisdiction of the federal courts, and of the connection in which the word is used, I think the word is here employed in the sense of 'resident.' It comprehends locality of existence; the dwelling place where one maintains his fixed and legal settlement, not the casual and temporary abiding place required by the necessities of present surrounding circumstances. A mere 'so-journer' is not an 'inhabitant' in the sense of the act. The meaning, I think, is well expressed by Judge Deady in Holmes v. Railway Co. (D. C.) 5 Fed. 523: 'An inhabitant of a place is one who ordinarily is personally present there; not merely in itinere, but as a resident and dweller therein.'"

Considering the facts of this case and the construction I place upon the removal act of Congress, I am satisfied that the evidence shows that Colladay was not and has not been a resident of Atlanta in the meaning of the act.

The motion to remand is denied.

In re HOLMES.

(District Court, D. Vermont. November 23, 1908.)

BANKRUPTCY (§ 410*)-DISCHARGE-TIME FOR APPLICATION.

The provision of Bankr. Act July 1, 1898, c. 541, § 31a, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3434), that "whenever time is enumerated by days in this act or in any proceeding in bankruptcy the number of days shall be computed by excluding the first and including the last," is applicable to any proceeding in bankruptcy where the number of days is material, and, as applied to the provision of section 14a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), that a bankrupt may apply for a discharge "within the next twelve months subsequent to being adjudged a bankrupt," gives him a year and a day from the date of adjudication, and no longer, unless the time is extended by the judge as therein provided.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig.

§ 410.*]

In Bankruptcy. On application for discharge.

M. M. Gordon, for petitioner.

MARTIN, District Judge. The adjudication in bankruptcy was made November 9, 1907. This application was filed November 16, 1908, under a claim that the bankrupt has a year from the expiration of one month after the adjudication in which to file his application for discharge.

In Re Fahy (D. C.) 116 Fed. 240, Judge Shiras uses this language:

"Section 14 of the act provides that within twelve months subsequent to the adjudication the petition for discharge may be filed, and, if unavoidably prevented from filing the same within that period, the judge may permit it to be filed within, but not after the expiration of, the next six months. In express terms the discretion of the judge is limited to six months following the expiration of the year beginning with the date of the adjudication."

This expresses my views. The language of the act is "within the next twelve months subsequent to being adjudged a bankrupt." This gives the bankrupt eleven months in which to make application for discharge. The last clause of the paragraph gives the court jurisdiction to grant an additional six months upon the showing of the statutory cause for delay.

Section 31 (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St.

1901, p. 3434) provides that:

"Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday."

Applying this section to section 14, I hold that the old expression of "a year and a day" is applicable; or, in other words, if a bankrupt is adjudicated on the 23d day of November, 1908, he may file his application for discharge on the 24th day of November, 1909, and, if the 24th falls on Sunday or a holiday, the next day thereafter. While the first six words of section 31 would seem to indicate that it was not intended to apply where the time is enumerated by months or years,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—15

the following words, "or in any proceeding in bankruptcy," make it applicable to any proceeding in bankruptcy where the number of days is material. In the dissolution of attachments made within four months, this section has been applied in computing these months. Jones v. Stevens, 94 Me. 582, 48 Atl. 170, 5 Am. Bankr. Rep. 571; In re Warner, 144 Fed. 987, 16 Am. Bankr. Rep. 519.

After a year and a day from the date of the adjudication has elapsed, the court has no jurisdiction to grant a discharge unless he shall have extended the time six months by reason of unavoidable delay. Unless this petitioner can make it appear, upon application duly made, that his delay of six days over a year and a day was unavoidable, this court has no power to grant him a discharge.

This petition is dismissed.

DAKOTA CENTRAL TELEPHONE CO. v. CITY OF HURON.

(Circuit Court, D. South Dakota. November 3, 1908.)

1. Telegraphs and Telephones (§ 10*)—Rights in Use of Streets—Consent of Municipality.

Rev. Civ. Code S. D. § 554 (Acts 1885, p. 208, c. 141, § 3), provides that "there is hereby granted to the owners of any telegraph or telephone lines operated in the state the right of way over lands and real property belonging to the state and the right to use public grounds, streets, alleys and highways in this state subject to the control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across and the place the poles to support the wires are located." Const. S. D. art. 10, § 3 provides that "no * * * telephone line shall be constructed within the limits of any village, town or city without the consent of its local authorities." A city ordinance provided that "the right is hereby granted to * * his successors or assigns to place, construct and maintain upon and through the streets and alleys" of the city a telephone line, "subject however to all conditions and stipulations herein set forth." It required the grantee to accept the ordinance in writing and to construct the line within four months, which he did. It also provided: "Sec. 10. The term of this franchise shall be for ten years from and after its passage." The grantee operated the telephone system for six years, and then conveyed the same to complainant, which was a corporation organized under the laws of the state and by its charter authorized to purchase, lease, construct, and operate telephone lines and exchanges. Held, that by the ordinance, and its acquiescence in the construction of the line by its grantee, the city consented to such construction within the meaning of the constitutional provision; that the right of complainant to maintain and operate the line was not derived from the city but from the state, and was not affected by the limitation in section 10 of the ordinance.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 10.*

Rights of telegraph and telephone companies to use of streets, see note to Southern Bell Telegraph & Telephone Co. v. City of Richmond, 44 C. C. A. 155.]

2. Telegraphs and Telephones (§ 7*)-"Franchise."

The consent of a city granted by ordinance to a person and his successors and assigns to construct a telephone system within its limits is

For other cases see same topic & a Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not a franchise, although such consent is necessary under the Constitution and statutes of the state.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 5; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 3, pp. 2929-2941; vol. 8, p. 7666.]

In Equity. On final hearing.

This cause has been submitted upon bill, cross-bill, answers thereto, and a stipulation of facts. From the stipulation the following material facts appear:

The Dakota Central Telephone Company is a corporation duly incorporated under the laws of the state of South Dakota on August 30, 1904, with power to purchase, lease, construct, and operate telephone lines and exchanges. The defendant is a municipal corporation of South Dakota. On January 28, 1898, at the request of one J. L. W. Zeitlow, the city council of the defendant duly passed the following ordinance:

"An ordinance granting to J. L. W. Zeitlow the right to erect and maintain poles and wires on the streets and public ways of the city, upon the conditions herein provided.

"The city council of the city of Huron do ordain as follows:

"Section 1. Be it ordained by the city council of the city of Huron, South Dakota, that the right is hereby granted to J. L. W. Zeitlow, his successors or assigns, to place, construct and maintain upon and through the streets and alleys and public grounds of said city all poles, posts and other supports, and all wires and fixtures proper and necessary for supplying to the citizens of said city and public communication by telephone and other improved appliances, subject, however, to all conditions and stipulations herein set forth.

"Sec. 2. All poles, supports or wires placed shall be so done under the supervision of the street committee and the same shall be so placed and the wires therein secured and kept at such elevation as to reasonably avoid danger to persons and adjoining property. No part of such poles, supports or wires shall interfere with the proper use of said streets for other lawful purposes; nor be so placed as to make cutting of shade trees necessary; and such poles shall be reasonably straight and maintained in good repair.

"Sec. 3. Said poles shall not be set so as to interfere with the construction, placing or proper maintenance of any water pipe, gas pipe, drain or sewer that has been or may be authorized by said city or in case of bringing to grade of curblines of any street or alley whereupon such poles may have been erected, then the said J. L. W. Zeitlow or his assigns shall change such poles and reset same to conform to such change.

"Sec. 4. The city council hereby reserves the right to grant a like right of way for poles or wires or fixtures of any other telephone, telegraph, electric light or electric street railway company or individuals when the said city so desires, provided the same shall not interfere with the full and proper use and right hereby granted.

"Sec. 5. In consideration of the foregoing, the said J. L. W. Zeitlow, if he shall accept this ordinance, is to allow the city of Huron to place upon its poles, free of charge, such wires as may be necessary for the purpose of maintaining a fire alarm system.

"Sec. 6. This ordinance shall be published according to law and shall take effect only on filing in the office of the city clerk of said city, within ten days after the first publication thereof, of a written acceptance of the terms of this ordinance by said J. L. W. Zeitlow.

"Sec. 7. That said J. L. W. Zeitlow, his successors or assigns, is to furnish for the city's business, and without charge and with exchange service for both local and long distance telephone, so long as the exchange is maintained hereunder, one telephone at city hall; also such other telephones for the city's business as the city council may hereafter by resolution require at 25 per cent. discount from regular exchange rates.

"Sec. 8. Rates for telephone service shall not exceed \$2.50 per month for business houses, hotels, offices, etc., and \$1.00 per month for private residences.

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Sec. 9. Work shall be commenced under this franchise within forty-five days from its passage and shall be completed and in operation within four months or this ordinance becomes null and void.

"Sec. 10. The term of this franchise shall be for ten years from and after

its passage.
"Passed at a regular session of the city council, March 11, 1898."

On April 8, 1898, said Zeitlow filed with the city clerk of defendant the following acceptance of said ordinance:

"To the Mayor and Common Council of the City of Huron, South Dakota.

"Gentlemen: I hereby accept the ordinance granted by your honorable body granting me permission to erect poles and fixtures and to string wires on any of the streets, alleys and public grounds of your city for the purpose of establishing and maintaining a telephone exchange within the City of Huron, South Dakota. Respectfully, J. L. W. Zeitlow."

Zeitlow duly constructed and completed the telephone lines and system mentioned in said ordinance, and operated the same until the year 1904, when the complainant purchased the same and has ever since owned and operated said telephone system. The complainant has invested in said telephone system the sum of \$25,000, and furnishes telephone service to about 820 subscribers therewith. On July 14, 1907, the city council of defendant passed the following resolution, and caused a copy of the same to be served upon complainant:

"Whereas it is the policy of the city of Huron not to grant a franchise to any public service corporation which is not controlled by citizens of the city of Huron; and whereas the franchise of the present telephone company con-

trolled by J. L. W. Zeitlow expires on the 11th day of March, 1908.
"Be it resolved: That no franchise for the purpose of operating a telephone service within the city of Huron will be granted to any company which is not controlled by citizens of Huron;

"Be it further resolved: That a copy of this resolution be at once sent by registered mail to Mr. J. L. W. Zeitlow by the city clerk."

On January 24, 1908, the city council of the city of Huron passed the following resolution:

"The city council of the city of Huron does hereby resolve that the franchise now held by J. L. W. Zeitlow to maintain telephone system in the city of Huron, which expires on the 11th day of March, 1908, will not be renewed.

"It is further resolved that the Dakota Central Telephone Company now operating in the city of Huron is hereby required to vacate the streets and alleys of the city of Huron at the expiration of the said franchise, and to remove their poles and wires and other apparatus therefrom. And the city clerk of the city of Huron is hereby directed to notify the said Dakota Central Telephone Company and Mr. J. L. W. Zeitlow of the action of this council, passed at a regular meeting of the city council of the city of Huron on the 24th day of January, 1908"-

and caused a copy thereof to be served upon complainant. The defendant through its officers threaten to remove by force the poles and lines of complainant's telephone system from the streets of said defendant. On this record complainant prays that the defendant be perpetually enjoined from tearing down and removing its telephone poles and lines as threatened, and the defendant prays by its cross-bill that the complainant be compelled within a reasonable time to remove said poles and lines from its streets for the reason only that the time limit fixed in the ordinance of January 28, 1898, has expired, and that the said poles and lines now constitute a public nuisance.

T. H. Null and W. A. Lynch, for complainant.

A. B. Fairbank and A. K. Gardner, for defendant.

CARLAND, District Judge (after stating the facts as above). The following provisions of statutory law relate to the questions raised on this record:

"To provide for the lighting of streets and public grounds, the laying down of gas pipes and erection of lamp posts, lines for conveying electric light and telegraph and telephone lines and to regulate the distribution, use and sale of gas and other illuminating fluids." Paragraph 11 of section 7 of the charter of the city of Huron.

"No street passenger, railway or telegraph or telephone line shall be constructed within the limits of any village, town or city without the consent of

its local authorities." Article 10, § 3, Const. S. D.

"There is hereby granted to the owners of any telegraph or telephone lines operated in this state the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys and highways, in this state subject to the control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located. The right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations." Section 554, Rev. Civ. Code (Acts S. D. 1885, p. 208, c. 141, § 3).

The Supreme Court of South Dakota, in Missouri River Telephone Co. v. City of Mitchell, 116 N. W. 69, in speaking of said article 10 of the Constitution, and said section 554 of the Revised Civil Code, used the following language:

"Adding to the statute the constitutional provision regarding consent, the law applicable to the issue here involved is expressed in the following language: 'There is hereby granted to the owners of any telegraph or telephone lines operated in this state the right of way over lands and real property belonging to this state, and the right to use public grounds, streets, alleys and highways, in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located. The right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations.' Provided, however, that no telephone line shall be constructed within the limits of any city, without the consent of its local authorities. Rev. Civ. Code, § 554; Const. S. D. art. 10, § 3."

The same court, in the same case, at page 70 of 116 N. W., speaking of the manner in which a municipal corporation may give the consent required by the Constitution, used the following language:

"No particular mode of manifesting municipal consent to the construction of a telephone line is prescribed by the Constitution or statutes. So far as the Constitution is concerned, such consent may be either express or implied."

Taking the facts and the law as stated, two questions arise for determination upon this record: First. Did the defendant ever give its consent to the construction of the telephone system now owned and operated by complainant in said city of Huron? Second. If such consent was given, was such consent in any way limited by section 10 of the ordinance of March 11, 1898, which is as follows:

"The term of this franchise shall be for ten years from and after its passage."

In view of the holding of the Supreme Court of South Dakota in the case of Missouri River Telephone Co. v. Mitchell, supra, that the consent required by the Constitution may be express or implied, we may look to all the acts of the parties to the ordinance of March 11, 1898, to determine whether or not the consent required by the Constitution has been given. We need not dwell long upon this question, for it conclusively appears that Zeitlow did construct the telephone system provided for by said ordinance with the knowledge and acquiescence of the city of Huron; and this fact, taken in connection with the ordinance itself, clearly establishes the fact that the defend-

ant did consent to the construction of the telephone system constructed by Zeitlow. There are no express terms in the ordinance granting consent, but it necessarily results that the city did consent by the facts stated in the record.

It is not necessary in this case to consider the question as to whether the city of Huron had any authority in its charter to grant a franchise to Zeitlow, empowering him to operate a telephone system in the city of Huron and charge tolls therefor, as whatever franchise Zeitlow obtained by the ordinance of March 11, 1898, has terminated by the term of the ordinance itself.

But for the purpose of arriving at the intention of the parties to the ordinance of March 11, 1898, and for the purpose of ascertaining the sense in which they used the words therein to express their intention, we may consider the fact that the parties to the ordinance beyond question thought that the city had the right to grant Zeitlow the franchise to operate a telephone system within the city of Huron. It is also necessary for the purpose above mentioned to consider the fact that all the franchise Zeitlow had to operate a telephone system in the city of Huron came through the ordinance of March 11, 1898. The laws of South Dakota gave Zeitlow no franchise to operate a telephone system within the city of Huron, and he was obliged to get the franchise from the state or from the city; and both, acting under the impression that the city could grant the franchise, entered into the contract composed of the ordinance of March 11, 1898, and its acceptance of April 1, 1898.

In view of what has been said, it is plain to this court that section 10 of the ordinance of March 11, 1898, never in any way limited the consent given by the city for the construction of the telephone system by Zeitlow. The section referred to by its express terms limits its operation to the franchise granted by the ordinance. It involves a contradiction of terms to say that an ordinance which provided that work should be commenced under the ordinance within 45 days from the passage of the same, and should be completed and in operation within 4 months, was an ordinance or express consent conditioned that Zeitlow should construct the telephone system within 10 years as provided by section 10 of the ordinance. The Constitution of the state requires consent to the construction, and not to the maintenance and operation, of telephone systems, and this language, we must presume, was used with reference to the power of the state to grant franchises for the purpose of operating and maintaining telephone systems. The provision in the Constitution was no doubt incorporated therein for the purpose of enabling municipalities to impose proper conditions within the limits of the police power before the telephone company could place its poles and wires in their streets. The case presented is this: Complainant, by its charter granted in 1904, has the power to purchase, lease, construct, and operate telephone lines and exchanges. It is the owner of the telephone system constructed by Zeitlow with the consent of the city of Huron, and which is now being operated by complainant. It, therefore, is not obliged to look to the ordinance of March 11, 1898, for any authority whatever, but may stand

upon its charter powers and its ownership of the system constructed by Zeitlow. If Zeitlow had remained the owner of the system, he would be obliged to look to the ordinance of March 11, 1898, for his franchise—that is, his right to operate the system within the city of Huron and charge tolls therefor—but it is not so with the complainant, for it has received express power so to do by its charter granted in 1904. In connection with the word "franchise" as used in section 10 of the ordinance, it may be well to consider what a franchise is; and, when we have found out what a franchise is, we find that it bears no resemblance to the mere consent of a city to the construction of a telephone system within its limits which would be a mere license or easement.

"A franchise is a right or privilege granted by the sovereignty to one or more parties to do some act or acts which they could not do without this grant from the sovereign power." Bank of Augusta v. Earle, 13 Pet. 595, 10 L. Ed. 274.

In McPhee and McGinnity Co. v. Union Pacific Railway Co., 158 Fed. 10, the Court of Appeals of the Eighth Circuit says:

"A right or privilege which is essential to the performance of the general function or purpose of the grantee, and which is and can be granted by the sovereignty alone, such as the right or privilege of a corporation to operate an ordinary or commercial railroad, a street railroad, city waterworks or gasworks, and to collect tolls therefor, is a franchise. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 659, 6 Sup. Ct. 252, 29 L. Ed. 516; Walla Walla Water Co. v. Walla Walla, 172 U. S. 1, 9, 19 Sup. Ct. 77, 43 L. Ed. 341; Denver v. City Cable Co., 22 Colo. 565, 45 Pac. 439; Donahue v. Morgan, 24 Colo. 389, 390, 400, 50 Pac. 1038; Thomas v. Grand Junction, 13 Colo. App. 80, 81, 56 Pac. 665; City of Denver v. Denver Union Water Co. (Colo.) 91 Pac. 918, 919."

It therefore conclusively appears to the satisfaction of this court that the word "franchise" in section 10 of the ordinance of March 11, 1898, was properly used, and referred only to the right of Zeitlow to operate and maintain a telephone system in the city of Huron and charge tolls therefor, and did not refer to the consent of the city to construct a system which had to be constructed before it could be operated or maintained, and for this reason this case is clearly distinguishable from Southern Bell Telephone Co. v. City of Richmond, 103 Fed. 31, 44 C. C. A. 147, but does fall within the principles enunciated in the case of Northwestern Telephone Exchange Co. v. City of Minneapolis et al., 81 Minn. 140, 86 N. W. 69, 53 L. R. A. 175, and Abbott et al. v. City of Duluth (C. C.) 104 Fed. 833.

It results from what has been stated that the complainant is entitled to the relief prayed for. The court not only believes that the legal propositions herein stated are sound, but also is constrained to believe that the result reached is in accord with equity and good conscience. On the one hand, the complainant is threatened with a destruction of valuable property in which it has invested its money; and, on the other hand, the city of Huron is seeking to accomplish such destruction, not that it may make a better contract with any other person, but that some citizen of Huron may construct a telephone system within its limits, to the exclusion of all others.

BOWER v. STEIN.

(Circuit Court, D. Oregon. November 16, 1908.)

No. 3,159.

1. Mortgages (§ 401*)—Foreclosure by Action—Right to Foreclose—Stipu-Lation for Maturity of Debt on Default.

Under a provision in a mortgage giving the holder the right at his election to declare the debt due and foreclose on default in the payment of interest, no formal declaration of such election is required, but the commencement of a foreclosure suit is a sufficient declaration.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. 1209; Dec. Dig. 401.*]

2. Mortgages (§ 529*)—Foreclosure—Suit to Set Aside Sale—Laches.

Complainant executed a mortgage on property to secure a debt in 1896, and then removed to another state. No payment of either principal or interest was made or tendered until 1907, when complainant filed a bill in equity to set aside a foreclosure sale made in 1898, as authorized by the terms of the mortgage, and to redeem therefrom, the property having in the meantime been conveyed to defendant, who was an innocent purchaser for value. The bill alleged that it had largely increased in value, and that complainant had no knowledge of the foreclosure until 1902, but it did not allege that she had made any inquiry in that respect, nor state any sufficient excuse for the delay after 1902 in bringing suit. Held, that complainant was chargeable with such laches as to bar her right to have the sale set aside in equity on the ground of technical defects in the foreclosure proceedings or of fraud on the part of the mortgagee in failing to give complainant actual notice of the same.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. $1542 \; [$ Dec. Dig. $529 \; [$

In Equity. On demurrer to bill.

The complainant in this bill seeks to have canceled and set aside a decree of foreclosure, and a sale thereunder, of lots 2 and 3 in block 250, Couch's addition to the city of Portland. She also seeks to be allowed to redeem the property from the lien of the mortgage foreclosed.

It appears from the bill that complainant and her husband, John M. Bower. on March 20, 1896, mortgaged the property to one Sherman, to secure the payment of \$1,500, which mortgage Sherman subsequently assigned to Cleveland Rockwell. Shortly thereafter complainant, who was an artist, removed with her husband, who was an attorney at law, from this state, and took up her abode in the city of New York. On the 30th of April, 1898, there had accumulated, and remained unpaid, interest on the note and mortgage to the amount of \$180, and on that date Rockwell commenced foreclosure proceedings against the complainant, her husband, and Sherman, in the state circuit court for Multnomah county, Or. Complainant and her husband having become nonresidents, Rockwell filed in said foreclosure suit an affidavit for service of process upon them by publication, in accordance with the Code of Civil Procedure in this state. In this affidavit it was stated, inter alia, that the defendant Lucy Scott Bower, and John M. Bower, her husband, were nonresidents of this state; that plaintiff had inquired among numerous persons in and about the city of Portland, friends of said defendants, and had ascertained definitely that they then resided in the city of New York, and that their post office address was No. 215 West 125th street, New York City; that each of them had removed from the state, and had been absent therefrom continuously for more than six weeks prior to the commencement of said suit.

After alleging that this affidavit is insufficient in five specific particulars, the bill proceeds with the charge that the affidavit for publication was false

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in fact, in that complainant's address was not then, or at any time, No. 215 West 125th street, New York City, and that Rockwell knew such was not complainant's correct address; that the persons of whom he had inquired for her whereabouts, named in said affidavit, were not her friends, but his own, and that they did not know her address; that Rockwell was, at the time of making said affidavit, and for a long time prior thereto had been, president of the Oregon Art Association, and that complainant was secretary thereof for a long time (though it is not stated she was on this particular date), and that she had frequent communications with members of said club and with Rockwell, and that she had a number of correspondents among the members of said club, with whom Rockwell was well acquainted and from whom he could easily have ascertained her address; that her address was upon the letters and communications aforesaid, and that Rockwell could have ascertained her address therefrom, or from her friends, and could have known that it was not as stated in said affidavit; and that the affidavit was fraudulently made.

It is further averred that, pursuant to said affidavit, an order for service by publication was duly made June 20, 1898, which directed that a copy of the summons and complaint be mailed to complainant at the address aforesaid; that Rockwell caused the same to be deposited in the post office at Portland, Or., June 24, 1898, addressed to her at No. 215 West 125th street, New York City, but that she never received the same; that such further proceedings were had in said suit that a decree of foreclosure was entered September 9, 1898, based upon which a sale was had on October 18, 1898, at which Rockwell became the purchaser at the sum of \$2,039.35, which sale was subsequently confirmed by the court on December 8, 1898; that Rockwell took possession of the property, and appropriated the rents and profits up to the 24th day of May, 1902, when, for the consideration of \$2,050, he conveyed to the present defendant by a deed of quitelaim.

The bill further alleges that the property has increased in value till it is now worth the sum of \$20,000, and was worth \$10,000 when sold at execution sale; that complainant's delay in bringing this suit was unintentional, but was occasioned by her living in a distant state and engaging actively in her work there as an artist, and her lack of means to employ counsel and pay the costs of such a suit, and by the further fact that she was ignorant of the sale of the property, and that her first actual notice thereof was acquired subsequent to the year 1902. This suit was commenced June 7, 1907.

There is a demurrer to the bill, specifying, among other objections, laches and want of equity.

Albert H. Tanner, for complainant. William G. Munly, for defendant.

WOLVERTON, District Judge. Several technical objections are made in the bill to the affidavit filed in the foreclosure proceeding, upon which the order for service by publication was procured. I have given these objections careful attention, and am satisfied that they do not, nor do any of them, render the decree vulnerable. Reference is made by the plaintiff and affiant to the records and files in the case, and the same were thereby made a part of the affidavit for publication. This was tantamount to reading the bill of complaint in the foreclosure proceeding into the affidavit, and renders the same full in every requisite particular. Almost every feature of these technical objections to the service is covered by the cases of Cohen v. Portland Lodge No. 142, B. P. O. E. (C. C.) 144 Fed. 266, and Ranch v. Werley (C. C.) 152 Fed. 509. Further comment is, therefore, unnecessary.

One of the grounds of recovery alleged is that the plaintiff in the foreclosure suit made no election to declare the obligation due and payable, which the mortgage was given to secure, prior to the institution

of such suit. No specific declaration of such an election is necessary, although it is usual to proceed in that way. The commencement of the suit is itself regarded as a sufficient declaration in that respect, and none other is essential.

Nothing is alleged in the bill tending to connect the defendant Stein, the present holder of the legal title to the property in dispute, with the alleged fraud of Rockwell in procuring the foreclosure decree; nor is it claimed that he had any actual notice thereof.

A case of this character must be resolved more or less by the impression it makes upon the conscience of the court. A court of equity is not hampered by the strict rules of the law, and is at liberty to dispose of a cause in consonance with its conceptions of justice, taking into consideration the actions of the parties from the beginning to the end of the dispute, and is bound by the single obligation that the equity it applies shall be legal. Certain equitable principles, familiar to all, are readily suggested when the facts in this case are marshaled among others, that equity aids the vigilant, not the slothful; that courts of equity are never attracted by the appearance of a stale or inequitable demand, and that, when such an one is presented for their disposition, they remain passive and refuse to be moved by any such considerations, leaving those who seek their aid to such comfort as may be afforded them in a court of law. A party seldom has an absolute right in equity to recover an interest in real property, albeit the effort to do so is made within the period of limitation fixed by the law. If the attempt is made, the case stands or falls according to the special circumstances of the case. A case brought at law for such a recovery within the statutory period must proceed to judgment according to the legal principles which control the ultimate facts involved; but, in equity, the slightest appearance of unfairness or injustice, aggravated by delay, will defeat the guilty party, though the legal period within which the attempt can be made has not elapsed. As said by the Supreme Court of the United States, in Abraham v. Ordway, 158 U. S. 416, 420, 15 Sup. Ct. 894, 39 L. Ed. 1036:

"Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitations; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law. Wagner v. Baird, 7 How. 234, 238, 12 L. Ed. 681; Harwood v. Railroad Co., 17 Wall. 78, 81, 21 L. Ed. 558; Sullivan v. Portland, etc. Railroad, 94 U. S. 806, 811, 24 L. Ed. 324; Brown v. County of Buena Vista, 94 U. S. 157, 159, 24 L. Ed. 422; Hayward v. National Bank, 96 U. S. 611, 617, 24 L. Ed. 855; Lansdale v. Smith, 106 U. S. 391, 392, 1 Sup. Ct. 350, 27 L. Ed. 219; Speidel v. Henrici, 120 U. S. 377, 387, 7 Sup. Ct. 610, 30 L. Ed. 718; Richards v. Mackall, 124 U. S. 183, 188, 8 Sup. Ct. 437, 31 L.

To the same effect is Wagner v. Baird, cited in the opinion of the court:

"A court of equity will not give relief against conscience or public convenience where a party has slept upon his rights. 'Nothing' says Lord Cam-

den, 3 Bro. Ch. R. 640, 'can call forth this court into activity but conscience, good faith, and reasonable diligence; when these are wanting, the court is passive and does nothing.' Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. The party guilty of such laches, cannot screen his title from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability."

The principle was also applied in Richards v. Mackall, 124 U. S. 183, 189, 8 Sup. Ct. 437, 441, 31 L. Ed. 396, where the court says:

"We find nothing whatever in the record to excuse the failure of the appellee to institute legal proceedings, in due time, to have the sale set aside. He knew that the appellant relied upon the sale, and upon the faith of it expended large sums. He knew that the premises here in dispute were in fact levied on for his debts, and were intended to be sold in satisfaction of those debts. But after the property has largely increased in value, and after sleeping upon his rights for nearly twelve years, with information, during the whole of that period, of every fact now relied upon by him, appellee asks the aid of a court of equity to set aside the sale and conveyance, and adjudge him to be the owner of the property; and, chiefly, because of a mistake of the officer in not so describing the premises in the advertisement of sale and in the conveyance as to properly identify them. In our judgment, he is not in a position to claim the interference of a court of equity."

As applied to the allegations of this bill, these principles preclude the complainant in the present case. The debt was contracted in March, 1896. Immediately thereafter, complainant and her husband removed from this state, and have remained away ever since. There is no pretense that they paid or offered to pay any part of the sums of money due from them at any time up to the date this bill was filed. For 11 years, from 1896 to 1907, according to the bill, they remained quiescent, and led those who had succeeded to their rights to believe the incident was closed and that they asserted no rights in or to the property. For six years, 1896 to 1902, not a word was said by them to their creditor as to any intention or expectation of paying the debt, and no inquiry apparently was made by plaintiff as to what had been done in the premises, or as to what had become of the property; nor is any peculiar circumstance or misfortune stated that would shut off the avenues of inquiry from the plaintiff. For aught that appears, a letter addressed to any friend in the city of Portland containing an inquiry as to the disposition of the property would have brought notice to the complainant of what had been done. During all this time, she knew that she owed the money borrowed, and it was an unwarranted assumption upon her part to suppose that Rockwell would not take some steps to protect his rights, by foreclosure or otherwise. It is not to be doubted that, in so acting, complainant was sleeping upon her rights. But this is not all. While she is not as specific as she ought to be in the circumstances here in stating the time when she acquired knowledge of the foreclosure, she does say that she knew it "subsequent to the year 1902." This in itself is evasive. Candor obliges her to be more specific. This statement must be taken most strongly

against her, and the beginning of her notice put at the commencement of 1902. From that date until 1907—five years—she further delayed, and she gives no sufficient excuse therefor, saving only that she was a nonresident, and had not the means to employ counsel. If nonresidence was an impediment to her, she still has it to cope with, for the bill in this case was verified by her at the city of New York. Such an excuse is of no avail. Meanwhile, by her own admissions, the property has advanced from an inconsiderable value in 1896 or 1898, till it is now worth \$20,000. It is too clear for argument that she has waited upon its advance before seeking its recovery, in the meantime leading the defendant to believe in the repose of his title and possession. This is an act that a court of equity will not tolerate, and the suit, I am impressed, is therefore barred by complainant's laches.

For the reasons assigned, the demurrer will be sustained.

KIMPTON v. UNITED STATES.

(Circuit Court, S. D. New York. November 14, 1908.)

Nos. 5,206, 5,207, 5,239-5,242,

Customs Duties (§ 47*)—Dutiable Value—"Coverings"—Containers.

Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924), providing that the dutiable value of imports shall include "the value of all cartons, cases, crates, boxes, sacks and coverings of any kind," is not limited to encasements similar to "cartons, cases," etc.; and the term "coverings" extends to containers of liquids and similar substances, such as tins, kegs, jars, and terrines.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 20; Dec. Dig. § 47.*

For other definitions, see Words and Phrases, vol. 2, p. 1705.]

Actions by Kimpton, Magnus & Lauer, H. A. Metz & Co., Austin, Nichols & Co., and Frame & Co. against the United States.

These proceedings relate to two decisions by the Board of General Appraisers, affirming the assessment of duty by the collector of customs at the port of New York. One of the two decisions, which is reported as G. A. 6,704 (T. D. 28,686), reads as follows:

SOMERVILLE, General Appraiser. Each of these protests involves the construction of Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924), entitled "An act to simplify the laws in relation to the collection of the revenues." The character of the merchandise and of the coverings or containers holding it is of the following description:

(1) Stoneware jars containing fruit jams assessed at 1 cent per pound and

¹ The pertinent portion of this section reads as follows:

[&]quot;Sec. 19. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise, * * * including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs. charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.'

^{*}For other cases see same topic & \ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

35 per cent., under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651). Protest 259,900.

(2) Stoneware receptacles called "terrines," which contain prepared meat

assessed at 25 per cent, under paragraph 275, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652). Protest 258.166.

(3) Tins containing prepared vegetables assessed at 40 per cent, under paragraph 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649). Protest 258,166.

(4) Tins containing pineapples, assessed at 25 per cent., under paragraph 263, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651). Protest 260,952.

(5) Tins containing fish (caviare), assessed at 30 per cent, under paragraph 258, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650). Protest 261,008.

(6) Casks containing liquid gum and sizing assessed as gum advanced, at 114 cents per pound and 10 per cent. ad valorem under paragraph 20, Schedule A, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1628) and as soap at 20 per cent., under paragraph 72, 30 Stat. 155 (U. S. Comp. St. 1901, p. 1631). Protest

The value of these containers was in every instance included in the total appraised value of the merchandise, and the containers were assessed for duty at the same ad valorem rates, respectively, as the goods themselves, under the provisions of said section 19 of the act of June 10, 1890. The importers claim in each case that these containers are not dutiable at the same rate as the contents or otherwise, but are free of duty, and that said section 19 relates only to cartons, crates, boxes, sacks, and similar coverings, suitable only for covering dry or solid merchandise. It is further claimed that, if not entitled to free entry, these coverings or containers are subject to duty at various rates under the provisions of certain paragraphs of the tariff act recited in the protests, which it is unnecessary for us to specify with particularity,

All of the goods being subject to ad valorem rates of duty, the question for determination is whether these various containers, consisting of stoneware jars, tin coverings, casks, and other receptacles above specified, were properly included in the appraised value of the merchandise and subject to the same rates of duty as the contents.

The purpose of all statutory construction is to ascertain the intent of the lawmaker; and the rule laid down by Lord Coke, and since universally approved, makes it proper to consider, for this purpose (1) what was the law before the act was passed, (2) what was the mischief or defect for which the law had not provided, (3) what remedy the Legislature has appointed, and (4) the reason for the remedy.

In the case of Holy Trinity Church v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, Mr. Justice Brewer, speaking for the Supreme Court of the United States, after stating that all laws should receive a sensible construction, and that general terms should be so limited in application as not to lead to iniustice, oppression, or an absurd consequence, observed as follows:

"Another guide to the meaning of the statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed and as it was pressed upon the atten-

tion of the legislative body."

While the rule prescribed by Congress for ascertaining the dutiable value of imported merchandise, for the purpose of estimating the ad valorem duty to be assessed thereon, has been constantly changing in policy, almost since the foundation of the government, yet, as observed in the report of the committee on ways and means, as made to Congress, hereafter cited, "from March 1, 1823, to March 3, 1883, a period of sixty years, coverings, packing charges, etc., were elements of the dutiable value of imported goods, except during the brief period intervening between the acts of March 3, 1865 (13 Stat. 493, c. 80), and July 28, 1866 (14 Stat. 328, c. 298)." All of these statutes are carefully reviewed in the case of Meyers v. Shurtleff (C. C.) 23 Fed. 577, decided May 13, 1885, up to and including the enactment by Congress of section 7 of the act of March 3, 1883, c. 121, 22 Stat. 523. It was held in that case that said section 7 of the act of March 3, 1883, repealed section 2907 of the United States Revised Statutes, and prohibited the value of coverings of merchandise from being estimated as a part of its dutiable value; and it was held accordingly that the value of barrels in which Portland cement was imported could

not be added to the wholesale price of the article as an element of its dutiable Said section 2907 provided that in determining the dutiable value of merchandise there should be added to the cost or the actual price or general market value at the time of exportation, among numerous other charges, the "value of the sack, box or covering of any kind in which such merchandise is contained." It was further decided in the same case, as we have said, that section 7 of the act of 1883 above cited repealed said section 2907 of the Revised Statutes, by providing, among other things, that the "value of the usual and necessary sacks, crates, boxes, or coverings of any kind," shall not be estimated as part of their value in determining the amount of duties for which they are liable. Of a similar purport was the decision of the Supreme Court of the United States in the case of Oberteuffer v. Robertson, 116 U.S. 499, 6 Sup. Ct. 462, 29 L. Ed. 706. The court in this case reviewed the Congressional enactments in force when the act of 1883 was passed, and held accordingly that under the provisions of the latter act the cost or value of certain paper cartons or boxes in which hosiery or gloves were packed, and the cost or value of the packing of the goods in the cartons, and of the cartons in the outer case, were not dutiable items, either by themselves or as a part of the value abroad of the goods, provided they were the usual coverings of such merchandise as distinguished from those that were unusual. This decision revolutionized the practice previously followed by customs officers and by the courts.

It was to this decision and its consequences that the particular attention of Congress was drawn by the committee of ways and means, when the customs administrative act was under consideration by that body. Mr. McKinley, in making the report of this committee to the House of Representatives, Fifty-First Congress, First Session, Report No. 6, called special attention to the decision of the court in the Oberteuffer and Robertson Case. The following

language was used in this report:

"Early after the passage of the act of 1883 Secretary Folger invited the attention of Congress to the difficulties encountered in administering this section; and Secretaries Manning and Fairchild repeatedly expressed to Congress their views as to the impracticability of securing the just appraisement of merchandise while this section remained in force."

He further quoted from the report of Secretary Windom as follows:

"It is necessary, in order to enable appraising officers to make uniform and satisfactory appraisements, that they be relieved from the embarrassments imposed upon them by the law which exempts the coverings, charges, etc., from duty, and which has been productive of constant trouble, fraud, and litigation. In very many cases the merchandise has no market value apart from its coverings and incidental packing; and the arbitrary rule that a part of this value shall be deducted in the assessment of duty is illogical, and in fact requires the appraising officers to do an impossible thing—to work an incongruity."

Such seems to be the view of the old law and the evils existing under its administration, which was pressed upon the attention of Congress when the customs administrative act was passed. This report of the ways and means committee, with the reasons given by them for the enactment of said section 19 of the customs administrative act, is unquestionably competent evidence to throw light on the intent of Congress in the enactment of the law. Trinity Church Case, 143 U. S. 487, 12 Sup. Ct. 511, 36 L. Ed. 226; Mosle v. Bidwell, 130 Fed. 334, 65 C. C. A. 533 (T. D. 25,276). The Board of General Appraisers, since their organization in 1890, and the various federal courts have uniformly interpreted said section 19 in accordance with the view reached by the ways and means committee in the above report.

The case of U. S. v. Wood (C. C) 85 Fed. 212, involved the determination of the market value of oats contained in burlap bags, which were the usual coverings of such merchandise; and it was held that the value of the article as a whole, including the coverings, should be taken as the market value of the merchandise, even though the covering, if separately imported, would have been free of duty. It was observed by the court as follows:

"The collector was not estimating the value of an importation of burlaps, nor of bags for grain, made of burlaps. He was estimating ad valorem oats

in bags. He was ascertaining its value at its place of exportation, in the condition in which it was exported. And surely the fact that it was put into bags, handled in bags, and exported in bags, gave to the merchandise a value measured by its own inherent value, plus the cost of the bags. The collector was estimating the value of a compound article—oats in bags."

In Smith v. U. S. (C. C.) 91 Fed. 757, it was held by the court for the Southern district of New York that glass jars containing preserves, which were held not to be bottles, were dutiable with the preserves as coverings, and as a part of the market value of the importation. In U. S. v. Dickson, 73 Fed. 195, 19 C. C. A. 428, the Circuit Court of Appeals, Second Circuit, had under consideration the dutiable character of bottles containing ginger ale, under paragraph 248 of the tariff act of 1894 (Act Aug. 27, 1894, c. 349, Schedule H, 28 Stat. 526). It was held by the court that the collector was prevented under the express requirements of the law from adding the value of the bottles to the value of the ale, as coverings under the customs administrative act of June 10, 1890. It was observed by Judge Lacombe as follows:

"Ordinarily, bottles may properly be considered as coverings of their contents, and treated accordingly. But for many years Congress has legislated

in customs acts for bottles eo nomine, as a separate subject of duty."

It was held accordingly that bottles could not be embraced in the term "coverings," as used in said section 19, on the ground that they were specially subject to a separate duty as bottles under other paragraphs of the tariff act, and that it could not be assumed that Congress intended to levy cumulative duties upon them by taxing the articles both as bottles and coverings.

In Hempstead's Case (C. C.) 96 Fed. 94, Judge Gray, sitting for the circuit for the Eastern district of Pennsylvania, passed on the dutiable character of certain glass tubes containing chloride of ethyl, which is a liquid. These containers were designated as coverings, which were held to be the usual coverings of merchandise, and not liable to a separate duty as unusual coverings under the provisions of said section 19. Note, also, American Sugar Refining Company v. U. S., 99 Fed. 716, 40 C. C. A. 84, affirmed in effect by the Supreme Court, 181 U. S. 610, 21 Sup. Ct. 830, 45 L. Ed. 1024.

Such was the uniform view taken by the courts, and generally in customs practice, until the rendition by the Supreme Court of the United States of their decision in U. S. v. Nicholls, 186 U. S. 298, 22 Sup. Ct. 918, 46 L. Ed. 1173. It was there held that certain glass bottles filled, imported under the tariff act of 1894, and liable to an ad valorem duty, could not be regarded as coverings within the meaning of the provision of section 19 of the customs administrative act of 1890. The following language was used by Mr. Justice

Brown, in delivering the opinion of the court:

"Section 19 was intended to provide a general method for the assessment of ad valorem duties, and to require the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind to be included in such valuation. We think the rule ejusdem generis applies to the words 'coverings of any kind, and that glass bottles, which are never in ordinary parlance spoken of as coverings for the liquor contained in them, is such a clear departure from the preceding words as to exempt them from the operation of the section, provided at least they are taxed under a different designation. It is very singular that, if Congress intended to include under the words 'coverings of any kind' vessels containing liquors, it should not have made use of the words 'casks, barrels, hogsheads, bottles, demijohns, carboys,' or words of similar signification. The inference is irresistible that by the word 'coverings' it only intended to include those previously enumerated, and others of similar character, intended for the carriage of solids and not of liquids. Webster defines a covering as 'anything which covers or conceals, as a roof, a screen, a wrapper, clothing,' etc.; but to speak of a liquid as being covered by the bottle that contains it is such an extraordinary use of the English language that nothing but the most explicit words of the statute could justify that construction.

"So, by cartons, cases, crates, boxes, and sacks, we understand these encasements which are not usually of permanent value, and such as are ordinarily used for the convenient transportation of their contents. Indeed, it is quite possible that they were made taxable in a general way by the customs administrative act in order that, if they were so made as to be of further, use after

their contents were removed, they might not escape taxation. The ordinary cartons, cases, crates, boxes, and sacks are of no value after their contents are removed; but in order that they should not escape taxation altogether, if they were of permanent value, they were included in the general terms of the customs administrative act."

The most casual scrutiny of this decision shows that the case went off on the ground that Congress had legislated for bottles eo nomine as a separate subject of duty, and various decisions of the courts are cited in support of this view. The simple question decided by the court was that bottles of the kind under consideration were not to be regarded as "coverings" within the meaning of the customs administrative act. It was not necessary to decide more than this; and so much as was said by the learned judge in reference to the general condition of the word "coverings," while entitled to great respect, is not to be considered as binding upon this board or the courts, especially when opposed to uniform decisions running through a series of not less than 10 or 12 years. It may be observed, moreover, that the Nicholls Case was decided under the tariff act of 1894, and that the present tariff act of July 24, 1897, under which these importations were made, contains some relevant provisions that were not found in previous tariff acts. For example, the concluding phrase of paragraph 300 of the present tariff act, relating to the dutiable character of ginger ale and other articles contained in bottles, concludes with the phrase that "duty shall be collected on the bottles or other coverings at the rates which would be chargeable thereon if imported empty." So, paragraph 301, relating to mineral waters in bottles, contains the same phrase in substance, "that duty shall be quoted upon the bottles or other coverings at the same rates that would be charged thereon if imported empty or sepa-

The phrase above used, "or other coverings," would seem to include all bottles other than those made of glass, which are specially subject to duty under paragraph 99 of said act. No such phrase occurred in the corresponding paragraphs (248 and 555) of the tariff act of 1894. So, also, paragraph 241 of the present act, relating to the dutiable character of beans, peas, etc., preserved in tins, jars, bottles, or similar packages, which are dutiable by weight, provides that there shall be included the "weight of all tins, jars and other immediate coverings." Again, paragraph 239 enumerates "milk, preserved or condensed, or sterilized by heating or other processes," which is made dutiable at 2 cents per pound, "including the weight of immediate coverings." The word "coverings" here manifestly refers to the coverings of milk in a liquid form as well as condensed.

Paragraph 281, whereby chocolate is made dutiable by weight, provides, among other things, as follows:

"The weight and value of all coverings other than plain wooden shall be included in the dutiable weight and value of the foregoing merchandise."

This weight and value would include the paper coverings as well as tin-foil coverings on chocolate. So that, for tariff purposes, a term or word used may often have a signification different from its ordinary lexicographical meaning. Hayes v. United States, 150 Fed. 63, 80 C. C. A. 17 (T. D. 27,806).

The enacting clause of the present tariff act provides for the levying and collection of duty upon "all articles imported from foreign countries," and mentioned in the schedules therein contained. The only exemptions from duty would seem to be where such articles are enumerated in the free list or are made free by some general principle of law as announced by the courts. For example, free goods imply free coverings; and so, goods subject to a specific rate as distinguished from an ad valorem rate of duty. U. S. v. Leggett, 66 Fed. 300, affirmed in 13 C. C. A. 450; Merritt v. Stephani, 108 U. S. 106, 2 Sup. Ct. 308, 27 L. Ed. 668; Hayes v. U. S., supra.

It would thus appear that the present tariff act at least, whatever might be said of previous ones, uses the word "coverings" in the sense of containers or packages.

The testimony shows that the merchandise under consideration is usually bought and sold in the condition in which it is imported, so as to include, as an entirety, the merchandise itself as well as the containers, and that it would often be impracticable to find a market value separately for the two entities.

In our judgment the containers or coverings in each of the two cases before cited were properly included in the appraised value of the merchandise as a part and parcel of its market and dutiable value. It follows from those principles that the protests should be overruled, and the collector's decision affirmed in each case; which is accordingly ordered.

We have given this question a rather elaborate consideration, in view of its importance and of the vast amount of revenue involved in a decision of the

underlying principles on which our conclusion is made to rest.

Walden & Webster (W. Wickham Smith, of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty.

MARTIN, District Judge. Affirmed on the opinion of the Board of General Appraisers.

LAWRENCE v. SOUTHERN PAC. CO. et al.

(Circuit Court, E. D. New York. November 25, 1908.)

1. Removal of Causes (§ 86*)—Petition for Removal—Allegation of Nonresidence.

An averment, in a petition for removal, that defendant is, and was at the time of the commencement of the suit, a citizen and resident of another state named, is equivalent to an allegation of nonresidence in the state of suit, and is sufficient.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 173; Dec. Dig. § 86.*]

2. Removal of Causes (§ 31*)—Diversity of Citizenship—Formal Parties.

Defendants, who were joined in a suit in a state court to recover an interest in lands only as trustees holding the paramount title in trust, and whose title as such was not disputed, *held* not indispensable parties, whose citizenship and residence in the same state as complainant would prevent a removal of the cause by the other defendants, who were the real parties in interest.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 71; Dec. Dig. § 31.*]

On Motion to Remand to State Court.

Battle & Marshall (David Gerber and H. Snowden Marshall, of counsel), for plaintiff.

Joline, Larkin & Rathbone (Arthur H. Van Brunt, of counsel), for defendant Houston & T. C. R. Co.

CHATFIELD, District Judge. A long statement of facts on the present application seems unnecessary. Certain litigation has been had in the state courts, resulting in the dismissal of the complaint. MacArdell v. Olcott, 189 N. Y. 368, 82 N. E. 181. A second action, upon allegations growing out of the same state of facts, but setting forth a different cause of action, has been brought in the Supreme Court of the county of Queens, in the state of New York, by Walter B. Lawrence, on behalf of himself and other stockholders of the Houston & Texas Central Railway Company, against Southern Pacific Company, Frederic P. Olcott, Central Trust Company of New York,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes $165~\mathrm{F.}{--}16$

Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, the Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company. Before answer the defendants Southern Pacific Company, Frederic P. Olcott, and the Houston & Texas Central Railroad Company applied for an order of removal, upon an affidavit showing that the Southern Pacific Company was a corporation of the state of Kentucky and a citizen and resident of that state, that the defendant Frederick P. Olcott was a citizen and resident of the state of New Jersey, that the Houston & Texas Central Railroad Company and the Houston & Texas Central Railway Company were corporations of the state of Texas and citizens and residents therein, that the defendants Central Trust Company, Farmers' Loan & Trust Company, and the Metropolitan Trust Company of the City of New York were all corporations of the state of New York, and that these last three named trust companies are not necessary or indispensable parties to the action. The other allegations of the affidavit upon which the order of removal was obtained are not called into question, and seem to comply with the requirements of the statute. As the result of this application an order of removal was entered in the Supreme Court of the county of Queens, and the record was filed in the Circuit Court of the United States for the Eastern District of New York, upon the 16th day of March, 1908. The present motion to remand was brought on before this court upon the 20th day of March, 1908, and was duly argued and submitted.

The plaintiff contends upon the motion to remand that he seeks to impress a trust or obligation to convey certain lands upon both the defendant Olcott and the three New York trust company defendants, which trust companies hold title to these lands for the protection of certain mortgage bondholders. The defendants claim, however, that the defendant Olcott is apparently only given a reversion in the equity of redemption, as to which the right to a trust exists if the plaintiff be entitled to any such right. The person in possession of land, of which it is sought to obtain possession, is a necessary party to any such action. Construction Co. v Cane Creek, 155 U. S. 283, 15 Sup. Ct. 91, 39 L. Ed. 152. It is apparent that an action brought by the plaintiff, a resident of Queens county, in the state of New York, could not be brought against the Central Trust Company, a resident of the county of New York, in the same state, in company with other defendants, in the courts of the United States, under claim of diversity of citizenship, if the trust company is an indispensable party. The defendants who filed the petition for removal in the state court, it will be noted, include only Mr. Olcott, who is admitted by all parties to be both necessary and indispensable as a party defendant, and the Southern Pacific Company and the Houston & Texas Central Railroad Company, who are admittedly not residents of the state of New York. These defendants have alleged that the Central Trust Company and the other New York trust companies are not necessary or indispensable parties. The notice of this present motion was directed to and served upon the attorneys for the defendants who petitioned for removal; but the Central Trust Company of New York, together with the two other trust companies, have not appeared by attorney in the action nor upon any of the motions. The plaintiff is insisting upon his right to sue these absent defendants, and to ask, as he claims, affirmative relief against them, and the complaint, so far as the record in this case is concerned, is the only paper from which this court can determine the present motion. The decision in the MacArdell Case may throw some light upon the holding of the New York courts with reference to the agreements and deeds involved herein, but the question of the interpretation of the present complaint must be passed upon independently, and there is nothing in the MacArdell Case making any of these questions res adjudicata, so far as the present parties are concerned.

The defendants who caused the removal of this action into the United States court have laid great stress upon the point that a denial of the present motion and the retention of the case in the United States court will not mean the discontinuance of the action as to those defendants, and that they may be proper parties, and may ultimately be subjected to any orders of the court in this action. But this contention loses sight of the fact that they have not yet appeared, and that it is impossible to now determine whether a motion to discontinue as to them would or must be granted, if they are neither necessary nor indispensable. Certainly, without their appearance and presence, it is impossible to determine whether they will contest their being considered proper parties, and the whole question of retaining them in the suit depends primarily upon whether they are in default, after proper service.

The plaintiff has also raised the technical objection to the petition on removal, upon the authority of Fife v. Whittell (C. C.) 102 Fed. 537, that the allegations show affirmatively the residence of the defendants in question, but contain no statement that they are nonresidents of the state of New York. Under the present policy of the United States courts, as expressed by Kinney v. Columbia Savings, etc., Ass'n, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, and Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101, it would seem that Zebert v. Hunt (C. C.) 108 Fed. 449, states the better rule, and that allegations showing nonresidence are sufficient for the retention of jurisdiction, even if the direct statement of nonresidence is not set forth in the words of the statute.

The principal opportunity for argument would seem to be the use of the word "indispensable," as distinguished from "proper" or "necessary," parties. In the case of Rogers v. Penobscot Mining Co., 154 Fed. 606, 83 C. C. A. 380, it has been held that an indispensable party is one whose interest in the subject-matter of the controversy is such that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. In the case of Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122, an order of removal was sustained, and an application

to remand refused; the court holding that the action was severable as to the parties who were claimed to be not indispensable, and that any relief that might be had by the plaintiff against those defendants who had not joined in the order of removal was merely the resultant of relief against the indispensable defendants, and would follow whether the action included those nominal parties or whether it did not. The

present case is very similar.

In the case at bar no relief is asked against the three New York trust companies, except that they be declared not to have any beneficial interest or ownership in the lands conveyed to them as security for the mortgage bonds. It is apparent, from an examination of the deed of trust to them, that they took solely as trustees. The allegations of the complaint in this respect are not disputed by the defendants who have appeared, and these trust companies as trustees have a title paramount to that claimed by the other defendants, or to that title which the plaintiff demands shall be conveyed to him. The person having a paramount title is not a necessary or indispensable party, and, if the action had remained in the state court and the trust companies had failed to answer, no relief could have been asked of them, and no judgment could have been entered affecting them, except in so far as such a judgment recognized the validity of their title as trustee.

An examination of the records of this court shows that after removal these trust companies have neither joined in the motion to remand nor appeared in the action, and (if they were duly served) are now in default, and the allegations of the complaint are therefore admitted, so far as they are concerned. Under such circumstances it seems necessary to hold that they are not indispensable parties either to the trial of the action or the rendering of the judgment. If they resist the carrying out of the decree of the court, if a decree be ultimately entered in favor of the plaintiff, such resistance would have to be by affirmative action on their part, and if they are carried as parties in the action, although not indispensable, especially if they remain in default, no greater relief could be given against them (provided they claim under a title paramount) than if they were not parties and holding in the same way. On the contrary, such relief as can be granted can be enforced in the action as it stands at present, assuming that they are proper parties and have been made parties, even if they be regarded as not indispensable.

It has been suggested upon the argument and in the briefs that, if jurisdiction is retained by this court and the action is not remanded, great confusion and perhaps severe loss may result from the freedom of action which will thus be given to these three trust companies. For the reasons just stated, this objection does not seem to be of sufficient weight, and inasmuch as no appeal can be taken from an order remanding, which is in the discretion of the court, while, on the contrary, an order denying the motion to remand may be reviewed on appeal, the case would seem to be one in which the jurisdiction of this court should be retained and the motion to remand denied.

In re E. REBOULIN FILS & CO., Inc.

(District Court, D. New Jersey. July 23, 1908.)

1. Carriers (§ 51*) — BILL OF LADING — CONSTRUCTION AND OPERATION—EVIDENCE OF TITLE.

Mere possession of a bill of lading is evidence of title in the holder, either general or special, to the goods embraced therein, and that the bill is not made nor indorsed to such holder is not material.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 148; Dec. Dig. § 51.*]

2. BANKRUPTCY (§ 140*) — PROPERTY PASSING TO TRUSTEE—PROPERTY HELD AS BAILEE.

Petitioners entered into an arrangement to furnish money to the bankrupt corporation for use in its business of importing fruits in brine, pursuant to which, on a purchase of goods in France, the seller made a draft on petitioners' Paris house and attached thereto an invoice and bill of lading, which, on payment of the draft, were forwarded to petitioners in New York. On arrival of the goods, they and such papers were delivered to the bankrupt on its execution of a trust receipt, by which it agreed to hold the merchandise described therein on storage as the property of petitioners with power to sell the same and turn over the proceeds to petitioners until the amount of the draft and shipping costs was repaid. Held, that the title to such goods did not pass to the bankrupt, but remained in petitioners, who were entitled to recover the same, or their proceeds, from the bankrupt's trustee, who had sold them, on their proper identification. [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 193; Dec. Dig.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 193; Dec. Dig. § 140.*]

In Bankruptcy. On exceptions to master's report.

Stern & Rushmore (Eldon Bisbee, of counsel), for petitioners. W. Benton Crisp, for trustees in bankruptcy.

CROSS, District Judge. John Munroe & Co. filed their petition in this court for the possession of 500 casks of cherries, or the proceeds thereof, which cherries it was claimed were in specie in the hands of the bankrupt at the time the petition in bankruptcy was filed. The petition was duly answered, and the matters involved referred to a referee in bankruptcy as special master, to take testimony and report to the court what order should be made in the premises. The master has filed two reports, both of which were adverse to the petitioners' claim. After the filing of the first report, upon the application of the petitioners, who expressed a desire to take further testimony, the matter was referred back to the master for that purpose, after which, as already stated, he again reported adversely to the petitioners. Upon the coming in of his second report, the petitioners filed numerous exceptions thereto, and the questions thereby raised furnish the subjectmatter for present consideration. It will be unnecessary, however, to consider the exceptions specifically, as their general object is to show that the master's report is wholly erroneous and should be reversed.

It appears from the evidence that the bankrupt, desirous of importing cherries in brine and preserved fruits, applied to the petitioners, who are bankers in New York City, for a credit wherewith to finance

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"No. -----

its importations. A representative in France of the bankrupt was to order for its account the goods for importation. Thereupon the vendors of the merchandise were authorized to draw upon the Paris house of the petitioners, which drafts, pursuant to the agreement of the parties in establishing the credit, were in each case to be accompanied by certified invoices, insurance certificates, and bills of lading to the order of the petitioners. When the drafts were accepted in France, the above documents, including the bills of lading, were to be forwarded to the petitioners. Upon the arrival in New York of the goods, a memorandum was presented to the bankrupt, giving the amount of the draft, and of the charges, which had been accepted for its account, and the shipping documents and bills of lading were handed to the bankrupt, who simultaneously in each instance executed and delivered to the petitioners, in return therefor, a trust receipt of the following general form:

"New York, Sept. 5, 1905.

"Received from John Munroe & Co., of New York, the merchandise specified in the bill of lading dated Marseilles, Aug. 14, 1905, and shipped per S. S. Germania, namely, 38 casks fruits in brine, marks and numbers being as stated in said B/L, and in consideration thereof we agree to hold said merchandise on storage as their property, in trust, until the acceptance of Munroe & Co., of Paris, France, given or to be given as the purchase money of said merchandise under a credit issued to us, and any other indebtedness to said Munroe & Co., shall have been paid or satisfactorily provided for.

"It is understood that we shall be at liberty to sell the said merchandise and hand the proceeds, when received, to said John Munroe & Co., as security for due provisions for said acceptances and indebtedness, and also that we shall keep the same insured against fire, payable, in case of loss, to said John Munroe & Co., who are not to be chargeable with any expenses incurred thereon. The intention of this arrangement is to protect and preserve unimpaired the title of said John Munroe & Co. to said merchandise.

"E. Reboulin Fils & Co., Inc., S. Lamy, Secretary."

Under the foregoing arrangement the petitioners accepted drafts amounting to nearly 120,000 francs, of which amount they have been repaid about 5,000 francs. After the bankruptcy proceedings were instituted, an officer of the bankrupt, together with a representative of the petitioners, identified certain casks of cherries, then in the hands of the bankrupt, as a part of those which had been imported upon the petitioners' credit under the circumstances above outlined. These casks were subsequently sold by virtue of an order of this court, and the proceeds specially deposited in bank pursuant to a stipulation of the parties hereto. The goods, when imported, appear to have been invoiced to the bankrupt, and the bills of lading therefor were, for the most part, either drawn to the order of the bankrupt directly, or were made "to order" and indorsed by the shipper, "Consigned to the order of Messrs. E. Reboulin Fils & Co." In three cases, however, they were drawn to order and indorsed in blank by the shipper; but in every case the invoice and bill of lading, no matter how drawn, were, pursuant to the above agreement, delivered to and held by the petitioners as security for advances made on account thereof. The evidence in general establishes this fact beyond controversy, and the so-called trust receipts in and of themselves confirm it. This being so, under all of the authorities the petitioners had either a general or special property in the merchandise thereby represented, which was valid against all the world. So long as the petitioners held, as they did, the invoices and bills of lading, whether indorsed or unindorsed, or however drawn, neither the bankrupt nor any one else could lawfully have obtained possession of the goods represented thereby. That the invoices were made to the bankrupt is of no importance whatever. This was settled in Dows v. National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214, where the matter is discussed somewhat at length. So, too, the fact that the bills of lading were not made or indorsed to the petitioners is of no account, where, as in this case, the evidence shows that, pursuant to the agreement, they should have been so made, and that they were as a matter of fact delivered to the petitioners and held by them as security for their advances.

Mere possession of a bill of lading is evidence of title in the holder to the goods embraced therein. It is a symbol of the goods, and everywhere and always stands for the merchandise therein specified, and evidences title, either general or special, in the lawful holder thereof. It seems unnecessary to cite authorities upon this point. They are almost numberless. Reference will therefore be made to four or five only. Dows v. National Exchange Bank, supra; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; Farmers' & Mechanics' Bank v. Logan, 74 N. Y. 568; Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818; National Newark Banking Co. v. D., L. & W. R. R. Co., 70 N. J. Law, 774, 58 Atl. 311, 66 L. R. A. 595, 103 Am. St. Rep. 825. But the authorities go still farther, and hold that property in the merchandise will pass by delivery of a bill of lading drawn to order without indorsement of the bill. Bank of Rochester v. Jones, 4 N. Y., 497, 55 Am. Dec. 290; City Bank v. R., W. & O. R. R. R. Co., 44 N. Y. 136; Merchants' Bank v. Union R. & Transp. Co., 69 N. Y. 373; Richardson & Co. v. Nathan, 167 Pa. 513, 31 Atl. 740; Holmes et al. v. German Security Bank, 87 Pa. 525; Holmes v. Bailey, 92 Pa. 57. Under the evidence in this case the petitioners had property rights in these goods, at least up to and until the invoices and bills of lading were turned over to the bankrupt, and it only remains, therefore, to consider whether they lost their title by such surrender.

By virtue of the delivery of the bills of lading to the petitioners at the time they made the advances in question the petitioners had, as we have seen, property rights, either general or special, in the goods in question, and were entitled to hold them until such advances had been repaid. They could have taken the goods from the vessel and either warehoused or sold them. This was the situation at the time when the several so-called trust receipts were executed. Without the execution of those receipts, or other like agreements, the title of the petitioners would have been lost upon the unqualified surrender, or indorsement and surrender, of the bills of lading. By such acts their title to or property, of whatever nature, in the goods would have been determined. To prevent this the transfer of the bills of lading was limited and qualified by the trust receipts executed and delivered simultaneously with the surrender of the bills of lading. The indorsed bills of lading and the trust receipts, having been contemporaneously

delivered, must be construed together, and, so construed, the indorsement and delivery were qualified and not absolute. The effect was not different than it would have been had the indorsements of the bills of lading contained the very language of the trust receipts. It is, moreover, scarcely conceivable that the petitioners, having the title, would, without payment of their advances, voluntarily have surrendered it. No reason for such action is manifest, or even suggested. But an examination of the trust receipts discloses no intention on the part of the petitioners to waive or surrender their property in the goods, but rather a clear intention to retain such property, which intention, moreover, was fully acquiesced in and recognized by the bankrupt. The bankrupt agreed thereby to hold the property on storage as the petitioners' property, and expressly assumed an attitude of trust in respect thereto, the terms of which were explicit and controlling. Furthermore, as already stated, the receipts contained an express recognition of title in the petitioners, and an undertaking that it should remain unimpaired, notwithstanding the substitution of the trust receipts for the bills of lading.

Since, then, the petitioners had title under the bills of lading, how can it be argued, from anything found in these receipts, that such title was transferred by them to the bankrupts? The receipts do not, in my opinion, contain a single word even looking in that direction. Clearly no title to the goods passed, but only their custody—a custody which, if, and in so far as, it constituted possession, was in law the possession of the petitioners. The bankrupt gained no property rights by the receipts, nor did the petitioners part with any. Beyond retaining their custody for the petitioners and a power of sale for their account, the bankrupts could do nothing with the goods without a violation of their trust agreement. The learned referee has dealt with this subject as if the preservation of the petitioners' rights required that a chattel mortgage should have been executed and filed in the proper place of registry. I am unable to assent to this view. Such a view assumes that the bankrupt obtained title when the bills of lading were surrendered; but it has been shown that it did not. No loan was made on the faith of the trust receipts, nor were any property rights lost or acquired thereby. No element of a conditional sale or chattel mortgage appears in the transaction. Consequently none of the requisites to the validity of such instruments was required. This proposition was dealt with in First National Bank of Cincinnati v. Kelly, Sheriff, 57 N. Y. 34, 36. The effect of trust receipts, similar to those in question, has been considered, and their validity upheld, in various cases, among them Brown v. Billington, 163 Pa. 76, 29 Atl. 904, 43 Am. St. Rep. 780; New Haven Wire Cases, 57 Conn. 372, 18 Atl. 266, 5 L. R. A. 300; Moors v. Wyman, 146 Mass. 60, 15 N. E. 104. It is undoubtedly true that upon the transfer of the bills of lading the petitioners, instead of requiring the execution of trust receipts, maintaining and continuing their property rights, might have allowed such rights to pass to the bankrupt upon its execution of a chattel mortgage upon the property. It is not, however, necessary to speculate upon what might have been

done, but only to consider what actually was done by the parties at the time.

In view of what has been said, I think the conclusions of the referee were erroneous, and must be set aside; but inasmuch as he has found, as a matter of fact, that 429 casks of cherries which were embraced in the bills of lading held by the petitioners have been duly identified and were found in specie in the hands of the bankrupt at the time the bankruptcy proceeding was instituted, an order will be made directing the payment to the petitioners of the proceeds of their sale.

In re PERRY ALDRICH CO.

No. 13,634.

(District Court, D. Massachusetts. September 28, 1908.)

1. BANKRUPTCY (§ 16*) — JURISDICTION OF COURT — FOREIGN CORPORATION — "PLACE OF BUSINESS"—"DOING BUSINESS."

A petition in involuntary bankruptcy was filed in the district of Massachusetts against a Maine corporation, which had carried on the mercantile business for which it was incorporated in Boston. About six months prior to the filing of the petition it sold the most of its stock in trade and gave up its place of business, and two months later receivers were appointed by a court of Maine, who took charge of and kept its remaining property in Boston. Held, that the corporation was not "doing business" in any proper sense after the appointment of the receivers, and had not had its principal "place of business" in Massachusetts for the greater part of the six months preceding the filing of the petition, within the meaning of Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), and that the court in that district was without jurisdiction of the proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \S 20 ; Dec. Dig. \S 16.*

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641; vol. 6, pp. 5390-5392.]

2. Bankruptcy (§ 16*) — Jurisdiction of Court — Foreign Corporation — Place of Business.

In determining whether a corporation has had its principal place of business in another state, so as to give the court in that district jurisdiction to adjudicate it a bankrupt, it is immaterial whether or not it complied with the laws of that state to entitle it to do business therein as a foreign corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 16.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

3. BANKRUPTCY (§ 63*)—INVOLUNTARY PROCEEDINGS—ACTS OF BANKRUPTCY—RECEIVERSHIP—"BECAUSE OF INSOLVENCY."

The appointment of receivers to take charge of the property of a corporation at suit of a stockholder, who alleged fraud and mismanagement by the officers and that the corporation was in danger of insolvency, but not that it was insolvent, cannot be said to have been "because of insolvency," so as to constitute an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541 § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1091, p. 3422) as amended in 1963 (Act Feb. 5, 1963, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1967, p. 1025]).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. BANKRUPTCY (§ 79*)—INVOLUNTARY PROCEEDINGS—ACTS OF BANKRUPTCY—RECEIVERSHIP—"PUT IN CHARGE."

Receivers are "put in charge" of the property of a defendant, within the meaning of Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), when the decree appointing them is entered, although they do not qualify nor take actual possession of the property until later, and the four-months period within which a petition in bankruptcy based on such appointment as an act of bankruptcy must be filed runs from the date of such decree.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 79.*]

In Bankruptcy. On involuntary petition.

Fred L. Norton, for petitioner.

Eugene C. Upton and George F. Haley, for respondents.

DODGE, District Judge. This involuntary petition, filed April 17, 1908, alleges the commission of a single act of bankruptcy, viz., that on or about December 21, 1907, because of insolvency, receivers were put in charge of the alleged bankrupt's property, by the Supreme Judicial Court of the state of Maine, under the laws of that state. The alleged bankrupt answered May 1, 1908, denying that its principal place of business was within this district for the greater portion of the six months ending with the filing of the petition, and denying, also, that it committed the act of bankruptcy alleged within four months before the filing of the petition. A similar answer was filed on the same day by an alleged creditor.

Under a reference to ascertain and report the facts, the referee's report has been in favor of adjudication on both the above questions. The answers also denied that the petitioners were creditors having unsecured provable claims amounting to \$500 in all; but this, accord-

ing to the report, seems to have been waived at the hearing.

1. The question as to the jurisdiction of this court turns on the following facts, which I find: The respondent was a Maine corporation, but at its Maine office in Kittery did nothing except hold its annual meetings. Its business of dealing in jewelry it had carried on in Boston, in offices of its own, where it had a stock in trade worth \$5,000 or more, until about the end of October, 1907. It then sold out all but a comparatively insignificant part of its stock, gave up its former place of business, and thereafter had no other place of business in Massachusetts, except a room occupied, used, and paid for by another concern whereof its own treasurer was also treasurer. To this room its remaining stock, worth from \$200 to \$300, and its fixtures, were removed from its former location. In this room its treasurer thereafter attended to its affairs; its name being upon a card attached to the outside of the door. There he received its mail and telephone messages, made some small sales from its stock, made some collections of amounts due it, sent out articles from its stock by traveling salesmen having their headquarters at the same room, answered inquiries, and negotiated settlements regarding its affairs. Some of its fixtures were used by the concern to which the room belonged, and some were kept there on storage. What its treasurer did there on its behalf from and

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after December 18, 1907, at latest, he did under the authority and with the approval of receivers appointed by the Supreme Judicial Court of Maine, in equity proceedings against it in that court which are more fully referred to below. An injunction issued in those proceedings November 22, 1907, forbade the respondent corporation to proceed any further with its business during the pendency of the case. Whatever the extraterritorial effect of this injunction, it does not appear that the corporation or its treasurer ever undertook to dispute its authority in any of their subsequent doings in Massachusetts. The receivers took possession of its property in Boston December 18, 1907. They instructed its treasurer to retain custody of the stock and fixtures, make sales and collections, and look after the mail. He acted in accordance with the instructions given him until the present petition was filed. The receivers had no authority to carry on the business of the corporation, nor did they ever undertake to carry it on. All they were directed by the court to do, or undertook to do, was to collect and hold its assets until otherwise ordered.

I do not think the corporation can be said to have been "doing business" in any proper sense after December 18, 1907. As against the petitioning creditors it might be estopped to deny that it had ceased doing the business in which their debts were contracted. Tiffany v. La Plume Milk Co. (D. C.) 141 Fed. 444. But another creditor would not be thus estopped, and as against him I do not think the facts proved establish the jurisdiction of this court. The corporation was not continuing the business it had been organized to do, nor was it liquidating its affairs of its own accord through officers of its own selection. It had been ordered by a court having the right to do so to stop doing that business; and acts done thereafter, merely in order to collect its assets or turn them into money, by officers of that court, cannot, as it seems to me, be what is intended by "business" in the expression "principal place of business," as used in the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The petitioners might perhaps have obtained jurisdiction here by filing their petition within three months following December 18th. That period having expired, it seems to me no longer possible to bring the case within the language of section 2 (1). I agree with the petitioners that it is wholly immaterial whether the corporation had or had not filed the certificates required of a foreign corporation by the laws of Massachusetts.

2. But, even if the court has jurisdiction, it remains to be decided whether the act of bankruptcy charged has been proved. This question depends upon the following facts, which I find:

A stockholder, on his own behalf and on behalf of all other stockholders who might join, filed his bill in equity against the corporation November 11, 1907, in the Supreme Judicial Court of Maine for York

county, whose jurisdiction is not disputed.

The bill alleged that the corporation was "in eminent danger of insolvency," but nowhere alleged that it was insolvent. It charged fraud, neglect, and mismanagement on the part of the officers, and set forth that by reason thereof there was danger of depreciation, waste, and loss of the assets if the officers were allowed further control. It prayed

that the corporation and its officers might be enjoined from receiving or paying out its moneys, selling or transferring its assets, or exercising any of its privileges or franchises, and that receivers might be appointed to wind up its affairs. Exhibit 1, a copy of the bill, may be referred to.

A subpœna was issued upon the filing of the bill, returnable January 7, 1908; also notice to show cause why a temporary injunction should not issue, returnable November 18, 1907. A hearing was had pursuant to this notice on November 22, 1907, and on December 3, 1907, the court entered a decree, a copy whereof is Exhibit 2, and may be referred to. The decree recites that it was made "after hearing the arguments of counsel and by agreement of parties." It ordered an injunction restraining the corporation from proceeding with its business pendente lite. It appointed two receivers, to receive, collect, and take possession of the corporation property, ordered it to deliver all its property to them, and directed them to report for the court's direction all the corporation's rights or causes of action, as also all their own doings. It provided that the receivers and the parties to the case should be at liberty to apply from time to time for the court's orders and direction.

The court on December 21, 1907, approved the receivers' bonds, filed the same day. An answer to the bill was filed January 4, 1908. A report of the receivers was filed January 30, 1908. A special master was appointed March 4, 1908. No further action by the court appears,

prior to the filing of the present petition.

It seems to me clear that the papers in the case wholly fail to show that the receivers appointed were put in charge of the defendant's property "because of insolvency." It is impossible to say, on what appears from them, that insolvency, as defined in the bankruptcy act, was one of the grounds upon which the court acted in making its decree. The allegations of the bill do not imply insolvency. They go no further than to say that there is danger of insolvency—in what sense is left uncertain. Whatever the kind of insolvency meant, the infer-

ence is that it does not yet exist.

Whether the corporation was actually insolvent or not when the bill was filed or the receivers appointed under it seems to me wholly immaterial, unless it can also be made to appear that the court so found, either upon the evidence before it or the agreements of the parties, and made the fact at least one of the grounds of its action. In this case the deposition of the learned justice of the Maine Supreme Court, who heard the case and made the decree appointing the receivers, has been taken by the parties opposing adjudication, and is before me. It leaves no doubt whatever in my mind, not only that he understood both parties to say that the corporation was then solvent, but that he told counsel at the hearing that if a receivership was desired on the ground of insolvency it probably could not be granted, in view of the decision, then recent, in Moody v. Port Clyde Development Co., 102 Me. 365, 66 Atl. 967, and that, as he expressly states, he did not appoint the receivers by reason of the corporation's insolvency. It seems to me clear that such insolvency entered in no way into the result arrived at by the court. In view of this deposition, it seems to me idle to discuss or consider any evidence as to what was or was not said by counsel, witnesses, or parties at the hearing. If any one of them stated or argued that the corporation was insolvent, they must have done so without affecting in any way the action of the court.

I am of opinion, in any case, that the receivers were "put in charge" of the corporation's property on December 3, 1907, when the decree appointing them was entered. This petition was not filed until after four months from that day had expired. The words of section 3a (4) of the bankruptcy act appear to me to refer to the action of the court in establishing the receivership, so as to make the act of bankruptcy complete when that action has been taken. If these receivers had been put in charge because of the corporation's insolvency, a bankruptcy petition against it on that ground could have been maintained, as it seems to me, before the receivers had actually qualified and taken possession. The facts that the receivers here did not qualify until December 21, and that the petition was filed within four months from that date, I should be unable to regard, in any event, as sufficient to sustain the petition.

It follows that adjudication must be denied, and the petition dismissed.

UNITED STATES v. SUTTON et al.

(District Court, E. D. Washington, E. D. October 23, 1908.)

No. 693.

1. Indians (§ 35*)—Introducing Liquors into "Indian Country"—Effect of Allotment of Land in Severalty.

The provision of Rev. St. § 2139, as amended by Act Jan. 30, 1897, c. 109, 29 Stat. 506, which makes it a criminal offense to introduce liquor into the Indian country, is a police regulation, and can be enforced only as to land within the exclusive territorial jurisdiction of the United States; and an indictment thereunder will not lie for taking liquor upon land within a state which was allotted in severalty to an Indian under Act Feb. 8, 1887, c. 119, 24 Stat. 389, prior to the amendatory act of May 8, 1906, c. 2348, 34 Stat. 182, and which is held in trust by the United States, such land being no longer "Indian country." the effect of the allotment having been to make it, as well as the allottee, subject to the jurisdiction and laws of the state, and to exclude therefrom the police powers of the United States, which have no relation to the protection of its title to, or rights in, the land as trustee.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*

For other definitions, see Words and Phrases, vol. 4, pp. 3545-3549.1

2. Indians (§ 32*)—Introducing Liquors into Indian Country—Effect of Treaty Provisions.

A provision of the treaty with the Yakima Indians that any Indian of the tribes who should bring liquor onto the reservation or drink liquor might have his annuities withheld did not have the effect of reserving to the United States exclusive jurisdiction of lands which were subsequently allotted in severalty to members of the tribes.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 32.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Demurrer to Indictment.

A. G. Avery, U. S. Atty., and Joseph B. Lindsley, Asst. U. S. Atty. Charles D. Cromlen, for defendants.

WHITSON, District Judge. The defendants stand indicted under section 2139 Rev. St. as amended by the act of January 30, 1897, c. 109, 29 Stat. 506, for having introduced ardent spirits and intoxicating liquor upon a certain Indian allotment made under the act of February 8, 1887, c. 119, 24 Stat. 388, and within the boundaries of the Yakima Indian Reservation. A demurrer raises the question whether the acts charged constitute a crime. While it does not appear from the indictment, upon argument it was conceded that the allotment referred to was made prior to the amendatory act of May 8, 1906, c. 2348, 34 Stat. 182, which in terms retains jurisdiction over allottees until the expiration of the trust period and issuance of the final patent.

The decision in the Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, settled several questions which had theretofore been obscure: First. Under the act of 1887, the completion of the allotment and the issuance of the preliminary patent conferred citizenship upon the allottee. Second. Allottees, being citizens of the United States, are also citizens of the state in which they reside, and since the act provides that they shall be subject to the laws, both civil and criminal, of that state, the act of January 30, 1897, can no longer be enforced as against the sale of intoxicants to such allottees. Third. The status of citizenship once conferred upon the Indians it is beyond the power of Congress to resume its control and guardianship without the consent of the individual Indian and the state. Fourth. The sale of intoxicating liquors is a police regulation which may no longer be enforced as to those who have become citizens by virtue of having received allotments, for by the same act which conferred citizenship Congress parted with its control of those matters which fall within the police power. Fifth. The general police power is reserved to the states, subject to the limitation that they may not trespass on the rights and powers vested in the national government.

Counsel, while conceding these propositions, would sustain the indictment upon grounds claimed to be in harmony with them. The position of the prosecution, as I understand it, is concisely and ably stated in a brief of the Solicitor General (filed in another case), which the District Attorney has adopted as a part of his argument. Briefly, it is this: The title to allotted lands during the period for which they are held in trust being in the United States, it may control those lands even to the extent of establishing police regulations over them

even to the extent of establishing police regulations over them.

Reliance is had upon United States v. Rickert, 188 U. S.

Reliance is had upon United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, and Rainbow et al. v. Young, Sheriff (C. C. A.) 161 Fed. 835, and particularly upon the case first mentioned; and the contention is based generally upon those decisions of the Supreme Court which uphold the power of Congress to dispose of and make all needful rules and regulations respecting the public domain, such as Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534, Jourdan v. Barrett, 4 How. 168, 11 L. Ed. 924, and Camfield v. United States,

167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260, and upon the powers vested in the federal government for the enforcement and execution of the laws as declared in Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, In re Debs, 168 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, and Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699. But none of those cases go to the extent of holding that the police power is not wholly within state authority except where it is incidental to and necessary for enforcing the laws of the United States or the protection of property over which it has exclusive control.

United States v. Rickert, supra, cannot be construed as announcing anything beyond the power to interfere for the exemption of allotted lands from local or state taxation. Clearly this is the principle upon which the decision rests, for "no authority exists for the state to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians" is the language of the Supreme Court. And in the discussion of that case in the Matter

of Heff, supra, it was said:

"But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title."

We have seen that the Supreme Court has designated the statute under which the defendants are indicted as a police regulation, but it was dealing with the sale of liquor to an allotted Indian, and not with the prohibition against the introduction of intoxicating liquors into the Indian country. If that phase of the statute also may properly be so construed, there would seem to be no ground upon which the indictment can be sustained, unless it be in the enforcement of such police regulations as the United States is entitled to invoke for the protection of its own property.

In the License Cases, 5 How. 504, 12 L. Ed. 256, speaking of the police power, it was said:

"Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of public peace, health, and morals, must come within this category."

So in the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, it was thus referred to:

"This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."

We are not left, however, to the necessity of deduction from abstract principles, but have the aid of their specific application to the very matter here in issue.

Ex parte Dick, 141 Fed. 5, 72 C. C. A. 667, arose out of an indictment for introducing liquor into the Indian country. The Circuit Court of Appeals (Ninth Circuit), in discussing the jurisdiction, said:

"We do not think that Congress can reserve or exercise such police power within the territorial limits of a state. The police power of the United States

can only be exercised where the legislative authority of Congress excludes territorially all state legislation. United States v. De Witt, 9 Wall. 41, 45, 19 L. Ed. 593; Slaughterhouse Cases, 16 Wall. 36, 64, 21 L. Ed. 394."

And so the statute was construed in United States v. Boss (D. C.) 160 Fed. 132, and perhaps counsel do not seriously contend to the con-

trary.

This extended reference has been made for the purpose of emphasizing the only possible ground upon which the offense charged may be punished under existing laws. It is true that the Supreme Court in Dick v. United States, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520, did not agree with the Circuit Court of Appeals, but the difference of opinion was not based upon the construction of statutes, but upon a treaty stipulation with the Nez Perce Indians; otherwise the decisions

are in harmony.

The defendants having been held, therefore, to answer for the violation of a police regulation upon land duly identified and set apart, it remains to inquire whether the United States has jurisdiction to invoke the police power in view of the citizenship of the Indian upon whose allotment the liquor was taken. The prevention of waste, the inhibition against alienation which might lead to complications and thereby impair the convenient carrying out of the object in view, namely, to transfer the land unincumbered, and like remedies are rights existing by virtue of the legal title which the United States still holds, and which were designated by the Supreme Court in the Matter of Heff, supra, as "mere property rights" which "do not affect the civil or political status of the allottees." The authority to protect the land which is ultimately to be conveyed may be asserted, but control over the Indian, which is purely a matter of state concern, referable to the police power, has been surrendered, and he cannot be deprived of rights which are conceded to other citizens. The allotment segregates the This conclusion follows the reasoning of Judge Hanford in United States v. Four Bottle of Sour Mash Whiskey (D. C.) 90 Fed. 720. The taking of liquor onto an allotment affects neither the title nor the possession. If it could be considered as affecting the latter, it would hardly come within the provisions of the statute, which must be strictly construed. Allotted land, coupled with citizenship of the allottee, can no longer be deemed Indian country within the meaning of that term as used by Congress and construed by the courts. Ex parte Crow Dog, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030; United States v. Martin (D. C.) 14 Fed. 817; Forty-three Gallons of Cognac Brandy (C. C.) 11 Fed. 47. Again, the law relates solely to the good order, quietude, and peace of the community. The legislation was intended to prevent disorderly conduct, and to restrain the Indians from excesses. The plausible argument of federal control, by any process of reasoning which may be applied, leads always to the protection of the Indian and not to the preservation of his property. So long as a place is within the exclusive jurisdiction of the United States, the police power may be exercised by it, but when once surrendered it belongs to the states when not necessary for the assertion of those things which are na-To sustain the indictment upon the ground contended for would present the anomaly of a judicial declaration that one citizen

may be denied privileges granted to another, and would be equivalent to holding that, over every parcel of public land claimed or unclaimed, it is competent for Congress to provide for the exercise of police powers within the states; and this would amount to a distinct invasion of their domestic concerns with which it is not, cannot be, concerned. Allotted Indians either are or are not citizens. The Supreme Court has taken Congress at its word and declared that they are. Once invested with that dignity, in the absence of treaty stipulations, they are entitled to all the rights, privileges, and immunities of other citizens, and the courts may not discriminate against them. The language of the Supreme Court, in United States v. Dick, supra, as applied to the issue here for decision, is significant, and, as I read it, decisive:

"If this case depended alone upon the federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant, for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the state, for all purposes of government, was full and complete. Bates v. Clark, 95 U. S. 204, 24 L. Ed. 471; Ex parte Crow Dog, 109 U. S. 556, 561, 3 Sup. Ct. 396, 27 L. Ed. 1030."

Reference has been made to article 9 of the treaty with the Yakima Indians (12 Stat. 954), said to bring the case within the rule of the last-mentioned decision. That article reads as follows:

"The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine."

Article 9 of the treaty with the Nez Perce Indians (28 Stat. 330, c. 290) reads:

"It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians."

It will be observed that in the case of the latter the jurisdiction of the United States was expressly retained, while as to the former the sole provision was that annuities could be withheld for such time as the President might determine. Besides, the defendants are not Indians. There is no analogy between the treaty stipulations which will bring that made with the Yakimas within the decision of the Supreme Court, or which will justify a construction that the treaty was intended to be other than it purports to be upon its face. Aside from considerations which deny the jurisdiction on principle, this court is concluded not only by the decision of the Supreme Court, but by the appellate court to which it is directly amenable.

Treating the stipulation of counsel concerning the time of the allotment as within the indictment, the demurrer must be sustained and the defendants discharged; but if it is the purpose to seek a review in the appellate court, an appropriate order will be made for securing their attendance should the views here expressed not meet with approval.

SOUTHERN RY, CO. v. BLUNT & WARD.

(Circuit Court, S. D. Alabama. November 9, 1908.)

No. 1,282.

1. Indemnity (§ 9*) — Construction and Validity of Contract — Loss Through Negligence of Beneficiary.

Plaintiff railroad company granted to defendants the right to build and maintain on its right of way a platform for shipping cotton, the contract providing that defendants should indemnify it against all loss or injury by reason of the structure caused by fire or otherwise, however resulting. Cotton piled on the platform took fire and burned, and the owners recovered for the loss from plaintiff on the ground that the fire was caused by its negligence or that of its servants. Held, that such fact did not preclude a recovery over from defendants on their contract of indemnity, but that such loss was within its terms and the contract valid and not contrary to public policy, since it was not made by plaintiff in its capacity as a common carrier

[Ed. Note.—For other cases, see Indemnity, Dec. Dig. § 9.*]

2. Insurance (§ 606*)—Subrogation of Insurer—Action—Parties.

Where an insurer has paid to the assured the total amount of the loss, such insurer is subrogated by operation of law to all of the assured's rights of action against third persons who are responsible for the loss, and the assured cannot maintain an action at law in his own right to enforce such liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1506; Dec. Dig. § 606.*]

3. Parties (§ 59*)—Amendment of Complaint—Joinder of Use Plaintiff.

Under Code Ala. 1907, § 2490, which provides that a party for whose use a suit is brought must be considered as the sole party on the record, and section 5367, by which an amendment to a complaint by striking out a sole plaintiff and substituting another is not permitted, a complaint which has been amended by adding a use plaintiff to the original plaintiff does not entitle either to recover, unless both are jointly interested in each cause of action pleaded.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 59.*]

4. Pleading (§ 57*)—Complaint—Duplicity.

A complaint by joint plaintiffs cannot embrace counts setting up causes of action in favor of one alone.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. 122 ; Dec. Dig. 57.*]

At Law. On demurrers to pleas and motion to amend complaint.

Pettus, Jeffries & Pettus, for plaintiff.

De Graffenried & Evins and Thomas E. Knight, for defendants.

TOULMIN, District Judge. This case was formerly before the court on the demurrers filed by defendants to the complaint, and many of the questions raised on this submission were disposed of by the

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruling on the demurrers. Southern Ry. Co. v. Blunt & Ward (C. C.) 155 Fed. 496.

The plaintiff, Southern Railway Company, claims that under a contract of indemnity which it had with the defendants, Blunt & Ward, the defendants are liable to it, and should reimburse it for the sums paid out by plaintiff to third parties for cotton burned on the platform of defendants, which losses it claims were caused by the presence of the platform of defendants on its right of way. The defendants, on October 16, 1907, filed 30 or more pleas to the complaint, and on October 2, 1908, the plaintiff filed demurrers to these pleas on numerous grounds. Without going into a discussion of the different pleas, it is sufficient to say that, in my opinion, only two of them are well made. Some of the pleas allege that the fire which destroyed the cotton was caused by the negligence of the plaintiff's agents. Under the contract between the parties the defendants agree to indemnify the plaintiff against all loss or injury caused by fire, or otherwise, howsoever resulting. The contract is not void as against public policy, and this plea is no answer to the complaint. Hartford Insurance Co. v. Chicago, etc., R. R. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, and cases cited.

The cases cited by defendants in reference to the defense that the loss and damage claimed arose from the negligence of plaintiff and its agents and servants relate to common carriers making contracts for immunity from their negligence or that of their agents. hold that, to accomplish that object, the contract must be so expressed (expressly stipulated). Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation, except where the carrier's immunity from the consequences of negligence is read in the agreement (in so many words)—ipsissimis verbis. It must not be left to a presumption from the language. Such a contract, however, may be read as an agreement to indemnify the railroad company, in the event of an action against it, for recovery of damages caused by its negligence; and that would be a perfectly proper agreement for the parties to make, as a part of the consideration for the contract. This is held in one of the cases cited, where there was a contract between an express company and a railroad company; defendant, in relation to the business of the former over the railroad, providing that the defendant should be expressly relieved from and guaranteed against any liability for any damage done to the agents of the express company, whether in their employ as messengers or otherwise. Kennedy v. N. Y. C. & H. R. R. Co., 125 N. Y. 422, 26 N. E. 626. In the case in 17 Wall, 359, 21 L. Ed. 627 (Railroad Company v. Lockwood), the question presented was, whether a railroad company carrying passengers for hire can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage. It was held it could not.

The duties and responsibilities of common carriers are prescribed by public policy. A common carrier exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests, and public policy forbids that he should be relieved by special agreement of diligence and fidelity which the law has exacted in the discharge of his duties as a common carrier. He cannot protect himself from losses occasioned by his own fault. This doctrine, which is urged by defendants, and the authorities which they cite in support of their contention, applies to contracts of common carriers as such, and not to the contracts made by them not in the capacity of common carriers, which latter contracts are valid even though they stipulate for immunity against the carrier's negligence, which is the case here. Railroad Company v. Lockwood, supra.

Another defense set up by the pleas is that of res adjudicata. The complaint does not claim indemnity for any sums paid to defendants and the pleas do not show that the contract of indemnity was in issue in any of the suits referred to in said pleas. The defendants cannot evade their liability because third persons recovered judgments against the plaintiff for losses sustained by fire caused, it may be, by the negligence of plaintiff's agents. The plaintiff was primarily liable to these third parties, and it is indemnified against these very judgments that under the contract is being claimed by the railway company. This contention is well sustained by authority. In Kennedy v. N. Y. C. & H. Railroad Company, supra, there was a contract between an express company and a railroad company in relation to the business of the express company over the railroad company, which agreement provided that the defendant should be expressly relieved from and guaranteed against any liability for any damage done to the agents of the express company, whether in their employ as messengers or otherwise. The court held this employé of the express company had a right to recover against the railroad company, he being injured on one of the trains of the railroad company, and he recovered in the case for damages. The railroad company then sued the express company on their contract of indemnity, and the court held that that could be done, although it was shown in the case the recovery by the messenger was for the negligence of the railroad company.

I am of the opinion that the two pleas which set up that the insurance company has paid to the plaintiff the entire amount of the loss which it has sustained on account of the fire are good. If the railway company has been indemnified or paid the loss which it suffered, then it has no further interest in this suit, as it has suffered no damages for which it can claim indemnity from its indemnitors, the defendants. This, however, would not apply to the insurer, the Transportation Mutual Insurance Company, as plaintiff. It is a general rule of law that, where an insurer pays to the assured the total amount of the loss, such insurer is subrogated by operation of law to all of the assured's rights of action against third persons who are responsible for the loss. The insurer's title arises, or is derived, from the assured alone, and can only be enforced in the right of the latter. In a court of common law this right of subrogation can only be asserted in the name of the assured, but in a court of equity or admiralty the insurer can prosecute the action against the third party in its own name and right. In any form of remedy the insurer can take nothing by subrogation but the rights of the assured. Phænix Ins. Co. v. Erie Trans. Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154.

In the case of Norwich Union Fire Insurance Society v. Standard Oil Company, 59 Fed. 987, 8 C. C. A. 433, the rule is stated as follows:

"When an insurance company pays to the assured the amount of the loss of the property insured, it is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the assured. In a court of equity or admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name when it has paid the assured the full value of the property destroyed—citing authorities. But the rule seems to be well settled that, when the value of the property exceeds the insurance money paid, the suit must be brought in the name of the assured. In such an action the assured may recover the full value of the property from the wrongdoer, but as to the amount paid him by the insurance company he becomes a trustee; and the defendant will not be permitted to plead a release of the cause of action from the assured, or to set up as a defense the insurance company's payment of its part of the loss." Hart v. Railroad Company, 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Hall v. Railroad Company, 13 Wall. 367, 20 L. Ed. 594.

In support of this rule, it is commonly said that the wrongful act is single and indivisible, and can give rise to but one liability.

"If," says Judge Dilion in Ætna Insurance Co. v. Hannibal & St. J. R. Co., 3 Dill. 1, Fed. Cas. No. 96, "one insurer may sue, then if there are a dozen each may sue, and if the aggregate amount of the policies fell short of the actual loss the owner could sue for the balance. This is not permitted, and so it was held nearly one hundred years ago in a case whose authority has been recognized ever since both in Great Britain and in this country."

This excerpt from Judge Dillon's opinion merely states the converse of the proposition, which seems to be settled law now, that where the value of the property exceeds the insurance money paid the suit must be brought in the name of the assured, and in such an action the assured may recover the full value of the property from the wrongdoer, but as to the amount paid him by the insurance company he becomes a trustee.

From the foregoing, I am of the opinion that the demurrers to pleas 3 and 7 are not well taken, and should be overruled. This ruling applies to the pleas before the amendment to the complaint adding

the insurer as a party plaintiff.

The plaintiff filed an amendment to the complaint by adding the Transportation Mutual Insurance Company, its insurer, as a party plaintiff, the action being, under this amendment, by the Southern Railway Company for the use of itself, for the loss it sustained, and for the use of the Transportation Mutual Insurance Company, for the amount of insurance money paid to it by the insurer. This amendment under the practice in this state should be allowed. The Code provides that the party for whose use the suit is brought must be considered as the sole party on the record. Code Ala. 1907, § 2490. Striking out a sole party and adding a new one is an entire change

and is not allowed, but an amendment of the complaint by adding a new party plaintiff is allowable. Code Ala. 1907, § 5367. The effect of the statute is to make the party for whose use the suit is brought dominus litis, and to give it the same rights as if it were the assignee of the cause of action, and its recovery is on the nominal plaintiff's cause of action. Mobile, etc., v. Jurey, 111 U. S. 595, 4 Sup. Ct. 566, 28 L. Ed. 527. In this case the Southern Railway Company was the original sole plaintiff, and the amendment in effect only adds a new party plaintiff to the complaint. Under the complaint as now amended both the insurance company and the railway company are the beneficial plaintiffs. If from the pleadings it appeared that the Transportation Mutual Insurance Company had paid to the plaintiff only a part of the loss, they would be jointly interested in the recovery from the indemnitors. Blunt & Ward, and the plaintiff could maintain the action in its own name and recover the full amount of the loss. As to the amount paid by the insurance company, it would become a trustee for said company. If the insurance company had paid the plaintiff all of the loss, then this suit should be by the insurance company alone in the name of the railway company as the nominal plaintiff for the use of the insurance company. If only a part of the loss had been paid by the insurer, the insured would be entitled to the residue; and how the money recovered is to be divided between them is a question which interests them alone, and in which the defendants are not concerned. In order to recover under the complaint as now drawn, the insurance company and the railway company must be jointly interested in each of the losses counted on in the complaint. If the insurance company has paid all of any individual loss to the railroad company, then the insurance company alone would be interested in this loss, and the railroad company would have no right to recover, and unless both plaintiffs can recover neither can. In the last amendment which the plaintiff proposes to make, the counts to be added by amendment claim only for losses sustained by the railway company, and on which losses no insurance was in force, and no payments have been made by the insurance company to reimburse the railway company for these losses. This would make the railway company solely interested in some of the counts of the complaint, and the insurance company solely interested in others, and this amendment cannot be allowed, as both plaintiffs must be jointly interested in the recovery to be had under each count. Under this view of the case, if the pleas 3 and 7 are true, the insurance company would be the sole party interested, and it alone could recover, and the railroad company could recover nothing, it having been paid the full amount of its loss, and under the rule above adverted to, under this state of facts, neither could recover in the present suit, and these pleas would be sufficient for that reason. The complaint cannot be amended now to strike out the Southern Railway Company as a usee, because it would work an entire change of parties plaintiff, which cannot be allowed, the beneficial plaintiff being considered the sole party to the record and the dominus litis. The amendment adding the Transportation Mutual Insurance Company as a usee will be allowed. The amendment adding new counts to the complaint. in which the insurance company is not interested, is disallowed, and the demurrers to pleas 3 and 7 are overruled; the demurrers to all other pleas are sustained.

On account of the ruling of the court, the plaintiff takes a nonsuit.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. NALLEY.

(Circuit Court, N. D. Georgia. November 6, 1908.)

EMINENT DOMAIN (§ 47*)—USE OF PUBLIC ROAD—RIGHTS OF ADJOINING OWN-

The construction of a telephone line upon a public county road or highway in the state of Georgia, with the approval of the county authorities in charge of such road or highway, which line is used in the transmission of messages between various points, is not an additional burden or servitude upon such public road, and does not exceed the uses to which the easement in the public can be put by the approval of such county authorities, and an abutting landowner has not the legal right to prevent such use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

In Equity. On demurrer to bill.

McDaniel, Alston & Black, for complainant.

Burton Smith, for defendant.

NEWMAN, District Judge. This bill is brought by the Southern Bell Telephone & Telegraph Company against W. H. Nalley, seeking to enjoin the defendant from interfering with the complainant company's line as set out in the bill. The allegations are: That during the year 1903 the Southern Bell Telephone & Telegraph Company, the complainant company here, began the construction of a long-distance line between the city of Atlanta, in the state of Georgia, and the city of Birmingham, in the state of Alabama. That in order to establish said line it was necessary to reconstruct certain old lines at points between said cities, and to extend such old lines after they were reconstructed. That a portion of said line is along the public highway upon which the lands of W. H. Nalley abuts, in the counties of Douglas and Carroll, and that said portion of its line was an old local line, which it was necessary to reconstruct, and build one more modern and substantial, in order to properly accomplish its purpose and connect the city of Atlanta and the city of Birmingham by telephone. Further, that the complainant company obtained the right to construct said line along the public highways from the proper authorities of the counties in which the defendant's lands were located (Douglas and Carroll). That the reconstructed line was located along the old line as far as possible, and though there was to some extent a change in the relocation of its poles, yet the new line is along the line of the old one. That, in rebuilding the line along the highway upon which defendant's lands abutted, the height of the new poles used necessitated the trimming, and perhaps the cutting, of

^{*}For other cases see same topic & \$ Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

certain trees upon said lands. That the complainant company, through its agent, approached said defendant, W. H. Nalley, and acquired the right to trim and cut down such trees as might interfere with the reconstruction of its line, or its operation, and that on July 22, 1903, it secured the right from said defendant, as evidenced by an instrument of writing which is attached to the bill. That the defendant was well aware of the work being done, and that he was consulted, and acquiesced in the trimming and cutting of such of his trees as were necessary. Also that the complainant company, in placing its poles, remained within the lawful limits of the public highway, and none of its poles encroached upon the lands of the defendant. That, long after the completion of the line, said defendant made the claim that complainant's lines and poles ran through his land for approximately two miles, and ordered said complainant to remove its poles, and has threatened to cut said wires and confiscate the poles for his own purposes and use; and, if said defendant is allowed to carry out his threat, that the usefulness of the entire line between Atlanta and Birmingham will be practically destroyed. That it has not encroached upon the property rights of the defendant. That it has no poles on his lands, but that said poles are located upon the public highway. That the defendant stood by and saw said poles located without protest, thereby assenting to their location. Further, that such a course on the part of the defendant would result in much loss of money to the complainant, and that the amount in controversy exceeds the sum of \$2,000, exclusive of interest and costs. That these lines and poles do no damage whatever to defendant's lands, but, on the contrary, this long-distance line has enhanced the value of all lands in its vicinity, and those of the defendant also. That said line was built some time during the fall of 1903, and that the same has been in operation ever since, and the same has been maintained by the complainant company since said time, and used by the public for the transmission of intelligence between the cities of Atlanta and Birmingham and intermediate points, and said line fulfills an important public function, and the public is served thereby to a very great extent, and there is a public demand for said line as a necessary commercial instrumentality between the two cities and the many intermediate towns.

Complainant then prays:

"That this court issue its writ of injunction, enjoining, restraining, and prohibiting said W. H. Nalley from cutting its wires, appropriating its poles, or in any way interfering with any portion of its line, either in the county of Douglas, the county of Carroll, or elsewhere. Complainant further prays that a restraining order or a temporary injunction be issued by the court, restraining and enjoining said W. H. Nalley from cutting its wires, appropriating its poles, or otherwise interfering with its line, whether in the county of Douglas, the county of Carroll, or elsewhere, until a hearing may be had by this court, in order that the present status may be maintained."

To this bill a demurrer was filed upon several grounds not material here. Afterwards the demurrer was amended as follows:

"The defendant, W. H. Nalley, by leave of the court just had and obtained, amends the general demurrer heretofore filed by him in the cause, and moves to dismiss the bill of complaint upon this additional ground of demurrer, to wit: Complainant has no right to maintain upon the public highway with the

approval of the county authorities its telephone line, as such telephone line constitutes an additional burden upon the highway and exceeds the uses to which the easement of the public in said highway can be put; and defendant, as adjacent landowner and as owner of the fee, has the legal right to terminate the occupancy by complainant of the portion of the highway adjacent to his premises."

After argument the demurrer was overruled, and the following order passed:

"The amended demurrer of the defendant, which was allowed by the court on the 6th day of November, 1908, has been considered. The court being of the opinion that the construction of a telephone line upon a public county road or highway in the state of Georgia, with the approval of the county authorities in charge of such road or highway (which telephone line is used in the transmission of intelligence between various points), is not an additional burden or servitude upon such public road, and does not exceed the uses to which the easement in the public can be put by approval of such county authorities, and that the adjacent or abutting landowner upon such public road has not the legal right to prevent the use and occupancy by the complainant of such public road for the purpose of constructing, maintaining, and operating its telephone lines thereon with the approval of such county authorities, it is therefore ordered that the original denurrer and amended demurrer of the defendant be and the same are hereby overruled."

In re KESTELMAN.

(Circuit Court, E. D. Pennsylvania. November 12, 1908.)

ALIENS (§ 68*)-NATURALIZATION-EVIDENCE OF QUALIFICATION.

The requirement of the naturalization act of June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 421), that an applicant for naturalization shall state in his petition the date of his arrival in the United States and the name of the vessel on which he came, must be given practical effect, and, where such statement is disproved prima facie by proof that the applicant's name does not appear among the passengers on the vessel named, the burden of proof is shifted to him to explain such fact to the satisfaction of the court, and his testimony that he came under a fictitious name which he cannot remember will not be accepted as satisfactory.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 68.*]

Application for Admission to Citizenship.

William S. Gregg, Special U. S. Atty.

DALLAS, Circuit Judge (orally). Cases of this character are very difficult of decision by a single judge, where the evidence is, as I may

say it is in this case, somewhat perplexing.

The applicant has complied with the requirements of the act (Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 421]). He produces two witnesses who swear positively that they have known him in this country for five years, and he states in his petition the name of the vessel in which he claims to have made the voyage to this country. So far as these features of the case are concerned, I need say no more. Prima facie they entitle him to citizenship. But the Congress of the United States, the court is bound to assume, in requiring that the petitioner shall state the vessel in which he ar-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rived, and its time of arrival, meant to attach to the statement of those circumstances some material importance. I suppose that the Congress perceived that it would be idle for the government of the United States to contest any application for citizenship upon the ground that the statement in the petition as to length of residence in this country was erroneous, unless provision were made for details of such statement, and, if need be, for proof of some of the elements going to make up the evidence as to length of residence.

This applicant has proved by the oath of two witnesses that they have known him here for upwards of five years. The testimony of the first witness examined in court, though he was positive, was unsatisfactory to me, because it does seem to me that a witness, upon being asked, "How do you fix that as five years, and not as four?" should be able to give some reason. Still, while the evidence of that witness is not entirely satisfactory, there is nothing to justify a charge of an intention to swear falsely. The other witness was more satisfactory, because he did state a circumstance which appeals to the reason as one supporting his general statement that he had known the applicant for more than five years in this country. They may both be mistaken, however, and if, in point of fact, the applicant arrived in this country in the year 1904, they must be mistaken. The government has taken that position, and relies on the act of Congress which provides that the vessel must be named, as a means by which to correct a misstatement as to time, and by which its falsity, whether innocent or intended, if it be false, may be determined.

The government proved, prima facie, that the applicant did not arrive in this country in 1902, and there we have a shifting of the burden of proof. At the beginning the prima facie case presented by the applicant placed the burden upon the government. When the government showed prima facie that he did not come in 1902, on the vessel he said he did, then the burden of overcoming such prima facie case by counterproof or by explanation was shifted back to the applicant. Then what is the explanation? That this man came to this country under a fictitious name. I make no account of the difference in time between the 5th and 7th of August, for I regard it as of no consequence; but the explanation is that, upon that particular voyage, whether it ended on the 5th or the 7th of August, he came under a fictitious name. That is the explanation: that he had bought the "card" of another man, and that he made the voyage, which certainly extended—as the court will judicially notice—over seven or eight days, under a fictitious name, and arrived here under a fictitious name, and yet does not remember what that name was. This case, as I indicated during the argument, turns upon the question as to whether a court, required to consider the evidence pro and con, can say that an explanation of this sort is satisfactory. I do not think it is; and, in the interest of the administration of this law, the time has come when, in my opinion, courts should require something more than a mere formal procedure to entitle a man to become a citizen of the United States.

The question being passed upon is not one of perjury or no perjury in a criminal court, where a jury must be satisfied beyond a reason-

able doubt. All the judge has to do in a case of this character is to weigh the evidence upon one side and the other, making every allowance for the uncertainty of human recollection, and then to determine whether, by a preponderance of the evidence, the time required by the act of Congress for residence in the United States has been satisfactorily established. Applying these views to the testimony adduced, I decline to order a certificate of naturalization in this case.

In re STERLINGWORTH RY. SUPPLY CO.

(District Court, E. D. Pennsylvania. November 18, 1908.)

No. 3,135.

BANKRUPTCY (§ 217*)—ADMINISTRATION OF ESTATE—SALE OF PROPERTY.

Where, at the time of an adjudication of bankruptcy against a corporation, its property had been for a year and a half under the control and management of a receiver appointed by a state court, under its direct orders and superintendence, a sale of property previously ordered by such court for the purpose of closing the receivership, and which had been advertised at considerable expense, will not be stayed by the court of bankruptcy unless it is clearly shown that it will be detrimental to the interests of general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 217.*]

In Bankruptcy. On motion to stay sale. See, also, 164 Fed. 591.

F. W. Edgar and H. J. Steele, for state court receiver.

Charles H. Edmunds, Samuel Scoville, Jr., and Frank Reeder, for federal court receiver.

William J. Conlen, for intervening creditor.

Frank P. Prichard, for bankrupt.

HOLLAND, District Judge. The Sterlingworth Railway Supply Company was adjudicated a bankrupt on November 4, 1908, and Frank W. Coolbaugh, who was appointed receiver two days later, presented a petition on the 16th day of November, 1908, asking that a receiver's sale of the bankrupt's property, ordered by the court of common pleas of Northampton county, be restrained until the further order of this court. The state receiver was appointed February 12, 1907, and has conducted the business of the company, under the direction of the Northampton county court, since that time. The appointment was the result, as alleged in the bill filed for that purpose, of—"a factional difference over the management of the corporation arising in the board of directors. * * * The board divided into two parties, each claiming a majority, and insisting upon the powers of the directorate, and claiming the control and management of the business, property, and corporate affairs of the corporation; * * * that both parties * * * were attempting to carry on the business * * to the great embarrassment, prejudice, and depreciation of the property," etc.

From the time of the appointment almost continuously the parties were before the county court litigating questions in regard to the

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

corporate property. A motion presented in December, 1907, to dismiss the state receiver upon the ground of malfeasance in office, was ruled against the petitioners, and sustained by the Supreme Court of the state of Pennsylvania. Almost every move on the part of the state receiver has been passed upon and approved by the judge appointing him, after a full hearing by all parties interested. Nothing has been done without the sanction of the county court, and on the 24th day of September, 1908, an order was made by the court directing the sale of certain of the corporate property to take place on November 20, The sale has been extensively advertised at considerable expense to the estate. The question of the advisability of selling at this time was fully considered by the Northampton county court in a number of hearings before it prior to issuing the order. The petition here presented sets forth numerous alleged grievances, none of which, however, can be considered in this court on a petition to stay this sale. The only matter to be considered upon this application is whether or not this sale will seriously jeopardize the interest the general creditors may have in the property. This question has been passed upon by Judge Stewart, of the county court, who knows all the facts and circumstances in connection with the property which affect the value, and which would be of importance in determining whether or not a sale should take place at this time, and he has concluded the sale should be made. The only reason given for a postponement of the sale is that as a result of the last election the property will probably bring more in the future. The state receiver has expended large sums of money and issued receiver's certificates therefor. This indebtedness was created by him in the management of the property, under the direction of the court, with the assent of all parties interested, and the sale is ordered for the payment of these charges, together with the receiver's expenses. On the 4th day of May, 1908, an order was entered that the receiver be discharged upon the payment of these charges by the interested parties, but the money was not forthcoming.

There is nothing in the case but some ex parte affidavits to the effect that the property will probably bring more in the future. This, in my judgment, is far short of making a case where the interest of the general creditors will be jeopardized by the sale at the time set; and as this receivership was created about one year and a half before the presentation of the petition in bankruptcy, and the property of the corporation at that time was taken into the custody of the state court. the management of the same should not be interfered with in any manner whatever. After the state receivership has been wound up, it will be the duty of the receiver in bankruptcy to receive from the state receiver whatever property belongs to the bankrupt's estate, and until the final settlement and discharge of the state receiver it will be the duty of the bankrupt receiver to look after the interest of the bankrupt's estate. Any action on his part in connection with the state receivership, which he deems advisable to be taken to protect the interest of the bankrupt's estate, will be authorized when it appears to this court that it is a necessary and proper step to take.

The motion to star the sale is therefore exampled

The motion to stay the sale is therefore overruled.

In re McKEE et al.

(District Court, E. D. New York. November 23, 1908.)

BANKRUPTCY (§ 417*)-RIGHTS OF BANKRUPT-SETTING ASIDE DISCHARGE.

Members of a partnership were adjudged bankrupts on a voluntary petition and obtained a discharge, having scheduled no assets. At the time of the adjudication an action on promissory notes was pending against them in a state court, in which they had pleaded a counterclaim, but through inadvertence or mistake neither the notes nor counterclaim were scheduled. Held, that on their application, made before the expiration of the time for filing claims, the bankrupts were entitled to have the discharge set aside and to amend their schedules, by including both the creditors' claim and their counterclaim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. 869 ; Dec. Dig. 417.*]

In Bankruptcy.

William O. Campbell, for petitioners.

Dittenhoefer, Gerber & James, for Metropole Construction Company.

CHATFIELD, District Judge. The bankrupts filed a voluntary petition in this court, in which they showed certain liabilities, but no assets, and upon which adjudication was entered, and a discharge granted, upon the 24th day of July, 1908. At the time of the filing of this petition, and of obtaining the discharge, a suit for damages upon two promissory notes was pending in the Supreme Court of the state of New York, and the defendants had presented an unliquidated counterclaim as a defense to that action. Neither the liability of the suit nor the possible asset represented by the counterclaim was included in the schedules filed by the bankrupts. The creditor received no notice, and is now pressing its case for trial. The bankrupts have applied for leave to open the discharge, amend the schedules, and go on with the bankruptcy proceedings as if the claim in question had been included in the original schedules. The result of this would be that the creditor, who was plaintiff in the state court action, would have a right to object to a discharge; that the claim upon which that suit is brought, arising upon the two notes, could be proven in bankruptcy (and, if a new discharge were granted, would be released thereby); and that upon the trustee in bankruptcy would devolve the responsibility of prosecuting the alleged counterclaim, if in his opinion that were advisable.

Section 15 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]) provides for the opening of a discharge within a period of six months, if obtained by fraud. Section 13 provides for the setting aside of a composition in the same way. But no such question arises here, inasmuch as this application is made by the bankrupts, rather than by a creditor, and no allegations of fraud are presented. The case of In re Spicer (D. C.) 145 Fed. 431, is cited in opposition to the present motion, and the decision therein is based upon exactly similar circumstances to those now under consideration, with one exception. The application in that case was not made until

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after the expiration of 12 months subsequent to adjudication. This made a proof of claim impossible under the circumstances, under the provisions of section 57, subd. "n," of the bankruptcy law. Similarly, the case of In re Hawk, 114 Fed. 916, 52 C. C. A. 536, decided by the Circuit Court of Appeals of the Eighth Circuit, holds that after the lapse of a year no creditor's rights can be taken away by the open-

ing of a discharge, at least without notice to the creditors. But a different situation arises upon the present motion. As has been indicated, the creditor here is in a position to file his claim, no assets have been distributed, no question of dividends entered into the matter, and the only assets of the estate shown, viz., the counterclaim, should be administered by the creditors as represented by a trustee. The bankrupt is no longer in a position to determine for his creditors whether the counterclaim is an asset or not. Further, the bankruptcy law, by section 14b (5), forbids the discharge of a bankrupt who has in voluntary proceedings been granted a discharge in bankruptcy within six years. To take away the benefits of the bankruptcy law from a bankrupt who has made a mistake which can be corrected without injury to any of the parties concerned, and thus to compel him to wait six years before he can obtain the very benefits intended to be given by the bankruptcy law, is too harsh a construction to place upon the bankruptcy statute, where the bankrupt has been guilty of no fraud and of no intentional laches.

At most the failure to include the debt in his schedules was a mistake of law, for which his attorney was presumably responsible; and, recognizing that a court of bankruptcy is, so far as possible, a court of equity, it seems to this court that the present application should be granted.

CAMPBELL v. TRINIDAD SHIPPING & TRADING CO., Limited.

(District Court, E. D. New York November 20, 1908.)

SEAMEN (§ 29*)—PERSONAL INJURIES—ASSUMPTION OF RISK.

Leaving the cover off from a hatchway on a vessel which was surrounded by a coaming 30 inches high, alongside of which was also a broad ledge, was not of itself a failure of duty toward a member of the crew, who had full opportunity to know the position and condition of the hatch, which renders the vessel liable for his injury by falling therein.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188; Dec. Dig. § 29.*]

In Admiralty.

Samuel F. Edmead, for libelant.

Convers & Kirlin (John M. Woolsey, of counsel), for respondent.

CHATFIELD, District Judge. The libelant was injured by falling through a hatchway upon the steamer Grenada. The hatch was surrounded by a coaming about 30 inches high, and had been open during the day for purposes connected with the cargo of the vessel. A broad ledge or covering over steam pipes also runs alongside the coaming, and would prevent persons along the passageway from getting close

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the hatch. The accident happened in the evening, about 7 o'clock, while the hatch covers were not in position. It was apparently getting dark at the time. The libelant, who was one of the crew, employed as baker, worked in a part of the ship which overlooked this particular hatch through windows immediately in front of where the libelant performed part of his duties. The libelant's story is that he slipped on greasy water. The presence of grease and water is denied, and the libelant is said to have told the officers that he sat upon the hatch coaming drinking tea just before he fell through. It is evident that he would not have been injured if the hatch covers had been in place, but no negligence or failure of due care toward the crew can be presumed from that fact He further alleges that he was not taken to the nearest port and given proper treatment: but the evidence shows that reasonable judgment was used, as good treatment given as appeared to be necessary, including examination by a doctor, and the libelant's own wishes consulted in bringing him to New York. There is nothing to indicate that he did not receive such care as the vessel's obligations called for.

The particular hatchway was not so constructed as to be capable of use as a part of the deck, nor could any member of the crew be relieved from responsibility if he saw fit to walk or sit upon the hatch, without looking to see if the covers were in place. The story of the libelant does not seem credible, and he has not only not sustained the burden of proof, but, on the contrary, the testimony of the officers seems to be more worthy of belief. The risk was certainly open and apparent. The libelant had an excellent opportunity to become aware of the exact condition, and it is impossible to see what obligation rested upon the vessel which can be considered negligence. The libelant was either guilty of contributory negligence or he was the victim of some accident for which the ship should not be held responsible.

The libel must be dismissed.

THE CURTIN.

(District Court, E. D. Pennsylvania. December 3, 1908.)

No. 31.

MARITIME LIENS (§ 65*)—Supplies—Proof of Delivery to Vessel.

A vessel cannot be subjected to a lien for supplies on evidence that they were ordered by some person who represented himself to be either the captain or the cook, and were charged to the vessel, and which fails to show that they were in fact delivered to the vessel or to any one authorized to receive them for her.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. $\$ 103; Dec. Dig. $\$ 65.*]

In Admiralty. Suit to enforce lien for supplies.

A. Lawrence Wetherill, for libelant. John A. Toomey, for respondent.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexea

J. B. McPHERSON, District Judge. This is a claim for supplies said to have been furnished to the tug Curtin in August and in December, 1904. Several questions were raised and argued at the hearing, but of these only one need be noticed, namely, the question whether there is sufficient evidence that the supplies were actually delivered to the vessel. To this the answer must, I think, be in the negative. Indeed, the libelants offered practically no testimony whatever from which the fact of delivery could be properly inferred. They did not even know whether the goods were sold to the captain or the cook, and the principal witness went so far as to testify that he only knew that the goods had been sold to some person "who represented himself to be either the captain or the cook." Manifestly, this is not enough to subject the vessel to a lien. The fact that the goods were charged against the tug upon the libelants' books is not of itself sufficient to support the action, and adds little, if any, weight to the meager testimony already referred to. For all that appears, the person who ordered the goods may have falsely represented himself to be connected in some capacity with the tug; or, even if they were ordered by the captain or by some other person acting in his behalf, they may have been delivered elsewhere than upon the vessel or within its control. This defect in the proof is fatal to the claim. The Vigilancia (D. C.) 58 Fed. 698; The Cabarga, Fed. Cas. No. 2,276; James Dalzell's Son v. Kaine (D. C.) 31 Fed. 748; Hays v. Rees, 93 Fed. 984, 36 C. C. A. 45. As is stated in 26 Cyc. 786. § 5:

"The basis of a lien for necessaries is a benefit rendered the vessel. Hence, in order for such a lien to arise, the necessaries must be either delivered on board the vessel, or brought into immediate relations to her, as by being delivered on the wharf or into the custody of some one authorized to receive them."

See cases cited in note 87; also, 19 Am. & Eng. Ency. 1101, § 1, and cases in notes.

A decree may be entered dismissing the libel, with costs.

NEFF v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1908.)

No. 2,613.

1. Forgery (§ 12*) — Transmitting Forged Instruments to Officer—Sufficiency of Instruments to Form Basis of Charge.

When a false instrument or affidavit is so palpably and absolutely invalid that it cannot defraud or inflict loss or injury under any circumstances, it may not form the basis of a charge of forging it, or of uttering it, or of transmitting it to the officer to defraud the United States.

But if under any contingency it may have the effect to deceive and defraud, it is sufficient to found a conviction of such an offense upon.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 28–47; Dec. Dig. § 12.*]

2. Forgery (§ 12*)—Forged Instrument Erroneously Received in Evidence may Form Basis of Offense.

A forged instrument or affidavit regarding a material fact erroneously received in evidence by the officers of a local land office in the trial of a claim to land within their jurisdiction may deceive them and defraud the United States, and hence may form the basis of a conviction under section 5418 (U. S. Comp. St. 1901, p. 3666), because a patent issued upon it by the Land Department would be impervious to collateral attack, and the United States would be estopped from avoiding it and from recovering the land even by a direct attack after the title to it passed to an innocent purchaser.

If the land and the claim were beyond the jurisdiction of the Land Department, the transmission of such an affidavit to its officers could not defraud the United States nor form the basis of a conviction under that section.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 28-47; Dec. Dig. § 12.*]

3. Forgery (§ 12*)—Instrument Sufficient if Valid on Face.

Such an instrument or affidavit is sufficient if it is apparently valid on its face, although extrinsic facts may exist that would render it void or ineffective if genuine.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 28–47; Dec. Dig. § 12.*]

4. Forgery (§ 12*)—Instrument is Sufficient Although Other Evidence or Acts Indispensable to Make It Effective.

It is not indispensable to a conviction for transmitting a forged affidavit to an officer to defraud the United States, or to a conviction of forgery, or of uttering a forged instrument, that the affidavit, the forgery, or the uttering shall be sufficient in itself, without other evidence or acts, to win the controversy or to accomplish the object of the wrongful act. It is enough that it may under some contingency aid to bring about that result.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 28–47; Dec. Dig. § 12.*]

5. Public Lands (§ 36*)—Forgery (§ 12*)—Timber-Culture Entry does Not Expire Thirteen Years After Date—Local Officers have Jubisdiction to Hear and Allow Proof Thereafter.

The acts of Congress and the regulations of the Land Department permitted one who had made a timber-culture entry to prove his compliance with their requirements within 5 years after the expiration of 8 years from the entry, and gave to the local officers of the Land Department jurisdiction to receive, consider, and approve, or reject in the first instance, final proofs of claims to the public land. They also provided that a notice of the taking of final proofs should be published, and that such proofs

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

should be taken within 10 days after the time specified in the notice. More than 14 years after the date of his entry an entryman applied to the local officers to make final proofs, and the notice was published.

Held: (1) The timber-culture entry did not expire or become ineffectual by the mere expiration of the 13 years from its date, and the officers of the local land office had jurisdiction to receive, to consider, and te approve or reject, final proofs thereon thereafter.

(2) A forged affidavit which appeared on its face to have been taken more than 10 days after the date named in the notice, which was transmitted to the officers by the defendant and was received and approved by them as a part of the proof, was sufficient to form the basis for a conviction under section 5418, Rev. St. (U. S. Comp. St. 1901, p. 3666).

(3) A forged affidavit which was sufficient to aid in making, but was insufficient in itself to make, the proof, was enough to form a basis for a

conviction under section 5418.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 36;* Forgery, Cent. Dig. §§ 28-47; Dec. Dig. § 12.*]

6. Public Lands (§§ 117, 138*)—Land Department—Patent is Judgment and IMPERVIOUS TO COLLATERAL ATTACK-INNOCENT PURCHASER'S TITLE UNDER IMPREGNABLE-"PATENT TO LAND."

A "patent to land" is the judgment of the Land Department and a conveyance of the title in execution of it to the party adjudged entitled, and, when the land described in it was within the jurisdiction and subject to the disposition of the department, is impervious to collateral attack.

An innocent purchaser's title under such a patent is impregnable. It

may not be avoided by the United States by a direct attack.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 323, 324, 368; Dec. Dig. §§ 117, 138.*

For other definitions, see Words and Phrases, vol. 6, pp. 5230, 5231; vol. 8, p. 7748.]

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Kansas.

I. E. Lambert (E. C. Cole and Humbert Riddle, on the brief), for plaintiff in error.

Harry J. Bone and J. S. West, for the United States.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

SANBORN Circuit Judge. Section 5418 of the Revised Statutes provides that every person who falsely alters any affidavit for the purpose of defrauding the United States, and any person who transmits to or presents at the office of any officer of the United States for such purpose any false, forged, or altered affidavit knowing it to be false, forged, or altered, shall be punished by fine or imprisonment, or both (U. S. Comp. St. 1901, p. 3666).

On March 15, 1889, Lemuel T. Williams made a timber-culture entry of a tract of land in the state of Kansas, and on September 25, 1903, his final proof was allowed by the register and receiver of the proper local land office, and the usual receiver's final receipt was issued to him. The defendant below was convicted and sentenced under section 5418 for altering the affidavit of Williams made on August 1. 1903, and for transmitting to the register and receiver this altered af-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fidavit and the forged affidavits of Clarence A. Younggren and James A. Ridpath, which together form the proof of Williams' compliance with the statute upon which the receiver's receipt was founded. This judgment is assailed on the ground that none of these affidavits could have defrauded the United States of the land for which Williams obtained this receipt, because they were made and transmitted too late, because they were incompetent evidence, and because they constituted insufficient proof of Williams' claim.

The main contention is that the affidavits could not have defrauded the United States because, before they were made or presented, the entry of Williams, which was made March 15, 1889, had expired and become ineffectual for every purpose under the act of June 14, 1878 (chapter 190, §§ 2, 3, 20 Stat. 114), which governed it, and which provided (1) that if, at any time within five years after the expiration of eight years from the date of the entry, the entryman should prove by two credible witnesses that he had cultivated the trees required by the act, and had otherwise complied with the acts of Congress, he should receive a patent for the land, and (2) that, if at any time after the entry and before the issue of the patent the entryman failed to comply with the requirements of the acts of Congress relating thereto, the land should be subject to entry under the homestead laws or under the timber-culture laws after notice to the original entryman had been given and a determination of the rights of the parties had been made as in other contested cases. The proposition is that under this act the entry was dead 13 years after March 15, 1889, or on March 15, 1902, and that the affidavits presented in 1903 could not have deprived the United States of the land. In support of this position counsel cite Northern Pacific Railroad Company v. De Lacey, 174 U. S. 622, 630, 633, 19 Sup. Ct. 791, 43 L. Ed. 1111, in which there is a decision that notwithstanding an uncanceled pre-emption entry made and abandoned in 1859 the United States had, in 1864 and 1884, "full title not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights" to the lands subject to the entry, and that no portion thereof had been "granted, sold, reserved, occupied by homestead settlers or otherwise disposed of" within the meaning of the exceptions to the grant to the Northern Pacific Railway Company by the act of July 2, 1864 (chapter 217, 13 Stat. 365), and Oregon & C. R. Co. v. United States, 189 U. S. 103, 23 Sup. Ct. 673, 47 L. Ed. 726, in which the Supreme Court held that, notwithstanding an uncanceled entry under the Oregon donation act of September 27, 1850 (chapter 76, 9 Stat. 496), as amended by Act Feb. 14, 1853 (chapter 69, 10 Stat. 158), made and abandoned in 1853, the land which was the subject of the entry was not "granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of" on July 25, 1866, within the meaning of the grant to the Oregon Central Railroad Company of that date (14 Stat. 239, c. 242). But these decisions are far from holding that, because those abandoned entries were ineffective against the railroad companies at the times when their respective grants took effect, no one who made or presented forged affidavits to the officers of the Land Department upon the trials of the claims made under those

entries could be guilty of the offense denounced by section 5418. In the former case the pre-emptor presented in 1887 to the register and receiver of the land office the proof of his claim initiated by his entry in 1859, and those officers and the Commissioner of the General Land Office approved his proof and sustained his claim, but the Secretary of the Interior reversed their decision and awarded the land to the railroad company. If the pre-emptor and his witnesses had knowingly made or presented forged affidavits to the officers of the Land Department upon the hearing upon his claim before them for the purpose of defrauding the United States out of the land there in controversy, would they have been guiltless of the offense specified in section 5418 because the receipt of those affidavits in evidence and the award of the land to the pre-emptor were legal errors? An affirmative answer to this question, which the maintenance of the proposition of counsel demands, ignores the radical difference between the action of a judicial or of a quasi judicial tribunal beyond its jurisdiction and its erroneous action within its jurisdiction. The former is void. But the latter is impregnable to collateral attack, and voidable, if at all, only by a direct proceeding for that purpose. Let it be conceded that if the affidavits transmitted by the defendants could not have been used before the local officers of the Land Department to defraud the government of the land which Williams claimed, then the defendant could not have been guilty of the offenses charged against him; that, if the officers of the Land Department could not have issued a patent upon these affidavits that would have deprived the United States of the land. the use of the affidavits to obtain the patent could not have defrauded it; but if those officers could have issued such a patent upon those affidavits, then they might have been used to defraud it. Let it be further conceded for the purpose of the first consideration of this question that the entry of Williams had expired, that it was error for the officers of the Land Department to receive the affidavits in evidence, that it was error for them to decide that the original entry was still effective, and that it was error for them to determine that the entry and the affidavits proved that Williams was entitled to the land. Nevertheless, might not the United States have been deprived of the land by their decision in favor of Williams and their patent issued upon the affidavits? By the act of March 3, 1849 (chapter 108, § 3, 9 Stat. 395; Rev. St. § 441 [U. S. Comp. St. 1901, p. 252]), the Secretary of the Interior is charged with the supervision of the public business of the United States relating to the public lands; and by the act of July 4, 1836 (chapter 352, § 1, 5 Stat. 107; Rev. St. § 453 [U. S. Comp. St. 1901, p. 2571), the Commissioner of the General Land Office is required to perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government. Applicants for the public lands are required to apply in the first instance to the register and receiver of the local land office of the district in which the land is situated. Act May 10, 1800, c. 55, §§ 7, 8.

2 Stat. 75; Rev. St. §§ 2223, 2247, 2295 (U. S. Comp. St. 1901, pp. 1362, 1371, 1398). The land to which Williams attached his timberculture claim was public fand subject to the disposition of the Land Department and within its jurisdiction. When a claim is made under the homestead, the pre-emption, or the timber-culture laws to a portion of the public domain that is subject to its disposition, the Land Department must hear the evidence offered and decide whether or not the claimant is qualified to acquire the lands under the terms of those laws, whether or not the land claimed is subject to the laws, and whether or not the claimant has so complied with the requirements of those laws as to entitle him to the title to the land. The Land Department of the United States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to the public land which it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. A patent to land which that department has the power to dispose of is both the judgment of that tribunal and a conveyance of the title to the land to the party adjudged to be entitled to it, and it is impervious to collateral attack for errors of law or mistakes of fact committed in the decision of the case it determines. Moore v. Robbins, 96 U. S. 530, 533, 24 L. Ed. 848; United States v. Winona & St. Peter R. Co., 15 C. C. A. 96, 104, 105, 106, and cases there cited, 67 Fed. 948, 956, 957 958; James v. Germania Iron Co., 46 C. C. A. 476, 479, 107 Fed. 597, 600.

It is true that the United States, or any party who has the equitable title under it, may maintain a bill in equity to set aside such a patent or to declare it to be held in trust either on account of error of law, fraud, or gross mistake (James v. Germania Iron Co., 107 Fed. 597, 600, 46 C. C. A. 476, 479), but in the hands of an innocent purchaser for value the title under such a patent is impregnable, and the United States may not maintain a bill to avoid the patent or to recover the title (United States v. Burlington, etc., R. Co., 98 U. S. 334, 342, 25 L. Ed. 198; United States v. California & C. Land Co., 148 U. S. 31. 41, 13 Sup. Ct. 458, 37 L. Ed. 354; United States v. Winona & St. Peter R. Co., 15 C. C. A. 96, 109, 67 Fed. 948, 961; United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 333, 26 Sup. Ct. 282, 50 L. Ed. 499; United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 677, 67 C. C. A. 1, 10; Colorado Coal Co. v. United States, 123 U. S. 307, 309, 322, 8 Sup. Ct. 131, 31 L. Ed. 182; United States v. Clark [C. C.] 125 Fed. 774, 776).

In June, 1903, Williams applied to the local officers of the Land Department to prove up his timber-culture claim. His original entry of March 15, 1889, was uncanceled upon the books of the Land Department. The land was subject to the disposition of the officers of that department, and the power was vested in the local officers, and the duty was imposed upon them, to hear and decide the question whether or not Williams was entitled to a patent to the land. The land, the issue, and the parties were within the jurisdiction of the Land Department, and the first action and hearing upon the application of

Williams was within the jurisdiction of the register and receiver of the local land office. If it was error for the officers of that department to receive the forged affidavits in evidence and to hold that Williams' original entry was still effective, nevertheless those affidavits might have been used before them to defraud the United States out of the land by procuring a title to Williams and then causing this title to be conveyed to an innocent purchaser. The defendant, therefore, cannot escape punishment on the ground that the affidavits were incapable of use before the officers of the Land Department to defraud the United States. The argument that one who by false affidavits deceives a judicial officer and induces him to render an erroneous judgment ought to escape the punishment prescribed for such deceit because he also induces the officer by means of those affidavits to commit an error of law in their reception and in his rendition of judgment upon

them does not appeal to the reason with persuasive force.

And right here is the answer to some other objections of counsel for the defendant. Under the acts of Congress and the rules of the Land Department, a notice of the making of final proof under a timber-culture claim was required to be published 30 days, and proof by affidavit might be taken at the time specified in the notice or at any time within 10 days thereafter. Act March 3, 1879, c. 192, 20 Stat. 472 (U. S. Comp. St. 1901, p. 1392); Act March 2, 1889, c. 381, § 7, 25 Stat. 855 (U. S. Comp. St. 1901, p. 1393); Rev. St. § 2294 (U. S. Comp. St. 1901, p. 1396); Circular General Land Office of January 25, 1904, pp. 74 The published notice given in Williams' case specified July 18, 1903, as the time for taking the proof, and the forged affidavit of Ridpath which was received and approved by the register and receiver as part of Williams' proof purported to have been sworn to on September 12, 1903. The receipt in evidence and the submission to the jury of this affidavit is specified as error on the ground that it was not taken in time and was a nullity. The affidavit appeared on its face to have been taken 46 days after the time fixed for its taking by the statute and the rules of the department, but the parties to any litigation may, by express declaration or by silent acquiescence, waive objections to the time and to the method of procuring evidence therein; and after the publication of the notice in Williams' case the only parties to the proceeding before the officers of the Land Department were the United States, the vendor of the land in question which was present by those officers, and the purchaser, Williams. It may be that their waiver of objections to the Ridpath affidavit on account of the apparent time of its taking would have been unavailing against a third party who had fastened a legal or equitable claim upon the land. But there is no evidence that there was any such party, and the Ridpath affidavit was offered in proof by the defendant for Williams and was received and acted upon without objection by the United States. Is every deponent who testifies falsely in a deposition taken without adequate notice or out of time after notice, and every one who knowingly puts in evidence a forged deposition which appears to be so taken, exempt from prosecution for perjury or for presenting a forged deposition because the deposition might have been excluded on the objection of

some party for an apparent irregularity in the time or manner of taking? The answer seems to be evident. Van Steenbergh v. Kortz, 10 Johns. (N. Y.) 167, 169; Montgomery v. State, 10 Ohio, 220; Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255; Pratt v. Price, 11 Wend. (N. Y.) 128. This is not a prosecution for perjury, or for forgery, or for uttering a forged instrument. The count now under consideration charges the commission of the offense created by section 5418 of transmitting the false or forged Ridpath affidavit to an officer of the United States knowing the same to be false and forged for the purpose of defrauding the government. The offense is statutory, but it is akin to the uttering of forged instruments. Established rules of law applicable to cases of this nature are that, where the instrument or affidavit is so palpably and absolutely invalid that it cannot under any circumstances inflict loss or injury, the charge of the offense cannot be sustained, but if under any contingency the forged instrument may be prejudicial, it is sufficient to form the basis of a conviction (State v. Briggs, 34 Vt. 501, 502; Dunn v. People, 4 Colo. 126; 1 Wharton's Criminal Law, § 680; Van Sickel v. People, 29 Mich. 61, 63); and that, if the instrument or affidavit is apparently valid on its face, it is sufficient upon which to base a conviction of the offense, although collateral or extrinsic facts may exist that would render it void if genuine (State v. Hilton, 35 Kan. 339, 348, 11 Pac. 164; Wharton's Criminal Law, § 1093; People v. Rathbun, 21 Wend. [N. Y.] 509, 520; State v. Johnson & Johnson, 26 Iowa, 407, 418, 96 Am. Dec. 158; State v. Pierce, 8 Iowa, 231, 235). In State v. Hilton an official proof of death which consisted of the affidavit of a physician and an affidavit of the defendant that the deceased died on Mav 2. 1885, and the affidavit of the undertaker and the certificate of the clergyman that his funeral and burial were on March 4, 1885, was forwarded to the insurance company. These affidavits and this certificate were upon a single piece of paper, or were attached together so that they constituted a single entity. They were sent to the insurance company but it discovered the discrepancy of the dates and did not pay the alleged loss. The defendant was convicted of forging the undertaker's affidavit and the clergyman's certificate, and his counsel insisted that these instruments were not subjects of forgery because the fact clearly appeared from the affidavits of the physician and the defendant, which were attached to them, that they could not be true. The court, however, overruled this contention, and held that the undertaker's affidavit and the clergyman's certificate must each be considered by itself; that, so considered, each of them formed a sound basis for a charge of forgery, although the extrinsic facts which prevented them from deceiving the insurance company and accomplishing their purpose appeared in the other portions of the proofs which were attached to them. The affidavit of Ridpath was valid on its face, and it was only by the collateral and extrinsic facts that the notice had been published and that it had specified July 18, 1903, as the time for taking the proof, that the objection to it could be made to appear.

If the Ridpath affidavit had been genuine it would have been valid. It purported to have been taken before an officer authorized to admin-

ister the oath, it contained proof of the cultivation of Williams' land, and any false swearing in it to a material matter was declared to be perjury by the act of May 26, 1890, c. 355, 26 Stat. 121 (U. S. Comp. St. 1901, p. 1396). There were contingencies in which it might have inflicted injury upon the United States, the contingency that it should be used, as it undoubtedly might have been, to induce the register and receiver to give a new notice and opportunity to take testimony in Williams' case and that false testimony should then be presented, and the contingency which actually arose that the objection to the affidavit because it appeared to have been taken too late should be waived by the government, and its officers should receive and approve the proof

which the affidavit aided to present.

It is contended that the affidavit of Williams which was altered by the defendant and sent to the officers was both incompetent and insufficient to sustain either charge based upon it, because the statutes and the regulations of the department required that it should be supported by the testimony of two credibile witnesses and the affidavit of only one witness was taken within the 10 days after the time specified in the notice. Counsel further insist that none of the affidavits was either competent or sufficient to base any charge in the indictment upon, because no proof was made before the officers of the Land Department that the failure of Williams to make his proof within the 13 years arose from ignorance, accident, or mistake. Section 2457, Rev. St. (U. S. Comp. St. 1901, p. 1520). In support of these objections they cite cases in which instruments absolutely and palpably void on their faces, like deeds and wills which have but one witness when the law renders them void unless they have more, have been held not to be subjects of forgery. Pearson v. Commonwealth, 117 Ky. 731, 78 S. W. 1128; Moffit's Case, 2 East's P. C. 954. But each of the affidavits in this case was apparently valid on its face, effectual to aid in proving the case and susceptible of use with other proof to defraud the United States of the land; and it is not necessary to a conviction for perjury, or for uttering a forgery, or for presenting a forged affidavit to an officer to defraud the United States, that the false swearing, the forgery uttered, or the forged affidavit transmitted should be sufficient in itself, without other evidence or acts to sustain the issue in controversy, or to accomplish the purpose of the offense. It is enough that it may be under some contingency aid to bring about that result. State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; Wood v. People, 59 N. Y. 117; State v. Flagg, 27 Ind. 24; State v. Molier. 12 N. C. 263.

Moreover, the essence of all the offenses charged against the defendant in the second, fifth, and seventh counts of the indictment was the use of the affidavits known by him to contain fraudulent statements made to defraud the United States of the land. He transmitted these affidavits to the officers, and secured the receiver's final receipt for the land by means of them. He thereby represented to the United States that they were lawfully taken, competent and sufficient to warrant the action which he induced the officers to take thereon, and it would seem that he is thereby estopped from denying that they were so. In-

graham v. United States, 155 U. S. 434, 437, 15 Sup. Ct. 148, 39 L. Ed. 213; National Loan & Investment Co. v. Rockland Co., 36 C. C. A. 370, 372, 94 Fed. 335, 337.

This case has been treated thus far upon the theory that the proposition that the entry of Williams expired 13 years from its date, and that it was error for the officers of the local land office to receive, consider, or approve thereafter proof that Williams had complied with the statutes in every other respect, except the time of his presentation of his proof, was sound. But in the authorities cited by counsel for the defendant that proposition was neither considered nor decided. question there considered was the conflicting claims of entrymen who had abandoned their entries years before the United States made grants to railway companies, and the claims of the beneficiaries of those grants. The general rule, repeatedly announced by the Supreme Court and followed by the Land Department, is that an entry of public land under the laws of the United States segregates it from the public domain, brings it within the exceptions of the railroad land grants, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed. Bardon v. Northern Pacific Railroad Co., 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; Wilcox v. McConnell, 13 Pet. 498, 513, 10 L. Ed. 264; Witherspoon v. Duncan, 4 Wall. 210, 218, 18 L. Ed. 339; Carroll v. Safford, 3 How. 441, 11 L. Ed. 671; Kansas, Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; Hastings & Dakota R. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; Whitney v. Taylor, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906; McIntyre v. Roeschlaub (C. C.) 37 Fed. 556; Hartman v. Warren, 22 C. C. A. 30, 33, 76 Fed. 157, 160; James v. Germania Iron Co., 107 Fed. 597, 603, 46 C. C. A. 476, 482; Railroad Company v. Forseth, 3 Land Dec. Dep. Int. 446, 447; Railroad Company v. Leech, Id. 506; Hollants v. Sullivan, 5 Land Dec. Dep. Int. 115, 118; In re Milne, 14 Land Dec. Dep. Int. 242. The decisions in Northern Pacific Railway Company v. De Lacey, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111, and Oregon & C. R. Co. v. United States, 189 U. S. 103, 23 Sup. Ct. 673, 47 L. Ed. 726, treat of cases the peculiar facts in which the Supreme Court takes great pains to show excepted them from this general rule. If the question treated in the authorities just cited had been presented to the officers of the Land Department, it would be somewhat difficult to hold that it would have been error for them to have decided according to the general rule which prevails in the courts and in the Land Department. But that issue was not before them. No grantee of the United States, no rival claimant, demanded Williams' land. The United States had offered to sell it to him in consideration that he would cultivate trees upon it for 8 years, and had given him 5 years thereafter to prove that he had done so. Williams had entered the land, and, according to the affidavits presented to the officers, had accepted the offer and cultivated the trees. The proof presented to them established the fact that he had complied with the terms of the sale in every respect except that he had not proved his compliance until about 18 months after the expiration of the 5

years. Time is not ordinarily of the essence of a contract for the sale of land which has been substantially performed unless made so by the express terms of the agreement. There was no provision of the statute or of the contract under it to the effect that a failure to make the proof within the 5 years should forfeit the claim or the right of the entryman. On the other hand, the statute provided simply that he should receive a patent if he made the proof within the 5 years; and that if at any time before the patent issued, whether before or after the expiration of the 5 years, he failed to comply with the terms of the law, the land should be subject to entry again after notice to him and after a determination of the rights of the parties as in other contested cases. Chapter 190, §§ 2, 3, 20 Stat. 114. Why did the statute require a notice to the entryman and a decision of his rights after as well as before the expiration of the 13 years? The rational, if not the unavoidable, answer is, because his entry and his cultivation of the trees for 8 years gave him the right to the patent, at least as against the vendor, the United States, under the familiar rule that time is not ordinarily the essence of a contract under such circumstances.

Where a grant has been made to a railroad company on the express condition that it shall construct, equip, furnish, and complete its entire road by a time certain, and it completes it after that time, its grant is not lost by the expiration of the time before the subsequent completion of the railroad. St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. Ed. 77; Schulenberg v. Harriman, 21 Wall. 44, 62, 22 L. Ed. 551; United States v. Southern Pacific Ry. Co., 146 U. S. 570, 606, 13 Sup. Ct. 152, 36 L. Ed. 1091; Farnsworth v. Minnesota & Pacific R. R. Co., 92 U. S. 49, 67, 23 L. Ed. 530; United States v. Northern Pacific R. R. Co., 177 U. S. 435, 440, 20 Sup. Ct. 706, 44 L. Ed. 836; United States v. Northern Pacific Railroad Co., 37 C. C. A. 290, 304, 95 Fed. 864, 878. And no sound reason occurs to us why such a forfeiture should be inflicted upon an entryman under the timber-culture act who has for 8 years cultivated the trees upon the prairie and substantially complied with the requirements of the statute. It is, and it ought to be, the rule and practice of the Land Department that when a default is cured by an entryman before notice of contest, or notice that any other party claims or desires to enter the land, his entry stands. Heptner v. McCartney, 11 Land Dec. Dep. Int. 400; Thompson v. Bartholet, 18 Land Dec. Dep. Int. 96; Boulware v. Scott, 2 Land Dec. Dep. Int. 263; Stanton v. Howell, 9 Land Dec. Dep. Int. 644; Sewell v. Rockafeller, 10 Land Dec. Dep. Int. 232; Meads v. Geiger, 16 Land Dec. Dep. Int. 366. It was, and it ought to be, the practice of the Land Department for the local officers to receive, consider, and act upon the final proof of timber-culture claims after the expiration of the 13 years. Morris Collar Case, 13 Land Dec. Dep. Int. 339; Pattin v. Smith, 21 Land Dec. Dep. Int. 315; Timpson v. Longnecker, 22 Land Dec. Dep. Int. 59; Zickler v. Chambers, 22 Land Dec. Dep. Int. 208; Carter v. Davidson, 24 Land Dec. Dep. Int. 288, 291.

Whether or not, after the consideration and approval of the proof by the local officers, the case should be referred to the equitable board of adjudication under sections 2450 to 2457 (U. S. Comp. St. 1901, pp. 1518-1526), before the patent issues is immaterial in this case, because decisions sustaining entries alone may be submitted to that board (Hawley v. Diller, 178 U. S. 476, 478, 20 Sup. Ct. 986, 44 L. Ed. 1157), and in order to get the case before the board the proof of the entryman must be taken by the local officers, considered, and sustained. Our conclusion is that it is not error for the officers of the local land office after the expiration of 13 years from the date of a timber-culture entry to receive, consider, and approve competent evidence that the entryman complied with the terms of the statutes in every respect except the making of his proof within the 13 years, and in view of this conclusion also the false affidavits were clearly capable of being used to defraud the United States.

Counsel argue that there was a fatal variance between the averments in the third and fifth counts of the indictment and the proof, but the record fails to sustain their position. The indictment set forth the words interlined in the affidavit of Williams, and that affidavit as it read after the interlineation. The proof was that the defendant made the interlineation charged in the indictment, and that he made others not there charged, and that the modified affidavit was as set forth in the indictment. The fact that the government proved interlineations that it did not plead constituted no variance, in view of the fact that its proof of the interlineation charged, and of the changed affidavit corresponded with its averments.

There was no error in the trial of this case, and the judgment below is affirmed.

MISSOURI-AMERICAN ELECTRIC CO. v. HAMILTON-BROWN SHOE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1908.) No. 2,817.

1. BANKBUPTCY (§ 463*)—TRIAL—EVIDENCE OFFERED SHOULD BE TAKEN AND RECORDED THOUGH HELD INADMISSIBLE—EXCEPTION.

It is the duty of examiners, masters, referees, and the court taking evidence in controversies in bankruptcy, in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that if the appellate court is of the opinion that evidence rejected should have been received it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence.

From this rule evidence plainly privileged, the testimony of a privileged witness, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are excepted.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 463.*]

2. Trial (§ 377*)—It is Error to Close Hearing Before Losing Party has Concluded the Offer of His Evidence.

It is error for a court on a hearing of a controversy in which it is taking the testimony to refuse to take or to consider evidence which

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the losing party desires to offer, and to close the hearing before such evidence is presented to the court so that it can consider it and determine its admissibility.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 887; Dec. Dig. § 377.*]

3. Accord and Satisfaction (§ 7*)—Consideration—Release of Entire Debt for Part Payment Void.

The release of an entire debt for a sum certain upon the payment of a part of the amount due is without consideration and void.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 46; Dec. Dig. § 7.*]

4. Accord and Satisfaction (§ 5*)—Consideration—Release for Part Payment in Things Different from That Due Valid.

A release of an entire debt in consideration of the payment of articles different from the thing due according to the terms of the contract, although those articles are of much less value than the thing due, is valid, because the legal presumption is that the articles had a special value to the recipient, and the transaction is an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 40, 41; Dec. Dig. § 5.*]

5. Assignments for Benefit of Creditors (§§ 4, 9*)—"General Assignment for Creditors"—Transfer of Title and Control of Substantially All Property of Debtor Essential to.

A transfer of the title to and the possession and control of substantially all the property of a debtor to an assignee in trust to convert it into money and distribute it among the creditors of an assignor is essential to constitute a general assignment for the benefit of creditors under section 3a (4) of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]).

A debtor conveyed about three-fourths of its property and the proceeds of any sale it should make of the other fourth, which consisted of real estate of which the assignor retained the possession and the right of use, control, and disposition, to its principal creditor, in consideration of the latter's discharge of the debtor's obligation to it and of the creditor's agreement to pay all the other obligations of the debtor out of the proceeds of the property conveyed.

Held: The conveyance was not a general assignment for the benefit of creditors, because it did not transfer substantially all the property of the debtor, because the title, control, and power of disposition of the real estate remained in the assignor, because the assignor did not intend the instrument as a general assignment, and because its legal effect was not that of a general assignment but that of a sale of the property described in it to the assignee in consideration of its release of the debtor and of its contract to pay the debtor's other debts out of the proceeds of the property conveyed.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 1, 3, 11; Dec. Dig. §§ 4, 9.*

For other definitions, see Words and Phrases, vol. 4, pp. 3052-3054.]

 Assignments for Benefit of Creditors (§ 6*)—"General Assignment"— Conveyance Directly to Creditor is Not.

A conveyance of his property by a debtor directly to his creditor or creditors for their benefit does not constitute a general assignment for the benefit of creditors, because it raises no trust.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 5; Dec. Dig. § 6.*]

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Eastern District of Missouri.

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

W. R. Spooner (Joseph Barton, on the brief), for appellant. Benjamin Schnurmacher (Harvey L. Christie and P. Taylor Bryan, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

SANBORN, Circuit Judge. This is an appeal from an adjudication in bankruptcy of the Missouri-American Electric Company, a corporation of the state of Missouri, upon a creditors' petition filed February 16, 1907, upon the grounds (1) that on October 7, 1906, the corporation, while insolvent, made a general assignment of all its property to the American Electric Company, a corporation of the state of New Jersey, and (2) that on October 17, 1906, the Missouri Company, while insolvent, paid to the American Company, one of its creditors, \$18,000. with intent to prefer the latter to its other creditors, and that the latter company at that time had reasonable cause to believe that it was intended to give it a preference over other creditors similarly situated by this payment. There was no evidence of any payment of \$18,000 or any like sum to the American Company within four months of the filing of the petition, except the transfer of the money and property which was subject to the written instruments executed on October 17, 1906, which the appellees insist constitute a general assignment for the benefit of the creditors of the Missouri Company under section 3a(4) of the bankruptcy law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]). The decision of the merits of the case turns upon the legal effect of those writings. The charges of the commission of the acts of bankruptcy were denied by the Missouri Company, the issues were tried by the district court, evidence which fills more than 200 pages of the printed transcript was adduced, the court closed the hearing while the Missouri Company was still introducing its evidence in defense and before it had rested, that company excepted to this premature closing of the case, and the court rendered a decree adjudging it a bankrupt.

The refusal of the court to hear and record the testimony which the defendant below was introducing before it, its premature closure of the case, and its decision of it against the defendant in the absence of the evidence it was seeking to introduce, was undoubtedly erroneous. A proceeding in bankruptcy is a proceeding in equity, and it is the duty of examiners, masters, referees, and the court, when taking evidence in controversies therein in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence. From this rule evidence plainly privileged, the testimony of privileged witnesses, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, and immaterial that it would be an abuse of the process or power of the court

to compel its production or permit its introduction, are excepted. The evidence which the Missouri Company was seeking to introduce when the court closed the case did not fall under this exception, and it should have been taken and recorded. First National Bank v. Abbott (filed November 24, 1908) 165 Fed. 852; Dowagiac Mfg. Co. v. Lochren, 74 C. C. A. 341, 343, 344, 143 Fed. 211, 213, 214; Blease v. Garlington, 92 U. S. 1, 7, 8, 23 L. Ed. 521; In re De Gottardi (D. C.) 114 Fed. 328, 342; Dressel v. North State Lumber Co. (D. C.) 119 Fed.

531; In re Romine (D. C.) 138 Fed. 837, 839.

Moreover, the court could not have known what other evidence, which the defendant had not then presented, it might desire to offer before it rested its case, and it was plain error to close the hearing and decide the case against it before it had offered all its evidence. Sometimes when a party to a controversy, in whose favor the court perceives that it must decide, has made plenary proof of his case, the record conclusively proves that he has suffered no prejudice, and hence no reversal follows from a refusal to take and hear cumulative evidence on his behalf. But when a court refuses to take and to consider evidence which the losing party desires to offer before that evidence has been presented to it so that it can determine the question of its admissibility, the presumption that error produces prejudice necessarily prevails.

The petitioning creditors, however, were not prevented from introducing their evidence. They made no objection and took no exception to the premature close of the trial, and we turn to the evidence which was actually introduced to ascertain whether or not the decree of the district court is sustained by the competent and relevant evidence returned in the record. Blease v. Garlington, 92 U.S. 1, 8, 23 L. Ed. 521; First National Bank v. Abbott (filed November 24, 1908) 165 Fed. 852. A careful examination and analysis of the evidence convinces that it established these facts beyond reasonable question: On October 17, 1906, the Missouri Company owned a lot in St. Louis which was worth about \$18,000 and was subject to a trust deed to secure the payment of \$10,000. It had other assets which were worth not less than \$20,000, so that its property was of the value of about \$28,000 above the incumbrances upon it. It was indebted to the American Electric Company, a corporation of New Jersey, in the sum of \$139,018.36. While the aggregate amount of its other debts is not well shown, and the burden was upon the petitioning creditors to prove it, their counsel assume in their brief, and this assumption is in accord with the evidence upon the subject, that this aggregate was less than the value of the property of the company, so that, aside from its debt to the American Company, it had property sufficient to pay its debts. In this condition of its affairs the Missouri Company on October 17, 1906, in consideration of the release and satisfaction of its debt to the American Company, its largest creditor, and of the agreement of that creditor to pay its other debts out of the proceeds of the property which it assigned, conveyed to the American Company its bills and accounts receivable, its choses in action, and the proceeds of sales made or to be made of its real estate, plant, machinery, stock, chattels, rights, and franchises; and the American Company, in consideration of that

conveyance, executed and delivered to the Missouri Company a written satisfaction and discharge of the latter's debt to it. If these writings had the legal effect which they purported to have, they reduced the indebtedness of the Missouri Company \$139,018.36, transformed it from an insolvent to a solvent corporation, and left all its property and all the proceeds of its property still available for the discharge of its debts to other creditors. But counsel for the petitioning creditors insist that the debt to the American Company was not discharged, because the release of an entire debt for a sum certain in consideration of the payment of a part of it is without legal consideration and the creditor may still sue and recover the residue. Fire Insurance Ass'n v. Wickham, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860; Bostwick v. United States, 94 U. S. 53, 24 L. Ed. 65. The rule invoked is indisputable, but it applies only when the part payment is made in the same medium called for by the obligation, as in money if money is due, in corn if corn is due, by the terms of the agreement.

Where articles other than that for which a contract provides are paid and received in satisfaction of it, they constitute a sufficient consideration for its discharge, although they are of much less value than that due, and this because the legal presumption obtains that they had a special value to the recipient. Such a transaction is necessarily an accord and satisfaction, and a release of an obligation founded upon it is valid. Pinnel's Case, 5 Coke, 117, where the law was thus stated:

"And it was resolved by the whole court that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum. But the gift of a horse, a hawk, or robe, etc., might be more beneficial to the plaintiff than the money in respect of some circumstances, or otherwise the plaintiff would not have accepted it in satisfaction."

Very v. Levy, 54 U. S. 345, 359, 14 L. Ed. 173; City of San Juan v. St. John's Gas Co., 195 U. S. 510, 521, 25 Sup. Ct. 108, 49 L. Ed. 299; Neal v. Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784; Dimmick v. Sexton, 125 Pa. 334, 17 Atl. 345; Bull v. Bull, 43 Conn. The assignment of October 17, 1906, conveyed not only the proceeds of sales of certain property of the Missouri Company made and to be made, but also all accounts and bills receivable and rights or choses in action belonging to the Missouri Company, and all books, papers, documents, and writings of that company pertaining thereto. Thus it brought the transaction far within the latter rule, and the debt of the Missouri Company to the American Company was discharged by the release given in consideration of this conveyance. The transaction evidenced by the assignment and the release, therefore, did not have the effect to prefer, nor did it evidence any intention of the debtor to prefer, the American Company to its other creditors, but it had the opposite effect and evidenced the contrary intention. It preferred the other creditors of the American Company.

Was the assignment of October 17, 1906, a general assignment for the benefit of the creditors of the Missouri Company within the meaning of section 3a(4) of the bankruptcy act of 1898 and hence an act of bankruptcy? A general assignment conveys all or substantially all the property of the debtor, while an assignment which conveys but a portion of it is a partial assignment, and not a general assignment. United States v. Hooe, 3 Cranch, 73, 90, 2 L. Ed. 370; Bock v. Perkins, 139 U. S. 628, 641, 11 Sup. Ct. 677, 35 L. Ed. 314; United States v. Howland, 4 Wheat. 108, 114, 4 L. Ed. 526; United States v. Langton, 26 Fed. Cas. 862, 864, No. 15,560; United States v. Clark, 25 Fed. Cas. 447, 451, No. 14,807; Mussey v. Noyes, 26 Vt. 462, 474, 475. This assignment did not convey the real estate of the assignor, which was about one-fourth of its property in value after the amount of the incumbrance upon the real estate had been deducted from its total value. It is true that the assignment transferred the proceeds of any sale of this real estate that had been made, or that should be made, but none had been made, and the Missouri Company retained the absolute possession, use, control, and power of disposition of it. Notwithstanding the assignment the assignor retained the right and the power to use, to rent, and never to sell the real estate. An absolute transfer by a debtor of both the legal and the equitable titles to the assignee in trust for his creditors, so that the grantor retains no control of its use and no power to dispose of it, is indispensable to a valid assignment of such property for the benefit of creditors. Sandmeyer v. Dakota Fire & Marine Ins. Co., 2 S. D. 346, 352, 50 N. W. 353, and cases there cited; Smith & Keating Imp. Co. v. Thurman, 29 Mo. App. 186, 191. The conveyance here in question made no such transfer of the real estate of the debtor.

A general assignment for the benefit of creditors is ordinarily a conveyance by a debtor without consideration from the grantee of substantially all his property to a party in trust to collect the amounts owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor. A conveyance of his property by a debtor directly to his creditor, or to his creditors, for their benefit, is not a general assignment for the benefit of creditors because it raises no trust. Mussey v. Noyes, 26 Vt. 462, 474, 475; Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C.) 125 Fed. 974. This conveyance is an assignment by a debtor to its largest creditor in payment of the latter's debt of a part of the debtor's property in consideration of the release of its debt by this creditor and of the latter's agreement to pay all other creditors of the grantor out of the proceeds of the property assigned. The apparent purpose and effect of it is a sale of the remainder of the part of the debtor's property described in the assignment after all its other debts have been paid out of it to the debtor's chief creditor in consideration of the latter's release and discharge of its claim against the debtor. The controlling rule for the interpretation of written instruments is that the intention of the parties should be adduced from them and given effect. Bock v. Perkins, 139 U. S. 628, 635, 11 Sup. Ct. 677, 35 L. Ed. 314. In the courts of the state of Missouri, of the state under whose laws the grantor in this conveyance was organized and in which its real estate and its place of business were situated, it is an established rule of construction that no instrument shall be held to constitute an assignment for the benefit of creditors unless it clearly appears either

that the grantor intended that it should so operate or that such was its necessary legal effect. Dry Goods Co. v. Grocer Co., 68 Mo. App. 290, 295; Haase v. Distilling Co., 64 Mo. App. 131, 135; Hargadine v. Henderson, 97 Mo. 375, 387, 11 S. W. 218; Jaffrey v. Mathews, 120 Mo. 317, 328, 25 S. W. 187; Brookshier v. Mutual Fire Ins. Co., 91 Mo. App. 599, 605.

In Becker v. Rardin, 107 Mo. 111, 117, 17 S. W. 892, a debtor had conveyed to one of his creditors his stock of goods, the creditor had satisfied his claim, and had agreed to pay the claims of certain other creditors in consideration of that conveyance. The parties further agreed in the instrument of conveyance that the goods should be invoiced, a part at first cost and a part at their then cash value, that, if the invoice value proved to be less than the aggregate amount agreed to be paid by the grantee to the creditors named therein the debtor would assign accounts receivable sufficient in amount to make up that aggregate, and that if the invoice value should prove to be more than that aggregate, then the balance above that amount should be paid to a third party for the benefit of other parties not named in the instrument. The Supreme Court of Missouri held that the conveyance did not constitute a voluntary assignment for the benefit of creditors.

Because the assignment of October 17, 1906, did not convey substantially all but only a portion of the property of the Missouri Company, because it did not transfer the title to its real estate to the assignee, but left the real estate, its use, control, and power of disposition in the grantor, because it was the intention of the grantor when it made the instrument to sell the remainder of a part of its property after its other debts had been paid out of the proceeds of that part to its chief creditor in consideration of a discharge of its obligation to it, and it was not its purpose, nor was it the legal effect of the assignment of October 17, 1906, to make a general assignment of the property of the debtor for the benefit of its creditors, our conclusion is that that instrument was not such an assignment and its execution was not an act of bankruptcy. The result is that the creditors failed to establish the averments of acts of bankruptcy contained in their petition, and the adjudication in bankruptcy must be reversed, and the case must be remanded to the court below with directions to dismiss the petition.

It is so ordered.

DETROIT UNITED RY. v. NICHOLS.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1908.)

No. 1,815.

1. Street Railroads (§ 74*) — Regulation and Operation — Injury to Persons on Track—Ordinance Regulating Speed.

An ordinance requiring street cars to slacken speed to a rate not exceeding three miles per hour when approaching any other car, "when such car has stopped or is about to stop to permit passengers to get on or off," does not apply in an action to recover for an injury to a passenger by be-

[•]For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—19

ing struck by a car after alighting from another when the latter had started and moved a distance of nearly a block before the accident occurred.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 154; Dec. Dig. § 74.*]

2. TRIAL (§ 420*)—WAIVER OF ERROR—RULING ON DEMURRER TO EVIDENCE— INTRODUCTION OF EVIDENCE.

In the federal courts the introduction of evidence by a defendant after a motion for a peremptory charge at the conclusion of plaintiff's evidence has been overruled is a waiver of such motion, and no error can be assigned to the ruling thereon; but the motion may be renewed at the close of all the evidence, in which case the whole of the evidence is to be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

3. COURTS (§ 356*)—FEDERAL COURTS—PROCEDURE—SCOPE OF CONFORMITY STAT-UTE.

In the federal courts everything after judgment, looking to a review by an appellate court; is regulated solely by the acts of Congress, the practice at common law, and the rules and decisions of such courts, and is not within the scope of the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 856.*]

4. STREET RAILROADS (§ 117*) - INJURY TO PERSON ON TRACKS-CONTRIBUTORY

NEGLIGENCE-QUESTIONS FOR JURY.

A person struck and injured by a street car while crossing the tracks at a public crossing at a street corner in a large city is not as a matter of law chargeable with such contributory negligence as to require a peremptory charge for defendant in an action against the street railroad company for the injury because before crossing she did not observe the tracks for an approaching car beyond a distance of 50 feet, the standard of care required in such case being different from that in cases of persons crossing the tracks of a commercial steam railway.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 255-257; Dec. Dig. § 117.*]

5. Street Railboads (§ 118*)—Injury to Person on Track—Action—Instruc-

An instruction, in an action to recover for an injury to plaintiff by being struck by a street car, that if, before going upon the track, she "looked a distance she thought sufficient" and saw no car, she was not guilty of contributory negligence, was error.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 269; Dec. Dig. § 118.*]

6. APPEAL AND ERROR (§ 763*)—BRIEFS—RIGHT TO FILE ADDITIONAL BRIEFS.

There is no authority under the rules or practice of the Circuit Court of Appeals for filing additional briefs at or after the hearing without special leave of court granted on sufficient ground shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3098; Dec. Dig. § 763.*]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

T. T. Leete, for plaintiff in error.

C. I. Webster and W. N. Choate, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LURTON, Circuit Judge. This was an action in tort. There was judgment for the plaintiff. The defendant in error, plaintiff below, while crossing a street car track at a street crossing, was knocked down and run over by an electric street car operated by the plaintiff in error, sustaining serious injuries. The defendant in error, hereafter referred to as Miss Nichols, accompanied by a friend, Mr. Cleveland, alighted from an east-bound street car at the corner of Kercheval and Field avenues, in Detroit, Mich. Kercheval avenue is an east and west street, 60 feet from curb to curb, and straight. Field avenue crosses it at right angles. The railway company has two parallel tracks on Kercheval; the northerly one being used by cars going west, and the southerly one by cars going east. The two passengers alighted from the south side of the car by a side door about midway from the ends of the car. The petition alleges that they stood upon the street and made no attempt to cross to the north side until after the car from which she had alighted had moved past them. The destination of Miss Nichols was the home of her mother on the northeast corner of Kercheval and Field avenues. The rear end of the car had stopped a few feet east of the east side of Field avenue. The entrance to her mother's home was on Field avenue. Hence a direct line from where she stood, until her car had gone on, to the entrance of her home, was a diagonal one. The distance was approximately 32 feet to the north rail of the west-bound track she must pass. Just as she was about to step over this northerly rail, she says she was struck by a west-bound car moving at great speed. She had, therefore, upon her own evidence and that of her witnesses, walked in a slow and usual way 32 feet before being struck.

First, as to the question of the negligence of the railway company. This was averred to consist in excessive speed in violation of a city ordinance, negligence of the motorman in failing to keep an outlook, and failure to ring the gong or give any warning of approach. There were two city ordinances in evidence regulating the speed of street cars. By these the street railway companies were prohibited from running over the lines of any street railway company in the city of Detroit at "a greater rate of speed than an average of ten miles per hour for the whole length of any route" within the "three mile circle," nor at a greater rate of speed than "an average of fifteen miles per hour for the whole length of any route lying without such circle." This accident occurred within the three-mile circle referred to. Another provision of the ordinance made it the duty of "motormen operating street cars" to cause such cars to slacken their speed to a rate not exceeding three miles per hour when approaching any other car going either in the same or an opposite direction when such car has stopped, or is about to stop, to permit passengers to get on or off." We italicize this because the application of the ordinance to the facts of this case is to be considered later.

In respect to a violation of the ordinances, the court charged the

jury as follows:

"By the ordinance of the city of Detroit referred to, all street railway companies in the city who shall have charge, supervision, or control of the running or the operating of cars on any street railway in the city of Detroit

shall be and are hereby required, in operating said cars to slacken their speed to a rate not exceeding three miles an hour when approaching any other car going in an opposite direction when such car has stopped or is about to stop to permit passengers to get on or off. By another ordinance, an earlier one, it is provided that cars shall not be run within the three-mile circle in the city of Detroit at a greater rate of speed than an average rate of ten miles an hour. Therefore, the question of speed enters into this case as one of the alleged acts of negligence of the company, namely, that the car was running at a too high rate of speed, and that, in part at least, was the cause of this injury, and in connection with other acts of negligence charged in the declaration to which I have already referred. It is for the jury to determine whether that ordinance was violated, and whether its violation was the cause in whole or in part of this accident to the plaintiff."

Bearing upon the meaning, purpose, and applicability of the ordinance prohibiting a greater speed than three miles per hour "when approaching any other car going either in the same or the opposite direction, when such car has stopped, or is about to stop, to permit passengers to get on or off," the plaintiff in error preferred a request for a special charge in these words:

"If you believe the evidence of the plaintiff and witness Cleveland that the east-bound car had started and proceeded easterly from its stop near Field avenue when the west-bound car passed it, then I charge you that the city ordinance fixing the rate of speed for cars passing cars stopped or about to stop has no application in this case."

This was refused, and an exception reserved, and the refusal is now assigned as error. The plaintiff had herself in her declaration averred that she had gotten off on the south side about the center of the car, and that she had stood some few feet away from the car until it had passed on east, and that only then did she start to cross the two tracks between her and the opposite side of the street. How far the car had passed she does not, in her testimony, say, because, she says, she did not look to see how far it had gotten away after she started to cross, or before going upon the west-bound track. Her companion, the witness Cleveland, referred to, testified that before reaching the west-bound track the car from which they had gotten off had about reached Sheridan avenue, some 300 feet east of Field avenue. Now, if this was the case, it is manifest that the car approaching from the east on the west-bound tracks, the car which collided with the plaintiff, had not "approached," in the plain sense and meaning of the ordinance, the car from which she had gotten off, so as to require it to slacken its speed to three miles per The obvious purpose of the ordinance is to guard against injury to passengers getting on or off a car, and a car cannot be said to be approaching a car "stopped" or which is "about to stop to permit passengers to get on or off" when such cars pass each other at a distance such as that indicated by the evidence referred to. The special request should have been given, and the nonapplication of that provision explained to the jury, if they believed the testimony.

The question of the contributory negligence of the plaintiff was sharply presented by the evidence of the plaintiff herself. Kercheval street was 60 feet wide from curb to curb, and was perfectly straight. After the car from which she had alighted had passed on, there was no obstruction to seeing the approach of the car on the west-

bound track. The hour was midnight, the approaching car was well lighted, and there was no traffic to prevent hearing. Yet the plaintiff says she looked east before starting to cross, and looked again when in the space between the two tracks, and neither saw nor heard this car coming from the east, and that she never did know of its presence until it struck her just as she was about to take the last step which would have placed her beyond the track upon which it was coming. The witness Cleveland says he, when about to go upon the west-bound track, looked east as far as the next cross-street and saw no car. The plaintiff, when interrogated, said:

"We stepped back two or three steps after we got off the car, and stood there south, toward the south curb. We stood there until the car passed, facing toward the north. I looked around toward the east, and then we started to cross. I looked toward the east, naturally, to see if there was a car coming. I did not see any car coming. Q. How far do you think you looked toward the east? A. Well, I don't know how far. I should think as far as Sheridan avenue, which is the next street east of Field crossing Kercheval. It was just an ordinary night, neither light nor dark. Q. Did you look to the east before or after the car that you had gotten off from started up again? A. Just as it passed I looked toward the east. Q. Now, you say as you stood here you were facing north. That would bring you facing this car? A. Yes, sir. Q. And this car was going to the east? A. Yes, sir. Q. When did you look toward the cast? A. As I said, just as the car started to pass. Q. Could you see up the track on both tracks when you looked? A. Yes, sir. Q. Did you see any car coming? A. No, sir. Q. What did you do after that? A. I said we started crossing in a diagonal direction. Q. Diagonally, which way? A. That would be toward the northwest. Q. Where you stood was above the corner, was it? A. Yes, about 20 feet east. Q. And you started diagonally northwest to the corner, did you? A. Yes, sir. Q. While we are waiting for the blackboard, what did you do next after you looked east to see if a car was coming; after this car had started on east, what did you do? Mr. Leete: Started to pass, she said. Q. Had the car gone by when you started across the track? A. Yes. sir; as it passed we started across, for we stood there until the car did pass. Q. Then you say you started in a diagonal direction across the track? A. Yes. sir. Q. Then go on and tell what you did. A. Well, we started across, as I said, toward the northwest, and when we got—I suppose it was the space we got to about the space between the tracks, when I looked toward the east again. Q. You were then in the space, you say, between the two tracks- Mr. Leete: No; she just said just within the space between the tracks. Let us have the answer read. A. No; I said we were some place in the space. It might have been about the space—some place in the space, I would not be positive to that; it wasn't on the north track. Q. Some place in the space between the tracks when you looked to the east again? A. Yes, sir. Q. Did you see any car coming this time? A. No; I didn't."

On cross-examination she said, in respect to looking when between the tracks, these tracks being about 5 feet 3 inches apart that is, from the north rail of the east-bound track to the first rail of the parallel west-bound track:

"Q. Now, I understand that at that time you looked to the east and saw no car coming on the northerly track; is that right? A. The time I was in the space, yes, sir. Q. How far to the east could you see? A. Well, I don't know just about how far it was. Q. A block? A. I don't think it was a block. I could not tell exactly how far I did look. Q. As far as your vision could carry you could see? A. As far as I could estimate a safe distance, you know. Q. Oh, did you limit your looking? A. No; I didn't stop to limit anything. Of course I didn't think about it. Q. Then you looked and looked as far as you could see? A. I didn't try to see how far I could see. Q. You didn't try? A. No; I didn't stop to see how far I could see down the street, but what I would estimate, you know, as a safe distance, you know; just to look around as you naturally look around to see if a car were coming, and you would not know

how far you looked. Q. How far you looked you don't know? A. No, sir. Q. It may have been as far as the whole of that block? A. I don't know but I should judge it would be about, maybe, a couple of car lengths. Q. You looked a couple of car lengths; that is your best judgment? A. Yes, sir. Q. There was no obstruction at the end of a couple of car lengths, not in the street, anyway? A. None that I know of. Q. None that you know of? A. No. Q. Then you proceeded, after having looked a couple of car lengths on over the rest of that space and upon the car track, and were struck when you were somewhere in the middle of the tracks; is that right? A. No; I was not in the middle of the north track; I was almost across the north rail. Q. You said one step more would have taken you off? A. I think it would. You think that would have been a little beyond the middle of the track? I think so; a lady does not step as far as a man. Q. And then the first thing you knew was when Mr. Cleveland called your attention to the approaching car? A. It was just about that soon before I was hit (snapping her fingers). Q. How close to you was it, then, when you first saw the light of the car? A. I didn't see it. Q. You didn't see any car? A. I didn't see any lights or hear any gong, and it was too quick for one to holler. I suppose I was struck before he got the words out of his mouth. Q. It was right on you? A. Yes, sir. Q. Why didn't you see it when it was 20 feet away? A. Well, I don't know. Q. You don't know? A. Of course, when it was 20 feet away, I don't known how far I was across. Q. Why didn't you see it when it was 50 feet away? A. I don't know how far that car would have been at that time. Q. I am asking you why you didn't see it when it was 50 feet away? A. If the car was within 50 feet of me at the time I looked the two car lengths, it would have been within the distance of my range of vision. That is the distance I looked, of course; I would have seen it, but I think I looked that far and it was not in sight. Q. When it was 10 feet away from you it was within your range of vision, was it not? A. If I had looked around. Q. When it was within 20 feet of your range of vision you could have seen it, could you not? A. I don't know how fast it was going. Q. If you looked when it was 20 feet away, you could have seen it? A. I didn't look all the time. I said I looked twice, and, when I looked the last time, I didn't see it. Q. You didn't see it when it was 50 feet away? A. I told you I didn't see it at all."

Did the court err in submitting the question to the jury upon this defense of contributory negligence? At the conclusion of the plaintiff's evidence the defendant moved the court for a directed verdict. This was denied, and an exception reserved. The defendant then introduced evidence, and at the conclusion of all of the testimony renewed its motion for a directed verdict upon the whole of the evidence. This was denied, and the case submitted to the jury, who found for the plaintiff. The introduction of evidence after a motion for a peremptory charge at the conclusion of the plaintiff's evidence was a waiver of that motion, and no error can now be assigned to that action of the court. Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; Union Pacific Ry. Co. v. Calaghan, 161 U. S. 91, 16 Sup. Ct. 493, 40 L, Ed. 628; Travelers' Ins. Co. v. Randolph. 78 Fed. 754, 759, 24 C. C. A. 305. But such a motion may be renewed at the close of all the evidence, in which case the whole of the evidence, that introduced by the plaintiff originally and that introduced by either party subsequently, must be taken into consideration. Travelers' Ins. Co. v. Randolph, cited above. The question is not a mere matter of proceeding or practice in the Circuit Court, and is, therefore, not within the "conformity statute" (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), and cannot be affected by any state statute or practice upon the subject. Everything after judgment, looking to a review by an appellate court, is regulated solely by the acts of Congress, the

practice at common law, and the rules and decision of the federal courts. Kentucky Life Ins. Co. v. Hamilton, 63 Fed. 93, 98, 11 C. C. A. 42; Chateuagay Ore & Iron Co., Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; Hudson v. Parker, 156 U. S. 281, 15 Sup. Ct. 450, 39 L. Ed. 424; Indianapolis & St. Louis R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Fishburn v. Railway Company, 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585; Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942. The question as to whether the court erred in refusing to instruct a verdict is, therefore, properly saved by the motion renewed after the close of all the testimony.

The contention is that it was a physical impossibility for the plaintiff to have failed to see a lighted car approaching from the east, if she had looked or listened as it was her duty to do before going upon that track upon which the car was approaching. But the plaintiff testified that she did look and did not see. When she first looked she says she observed the track as far as Sheridan street, the next street crossing Kercheval avenue east of Field. If the jury believed this, then her observation covered a distance of about 300 feet. She was then about 20 feet from the space between the two parallel tracks. Reaching that space, she says she again looked and saw no car. Her range of vision, she says, did not cover more than 50 feet, or 2 car lengths. Asked why she did not see the car when 50 feet away, she said:

"If the car was within 50 feet of me at the time I looked the 2 car lengths, it would have been within, the distance of my range of vision. That is the distance I looked, of course; I would have seen it, but I think I looked that far and it was not in sight."

The question upon this evidence is whether one about to cross a street car track upon the streets of a large city, at a public crossing at a street corner, is, as a matter of law, guilty of such contributory negligence as to require a peremptory instruction to find for the street car company, because, before crossing, she did not observe the tracks for an approaching car beyond the space of 50 feet?

It is possible that this car was not within her limited range of vision, and that she did not see a car within that range, as she testified. So it is possible, and indeed probable, from all the circumstances, that, if she had extended her observation even a few feet east of the distance covered by her glance, she would have seen this well-lighted car very close upon her. The plaintiff in error cited and relies upon Northern Pacific Railroad Co. v. Freeman, 174 U. S. 379, 384, 19 Sup. Ct. 763, 43 L. Ed. 1014. There Freeman was driving across a railroad crossing. He was struck and killed by a passing train which he could have plainly seen if he had looked. The court, discussing the evidence of witnesses tending to show that he did not look or listen, said:

"If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a rail-way crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or, if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence.

"The cases in this court relied upon by the plaintiffs are all readily distinguishable, either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions, or other peculiar circumstances tending to mislead the injured party as to the existence of danger in crossing the track.

"Upon the whole, we are of the opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor. The disposition we have made of this question renders it unnecessary to express an opinion upon the instruction as to damages."

But there is a distinction between the care usually exercised by reasonably prudent persons in crossing the tracks of a commercial steam railway and that exercised in crossing a street railway track upon the streets of a city. Street railway tracks are necessarily to be crossed with great frequency by reason of their occupancy of public streets. Such cars also pass with great frequency. There are often times and places when passing cars succeed each other so closely that cars are always very near the stream of crossing travel. Again, the facility with which such cars are stopped and the frequency of their stopping makes the danger measurably less than that incurred at an ordinary railroad crossing. So also the degree of caution and care ordinarily exercised by the motorman, in view of all the surroundings, is necessarily greater than that usually required or exercised by engineers upon commercial steam engines. The question of negligence, contributory or otherwise, is necessarily dependent upon the facts surrounding each There is no absolute standard of negligence applicable to all cases. Conduct which might be negligent in driving across a steam railway track might not be negligent in crossing on foot at the same place. Conduct of a traveler crossing a street railway track might not be so imprudent as to constitute negligence, as a matter of law, which at a commercial railway crossing would be legal negligence. These considerations lead us to think that it cannot be safely said that the plaintiff was guilty of such gross imprudence as to require the court to withdraw from the consideration of the jury the question as to whether, if they believed her evidence, she had or had not acted with that degree of prudence which reasonably prudent persons should exercise in her situation. The distinction we draw has been noticed and approved in Cincinnati Street Ry. v. Whitcomb, 66 Fed. 915, 14 C. C. A. 183; Tacoma Railway Co. v. Hays, 110 Fed. 496, 49 C. C. A. 115; Marden v. Portsmouth Railroad Co., 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476; Ryan v. Railroad, 123 Mich. 597, 82 N. W. 278; and McQuisten v. Detroit Street Ry., 147 Mich. 67, 110 N. W. 118.

In respect to this testimony of the plaintiff as to looking out before going upon the track, the court said to the jury:

"I charge you that the law is that, if the plaintiff before going on the track looked a distance she thought sufficient to enable her to cross the track and saw no car, she had a perfect right to attempt to cross, and, if the fact that she was struck shows she erred in her judgment, this does not make her guilty of contributory negligence."

This was manifest error. The question is not what she thought a sufficient distance to observe before going upon the tracks, but whether her conduct in not observing for a longer distance was that of a reasonably prudent person. If it was not, it is not material that she thought she was acting prudently, if her conduct did not conform to that of reasonably prudent persons under all the circumstances of the case. It is true that in an earlier part of the charge the court did say, in respect of her testimony, that:

"If you believe a reasonably prudent person would have looked further than that under the conditions that were presented her that night before attempting to cross the track, then I charge you she was guilty of negligence, and cannot recover, and it is your duty to render a verdict in favor of the defendant. If you believe the car was in sight of the plaintiff and could have been seen if she had looked carefully just before she stepped on the north track, then you have a right to find that she did not look, or looked carefessly, and in either case you will render a verdict in favor of the defendant."

But this did not, in view of the very close character of this question of contributory negligence upon the plaintiff's own testimony, cure the later and more emphatic statement we have criticised.

The other assignments of error are not important, and may not again arise. We therefore pretermit any opinion as to them.

Judgment reversed.

Application to file an additional brief of the defendant in error in this case is denied. Rule 24 (150 Fed. xciii, 79 C. C. A. xciii) provides for the filing of a brief by each side within a definite time fixed by the rule. But the rule does not provide for any further briefs. We have accepted such additional briefs when filed before the case was called for hearing. There is no authority under the rules or practice of this court for filing additional briefs at or after the hearing without special leave of court upon sufficient ground shown. Supreme Court Rule 20, par. 4, 108 U. S. 584 (3 Sup. Ct. xii). Without such leave or the consent of the opposite side, the clerk has no authority to file such additional briefs. While the court will not by any arbitrary rule cut itself off from additional light, there was in this case no sufficient reason for opening the case for filing brief at the time the application was made to the court.

UNITED STATES v. GRAND RAPIDS & I. R. CO. et al. (Circuit Court of Appeals, Sixth Circuit. November 23, 1908.)

No. 1,775.

1. Public Lands (§ 75*)—Railroad Grant—Construction—Lands Excepted—The grant of lands to the state of Michigan to aid in the construction of railroads by Act June 3, 1856, c. 44, 11 Stat. 21, was a grant in præsenti, and under the exception of "any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever," applied only to public lands such as were then subject to grant as not at the time withdrawn from sale or entry for any purpose whatever, and that certain lands then under reser-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vation subsequently became public lands, subject to grant, entry, or sale, did not have a retroactive effect, so as to bring them within the grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 238; Dec. Dig. § 75.*]

2. TREATIES (§ 9*)—TIME OF TAKING EFFECT—PRIVATE RIGHTS.

While it is a principle of international law that a treaty takes effect by relation as of the date it was signed, although not ratified until later, this is only so as between the contracting nations; and private rights are not affected by such a treaty until it is ratified, for then only, under the Constitution, does it become the law of the land.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 9; Dec. Dig. § 9.*]

3. Public Lands (§ 120*)—Railroad Grant—Suit by United States to Cancel Patents—Right to Equitable Relief.

Certain public lands, which were conditionally reserved from sale or entry for the purposes of a pending Indian treaty at the date of a railroad grant, and which did not pass thereunder, were nevertheless, in accordance with the then existing construction of such grants by the land department, certified and patented as part of the grant; the lands having been withdrawn from the reservation at the time the railroad line was definitely located. Both parties assumed that the lands were properly covered by the grant for several years, during which time they were sold by the railroad company to innocent purchasers for value, and the government made no other disposition of them. After the filing by the railroad company of the map of the definite location of its line, which brought such lands within the place limits of the grant, the United States disposed of a greater quantity of lands within the indemnity limits which were available to the company in lieu of the lands in question, and the company failed to obtain its full quota of land because of a deficiency existing on a part of its line to the extent of five times the quantity of land in question. Held that, conceding such land to have been erroneously certified and patented, the United States was not entitled in equity to a cancellation of the patents, or to recover the minimum government price thereof from the railroad company, under Act March 3, 1887, c. 376, 24 Stat. 556 (U. S. Comp. St. 1901, p. 1595).

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. $332 \; ; \; \mathrm{Dec.}$ Dig. 120.*]

Appeal from the Circuit Court of the United States for the Western District of Michigan.

For opinion below, see 154 Fed. 131.

The facts are so well and correctly stated by Judge Knappen, who heard this case in the Circuit Court, that we set out below and adopt that part of his opinion as our statement of the case.

The bill in this cause was filed February 20, 1896, by the Attorney General of the United States under the act of March 3, 1887, providing for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands (24 Stat. 556, c. 376 [U. S. Comp. St. 1901, p. 1595]), and for the cancellation of patents for 20,276.66 acres of land in the counties of Charlevoix and Emmet, Mich., certified by the United States to the state of Michigan, and conveyed thereunder to the Grand Rapids & Indiana Railroad Company, and for the recovery of the minimum government price of \$1.25 per acre for such of the lands as shall be found to have been conveyed by the railroad company to innocent purchasers. The facts are these:

In April, 1855, the Ottawa Indians, living in and about Little Traverse Bay, Mich., were negotiating a treaty with the United States, by which the former were seeking to obtain some government lands in Emmet and Charlevoix counties in exchange for lands west of the Mississippi river which had been set apart for these Indians under a former treaty. The Commissioner of Indian Affairs, through the Commissioner of the General Land Office and the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Secretary of the Interior, requested the President that certain designated townships and fractional townships be withheld from sale "until it shall be determined whether the same may be required for said Indians." The order of withdrawal was made May 14, 1855, in terms, "with the express understanding that no peculiar or exclusive claim to any of the lands so withdrawn can be acquired by said Indians, for whose future benefit it is understood to be made, until after they shall, by future legislation, be invested with the legal title thereto." The Land Commissioner accordingly notified the register and receiver of the local land office of the President's order, and under the Commissioner's direction the lands covered by the order of withdrawal were marked by the register on his tract book "Lands Withdrawn from Sale and Withheld for Indian Purposes, Conditionally, by Order of the President of May 14, 1855."

The lands here involved are but a small part of the lands so conditionally withdrawn. The contemplated treaty (which embraced certain tribes of Chippewas, as well as Ottawas) was concluded and signed at Detroit by the commissioners of the United States and by the chiefs and head men of the Indians on July 31, 1855. 11 Stat. 621. It provided, among other things, for the withdrawal from sale for the benefit of the Indians of certain specified lands, and dissolved the tribal organization of the Ottawa and Chippewa Indians. except so far as might be necessary for carrying into effect the new treaty. The lands involved here were excluded from the treaty, and have never been used or disposed of by the United States, except as they were later conveyed to the Grand Rapids & Indiana Railroad Company under the railroad aid grant later referred to. The Land Commissioner, upon the signing of the treaty, at once and on August 1, 1855, from Detroit, notified the Acting Land Commissioner at Washington of the conclusion of the treaty, giving in detail the descriptions of land embraced in it, and instructed that withdrawal be had of all the lands so described in the treaty, for the purpose of enabling the Indians "to select the quantity of lands guaranteed to them by said treaty," and that proper proclamation be made and notice to the land office be given "to avoid difficulties that might occur by entries being made within said boundaries." This treaty was ratified by the Senate (with certain amendments) on April 15, 1856. 11 Stat. 629.

On June 3, 1856 (11 Stat. 21, c. 44), after the conclusion and ratification of the treaty, and the permanent exclusion from its operation of the lands here in controversy, but before the Senate amendments had been assented to by the Indians, the United States granted to the state of Michigan, in aid of the construction of certain railroads in that state, including a railroad "from Grand Rapids to some point on or near Traverse Bay," upon the then usual conditions for conveyance from time to time as the building of the road progressed and for government use of the railroad, every odd-numbered section for six miles on each side of the proposed line of railroad, with fifteenmile indemnity limits in lieu of such lands within the six-mile limits as should be sold or pre-empted before the railroad lines should be definitely fixed. The state of Michigan accepted the grant February 14, 1857, and designated the Grand Rapids & Indiana Railroad Company as the beneficiary. in July, 1856, the Indians ratified the amendments made by the Senate to the treaty, and the latter, as so amended, was, on September 10, 1856, duly proclaimed by the President. 11 Stat. 629. On February 28, 1857, the railroad grant was formally accepted by the railroad company in writing. The acceptance by both the state and the railroad company was thus after the final ratification of the amended treaty, by the making of which treaty the condition upon which the lands here in question were reserved had failed.

The railroad map of definite location was filed with the Secretary of State for Michigan on November 23, 1857, and with the United States Land Commissioner on July 11, 1858. June 7, 1864, Congress amended the grant of June 3, 1856, by including within the terms of the grant the line from the southern boundary of Michigan to Grand Rapids; the indemnity limits being extended from 15 miles, as in the act of 1856, to 20 miles. 13 Stat. 119, c. 110. This extension of the indemnity limits was evidently made by reason of the fact that comparatively little public land remained within either the 6 or 20-mile limits south of Grand Rapids. This extension amendment was accepted by the state March 10, 1865 (Laws Mich. 1865, p. 241, No. 131), and by the railroad company February 22, 1866. The map of the extended line was filed with the state

authorities May 10, 1866, and with the Commissioner of the General Land office May 25, 1866.

The railroad company fully performed the terms of its agreement under the grant, including the building of the railroad, which was finished by November 25, 1873, and within the time provided by the original congressional and state acts and the subsequent extension acts; and the lands in controversy were accordingly, during the years 1871 and 1874, certified (with other lands) to the state by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, and upon the certificate of the register and receiver of the Government Land Office to the applicability of the lands to the grant and their freedom from adverse claims.

The order of May 14, 1855, conditionally withdrawing the lands in question from sale, was never in express terms revoked, but from the time of the making of the Indian treaty until 1887 (several years after the last of the lands had been patented to the railroad company) the making of the treaty was by numerous acts of the President and land officers impliedly and practically construed to be a revocation and termination of the withdrawal as to lands not embraced therein, and the railroad grant was accordingly construed and recognized as including all lands within its general terms which were not in fact expressly required by the terms and for the purposes of the treaty as actually made. In 1874, after a portion of the lands in question had been certified, the question of the right of the railroad company to the lands in controversy was distinctly raised, and after careful consideration the Commissioner of the General Land Office made the express holding, approved by the Secretary of the Interior, that the treaty in question extinguished the Indian claim, and restored to public domain the lands conditionally withdrawn by the order of May 14, 1855, so as to bring them within the grant of June 3, 1856, and under the then existing view that the status of the land at date of definite location governed the lands were accordingly certified to the state and patented to the railroad company. In 1887 the right of the railroad company to these lands was denied through a decision of the Secretary of the Interior, in the case of the Jackson, Lansing & Saginaw Railway Company, whose rights were similarly affected by the withdrawal of May 14, 1855, and the grant of June 3, 1856.

The total of the lands actually received by the Grand Rapids & Indiana Railroad Company, under both grants, lacked 101,852.73 acres of the amount contained within the 6-mile limits of the grant; this failure resulting from the fact that the amount within the 20-mile limits north of Grand Rapids available for the purpose was not sufficient to make up the deficit in the southern portion. There is included in the amount stated more than 23.000 acres disposed of by the United States since the extension amendment of 1864, by way of pre-emption, sales, and homestead entries, otherwise available to the railroad company under its grants. The railroad company presented a claim to the Interior and Treasury Departments for reimbursement on account of these failures in its land grant, which claim was disallowed. The proofs show that the railroad company received the lands in controversy in good faith under its grant, and that it has sold all of said lands to innocent purchasers for value.

lasers for value.

W. K. Clute, for appellant.

J. H. Campbell, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). Confessedly the lands involved are within the place limits of the grant of June 3, 1856. 11 Stat. 21, c. 44. The contention of the government is that, although within the place limits of that grant, they did not pass under the grant, because excepted out of its operation by a proviso excepting—

"any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose what-soever."

On May 14, 1855, these lands, with others, were withdrawn from sale or pre-emption by an order of the president for the purposes of pending treaty with the Chippewa Indians. This order had not been revoked when the grant of June 3, 1856, was made, nor, indeed, has it ever been formally revoked. Unless, therefore, the lands had been otherwise restored to the public domain as lands subject to sale and grant prior to June 3, 1856, the date of the land grant under which the railroad company claimed title, they did not pass under it and were excluded from its operation. The grant of June 3, 1856, was one in præsenti and was confined in terms to public lands; that is, lands then subject to grant as not at the time withdrawn from sale or entry for any purpose whatever. That this land in controversy subsequently became public land, subject to grant or sale or entry, does not have a retroactive effect, so as to bring it under the operation of the grant. Bardon v. Northern Pacific Railroad Company, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; United States v. Southern Pacific Railroad Company, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; Northern Lumber Company v. O'Brien et al., 139 Fed. 614, 71 C. C. A. 598.

But the contention is that as these particular lands were reserved only for the purpose of the pending treaty and as that treaty designated other lands and omitted those in controversy, the reservation terminated by implication, without any formal withdrawal order before the date of the granting act. But it does not appear that the pending treaty had been concluded, so as to constitute the law of the land until after June 3, 1856. It is shown that a treaty had been signed by the commissioners representing the United States and the chiefs and head men of the Chippewa and Ottawa tribes on July 31, 1855, a date antecedent to the grant involved, and that that treaty specifically designated the public lands which should be set apart to satisfy the terms of the treaty and did not include the lands in controversy. That treaty so signed on July 31, 1855, provided that it should be obligatory "as soon as ratified by the President and Senate of the United States." This ratification by the Senate occurred April 15, 1856, but was made subject to certain amendments, which were not accepted by the last of the chiefs and head men of the Indians until July 31, 1856. Neither was this amended treaty confirmed or promulgated by the President until September 10, 1856. For the treaty and its ratification see 11 Stat. 621–629, inclusive.

While it is a principle of international law that a treaty takes effect by relation as of the date it was signed, although not ratified until later, this is only so as between the contracting nations. Private rights are not affected by such a treaty until it is ratified; for only then, under our Constitution, does it become the law of the land. This is a distinction well settled by the decisions. United States v. Arredondo, 6 Pet. 691, 748, 8 L. Ed. 547; Davis v. Parish of Concordia, 9 How. 280, 289, 13 L. Ed. 138; Haver v. Yaker, 9 Wall. 32, 19 L. Ed. 571; Shepard v. Life Insurance Co. (C. C.) 40 Fed. 341. That this treaty should not become effective until confirmed by the Senate

and by the President is plainly shown by the treaty itself. The President might accept it or reject it after such amendment. In fact, the Senate did amend it. That the amendment did not include the lands here involved, as lands out of which the Indian claims might have been satisfied, is not important. It was subject to alteration until ratified, so as to have designated these lands as lands out of which the Indians might make their selections. An implied revocation of the order reserving the lands to meet the purposes of the pending treaty did not arise so long as the treaty was subject to alteration. Until ratification, these lands continued to be segregated from the public lands and were not subject to grant.

It is next contended that this treaty had been duly signed and promulgated when a map of final location was filed, and if the land was public land at that date the grant attached. For the United States it has been urged that, if it be conceded that the reservation was impliedly canceled by reason of the designation of other land to carry out the purpose of the treaty, the fact is irrelevant, as lands excepted out of its terms, because reserved, do not subsequently pass under such a grant, although the reservation is withdrawn before the date of the location of the railroad. It is also contended for the government that the decision of the Land Department that the grant did attach when the reservation had been revoked by implication was an erroneous decision of law, not conclusive upon the government or the court. The question thus stated is an interesting one, and not free from doubt under the decided cases. Kansas Pac. Ry. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; Bardon v. Northern Pac. Ry. Co., 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; Oregon Ry. Co. v. United States, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. Ed. 1012.

But, in the view we entertain of another question, it is deemed unnecessary to decide it. Assuming, for the purposes of this case, that the grant of June 3, 1856, did not attach to these lands, because they were under a valid reservation at that date, it does not follow that the United States is entitled to any relief in a court of equity. The lands were in fact public lands when the railroad company filed its map of definite location, because the provisional reservation which existed at date of grant had then expired as a consequence of the appropriation by the concluded treaty of other lands to meet the purpose for which these lands had been reserved. Thereafter the railroad company, having constructed its railroad in the manner and within the time required by the grant, selected these lands as lands earned and asked that they be certified and patented to it. This claim was made upon the theory that, having become public land before the filing of the map of definite location by which the grant, which had before been a mere float, became a grant of specific land, they passed under the grant. The question was given careful consideration by the Commissioners of the Land Office, who ruled that the treaty had extinguished the reservation and restored the lands to the public domain, which had thereby been brought within the terms of the grant. The decision was approved by the Secretary of the Interior, and the

lands were accordingly certified to the state of Michigan and patented to the railroad company. If this was an erroneous decision of a matter of law, the courts are not concluded. Wisconsin Central Railroad

v. Forsythe, 159 U. S. 47, 15 Sup. Ct. 1020, 40 L. Ed. 71.

That the contention of the railroad company for such a construction was made in good faith, and the decision of the department likewise in good faith, is not questioned. The ruling was in accord with the prior practice of the department, holding that the status of lands at the date of the filing of a map of definite location determined the lands to which the grant applied, thus disregarding their status at the date of the grant itself. Neither is it disputed but that the railroad company sold these lands in good faith to good-faith purchasers, who are now and have been for many years claiming and occupying them. The act of Congress under which this bill was filed confirms the title of such good-faith purchasers and limits the claim of the government, in such circumstances, to a recovery from the railroad company of the price of similar government lands. The government now concedes that under the facts of this case there can be no other relief. But this is a court of equity, and the government has applied to it as such, upon the theory that the railroad company, having received the price of these lands, should account to the government for such price to the extent of the selling price of similar lands, regardless of what it actually received. Does the case made entitle the government to this relief from a court of equity?

The Circuit Court found upon the facts, and in this we concur, that under both of the grants in which it was the beneficiary the railroad company had received 101,823 acres less than it had earned under its contract for the construction of the railroad aided by the grant. Of this shortage, 23,000 acres which the company might have received have been disposed of since the extension grant of 1864. In other words, the land available to satisfy the terms of the grant was more than 100,000 acres less than it expected to receive and the government expected to grant. Its claim, presented to the Departments of the Interior and Treasury, for compensation for the deficiency, was rejected. While it is true that Congress does not guarantee that there shall be a sufficient quantity of public lands subject to the grant to fulfill the expectations of the parties, yet, as said in Wisconsin Central Railroad Company v. Forsythe, 159 U. S. 47, 60, 15 Sup. Ct. 1020, 1025, 40 L.

Ed. 71, where Congress makes—

"a grant of a specific number of sections in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive the amount of lands specified, and, when it prescribes that the lands shall be alternate sections along the line of the improvement, it is equally clear that the intent is that, if possible, the beneficiary shall receive the particular sections."

This error, due to the mutual mistake of the railroad company and the government, by which these lands were certified and subsequently patented, has resulted in the loss of precisely that amount of land. But for this erroneous decision that these lands were available under the grant, other lands, then available, would have been patented, which other public land has since been otherwise disposed of by the govern-

ment. That these facts do not constitute such a claim as might be affirmatively asserted against the government may be conceded. That they may be the basis of an equitable defense against a claim for the price of lands so erroneously patented, when that claim is asserted in a court of equity, we have no doubt. This would be true if such a claim was presented by a private litigant, and it is no less true when the government comes into a court of equity for the relief it now asks. Equity will not lend its active assistance contrary to conscience and the plain justice of a case. United States v. Winona & St. Peter Railroad Co., 165 U. S. 463, 482, 17 Sup. Ct. 368, 41 L. Ed. 789; United States v. Detroit Lumber Co., 200 U. S. 322, 338 et seq., 26 Sup. Ct. 282, 50 L. Ed. 499.

In the Winona Case, cited above, the question arose under a bill similar to the one in the case under consideration. Failing to set aside and cancel the certification of the lands patented through mistake, the government sought a decree against the railroad company for the value of the lands erroneously certified. Mr. Justice Brown, for the court, said:

"It does not appear from this record either that the railroad company received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant; and, further, it does not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received, but for this erroneous certification. It will hardly be contended that if simply through a mistake of the land department these lands were certified, when at the time other lands were open to certification which could rightfully have been certified, and which have since been disposed of by the government to other parties, so that there is now no way of filling the grant, the government can nevertheless recover the value of the lands so erroneously certified. In other words, the mistake of the officers cannot be both potent to prevent the railroad company obtaining its full quota of lands and at the same time potent to enable the government to recover from the company the value of the lands erroneously certified. Our conclusion, therefore, is that, upon the record as it is presented, the decree of the Court of Appeals was right, and it is affirmed."

The conclusion of the court below was rested upon this ground, and we are content to affirm it.

'ADAMS et al. v. MURPHY.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1908.)

No. 2,743.

I. Indians (§ 24*) -Attorney for Indian Nation.

An act of the National Council of the Creek Nation authorizing the principal chief "to contract with, retain and employ an attorney at law," or firm of attorneys at law," to represent the nation and its members, and providing that the contract should be subject to cancellation on 30 days notice for good cause shown, did not make the attorney contracted with thereunder an officer of the nation, but he was a professional employé only, deriving his rights from the contract and not from the statute.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 24.*]

2. EQUITY (§ 46*)—GROUNDS OF JUBISDICTION—LACK OF ADEQUATE REMEDY AT LAW.

The rule that the nonexistence of a plain, speedy, and adequate remedy at law is a ground for equity jurisdiction does not apply where the deniat of a legal remedy is from considerations of public policy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151-163; Dec. Dig. § 46.*]

3. Specific Performance (§ 73*) — Contracts Enforceable — Contracts of Employment.

A suit in equity will not lie for the specific performance of a contract for personal services.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 206-210: Dec. Dig. § 73.*

Of contracts requiring performance of continuous acts, see note to 49 C. C. A. 103.]

1. Indians (§ 27*)--Status of Tribes-Actions.

The Curtis act of June 28, 1898, c. 517, § 2, 30 Stat. 495, providing that when in any suit in the courts of the Indian Territory it should appear that the property of any tribe would be affected such tribe should be brought in as a party, applied only to suits relating to membership in the tribes and the right to tribal lands or funds, and did not have the effect of abolishing the general exemption of the tribes from civil suits.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 19; Dec. Dig. § 27.*]

5. Indians (§ 27*)—Suit to Enforce Contract of Nation-Jurisdiction.

The Creek Nation of Indians being exempt, from considerations of public policy, from civil suit to compel its performance of a contract or to recover damages for its violation, the purpose of such a suit cannot be indirectly accomplished by means of a suit in equity against the principal chief of the nation to compel him in his official capacity to pay money of the nation into court to be applied to the discharge of a contract made in its behalf.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 19; Dec. Dig. § 27.*]

Appeal from the United States Court of Appeals in the Indian Territory.

For opinion below, see 104 S. W. 658.

This is a suit in equity brought by A. P. Murphy, appellee here, against P. Porter, as principal chief of the Creek Nation, and M. L. Mott. Pending the appeal P. Porter died, and the case was revived and continued in the name of John Adams, as administrator of his estate. The bill alleges that on the 10th day of January, 1903, the defendant P. Porter, as principal chief of the Muskogee or Creek Nation, entered into a contract in writing with complainant, employing him as national attorney for the tribe to represent it before the departments in Washington and the Dawes Commission, and in any litigation growing out of such questions as the right to membership in the tribe, and the right to tribal lands. The employment was to continue until the tribal relations of the Muskogee Nation had been dissolved, and until March 1, 1906. The salary was fixed at \$5,000 per annum, in addition to expenses, payable quarterly. The complainant also signed the contract on his part and accepted its terms, and agreed to perform the services therein mentioned. The instrument contained a provision that it should be "subject to cancellation by either party hereto upon thirty days' notice for good cause shown." This contract was entered into pursuant to an act duly passed and approved by the National Council of the Muskogee Nation, authorizing their principal chief "to contract with, retain and employ an attorney at law, or firm of attorneys at law,' and setting forth specifically the duties of the employment, and providing that the contract should be subject to cancellation as above mentioned. The contract was approved by the Secretary of the Interior in accordance with the provision of the statute. Immediately upon the execution of this contract the complainant entered upon the performance of his duties thereunder, and con-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tinued to act as national attorney until March 23, 1904. A short time previous to that date, Charles J. Bonaparte and Clinton R. Woodruff, as special inspectors, had reported to the federal government at Washington that Mr. Murphy had filed charges against a Mr. Douglas, engaged in the Indian service in the Indian Territory, which were either altogther unfounded, or very greatly exaggerated, and in so far as they had a basis of facts arose from friction between Mr. Murphy and Mr. Douglas. This report further stated as follows: "We feel that our duty would not be fully discharged if we did not add to what is said of Mr. Murphy in our original report, that he is, in our judgment, so much influenced in his recollection of events and his opinion of individuals by his very strong sentiments of personal sympathy or antipathy as to render his statements untrustworthy and to impair his usefulness as a public officer." This report was brought to the notice of the various departments before whom the complainant was by the terms of his employment to represent the Creek Nation, and the principal chief, acting in good faith, and believing that his usefulness to serve the nation was thereby impaired, if not destroyed, notified complainant in writing, on the 23d day of March, 1904, that his employment was terminated, saving unto him, however, by the notice, the right to his salary for 30 days. In this notice the principal chief assigned as his reason for the termination of the appointment the above-mentioned report. Immediately upon receipt of this notice the complainant served a counter notice denying that there was just cause for his discharge, and denying the authority of the principal chief to terminate the contract. About 30 days later the principal chief, acting on behalf of his nation, entered into a contract with the defendant, M. L. Mott, similar in its provisions to the one which had existed with the complainant. The bill further avers that the action of the principal chief in terminating the contract was unjust, oppressive, and in violation of the trust conferred upon him by the Creek National Council, and that complainant was ready, willing, and able to continue in faithful performance of the contract on his part, and was entitled to the compensation provided therein; that the Creek Nation had in its annual appropriation bill for the current year appropriated the sum of \$5,000 for the payment of the salary of national attorney, and that the principal chief intended to pay over this money from time to time to the defendant Mott, in violation of the rights of the com-The bill further alleged as the basis for equitable relief: this plaintiff has no remedy at law by which he could sue the Creek Nation and recover from said Creek Nation the amount of unpaid salary due him under and by virtue of the contract of January 10, 1903, or for damages for the breach of said contract, and that if the defendant P. Porter does issue to the said M. L. Mott the warrant or warrants for the salary of Creek national attorney, arising and accruing subsequent to April 1, 1904, and the said M. L. Mott receives the same, this plaintiff will be without any adequate remedy at law to recover the balance of his salary as Creek national attorney for the year 1904, and without any remedy at law whatever to recover the same." The bill asks that the defendant Porter be enjoined and restrained from signing or issuing any warrant or warrants upon the general fund of the Creek Nation, payable to Mott, or to any other person except to the plaintiff, for the salary of Creek national attorney, and enjoining and restraining the defendant Porter from paying to the defendant Mott, or any other person than the plaintiff, any portion of the salary of Creek national attorney, and enjoining and restraining the defendant Mott from receiving or attempting to receive, either directly or indirectly, such salary, or any warrant therefor; and as permanent relief, in addition to an injunction in substantially the terms above mentioned, the bill asked that the complainant, A. P. Murphy, be adjudged to be the duly and legally constituted national attorney for the Creek Nation, entitled to perform the duties of such, and to receive the pay for the same. Upon this bill an application was made for a temporary injunction in accordance with the prayer, which was granted.

Thereafter, on application of the complainant, the injunction was so modified as to command the defendant P. Porter to execute and file with the clerk of court warrants upon the general fund of the nation for the salary of national attorney, payable to the order of the complainant, and requiring the complainant to indorse the same, and directing the clerk to collect the

proceeds thereof and hold the same in the registry of the court subject to its final decree. Thereafter, by stipulation of the parties, and manifestly simply for the convenience of getting the fund into the custody of the court without the necessity of the warrants being made payable to the complainant and indorsed by him, the injunction was further modified so as to command the defendant P. Porter to execute the warrants for the salary of national attorney payable to the clerk of court directly, and requiring him to collect the same and hold the proceeds subject to the final decree in the cause.

A demurrer was interposed to the bill on behalf of the defendants, charging (1) that the complaint did not state facts sufficient to constitute a cause of action; (2) that it showed upon its face that the plaintiff had a complete remedy at law; (3) that the facts set forth in the complaint were not sufficient in law to give a court of equity jurisdiction or to warrant the granting of an injunction or restraining order. This demurrer was overruled, and an exception saved. The briefs upon the argument of the demurrer are set forth in the record, and it appears therein that it was contended that the court had no jurisdiction of an action against the Creek Nation or its principal officers, the case of Thebo v. Choctaw Tribe of Indians, 66 Fed. 372, 13 C. C. A. 519, being cited as authority. To the application for modification of the injunction so as to require the defendant P. Porter to execute warrants and file the same with the clerk of court, a further demurrer was interposed, challenging the jurisdiction of the court, and specifying particularly "that the court has no jurisdiction to order the defendant P. Porter, as principal chief of the Creek Nation, to issue the warrants on the treasury or funds of the Creek Nation, or to order said warrants to be paid"; and further alleging that the suit relates to and involves property of the Creek Nation, and said nation not having been made a party to this suit, as required by law, the court is without jurisdiction to make the order prayed for in the motion. As already stated, this demurrer was also overruled, and complainant's motion was granted. Thereafter an answer was interposed to the bill, admitting many of its provisions, but charging that the complainant had so misconducted himself as to forfeit the confidence of the departments before whom he was to represent the nation, and thus giving to the principal chief just cause for terminating the contract. The cause was referred to a master, who took testimony therein, and reported his findings of fact and conclusions of law. In this report the master found that no good cause existed for the termination of the contract, and that the plaintiff was entitled to his salary down to March 4, 1905, when he became a member of Congress from the Sixteenth district of Missouri, and disabled from performing his duties under the contract. In his conclusions of law the master finds: "That the employer has a legal right to dismiss or discharge the employe, and that P. Porter, as principal chief of the Creek Nation, had the right to dismiss and discharge the plaintiff, A. P. Murphy, as its attorney, but, unless good cause was shown, the nation is liable for the damages for the violation of its contract." The report recommended that a decree be entered adjudging that the complainant, A. P. Murphy, is entitled to recover the salary due as national attorney of the Creek Nation, under his contract, from the 1st day of April, 1904, to the 4th day of March, 1905, at the rate of \$5,000 per annum, and that the same be ordered paid out of the moneys paid into court. Numerous exceptions were saved to this report of the master, but they were all overruled by the final decree of the court, and the report was approved and confirmed. It was therein also adjudged and decreed that the plaintiff, A. P. Murphy, do have and recover of and from the defendants, P. Porter and M. L. Mott, to be paid out of the funds in the hands of the clerk of court, the sum of \$4,320.08, and the clerk was ordered and directed to pay over to the said plaintiff, A. P. Murphy, out of the funds in his hands, the sum of \$4,320.08, and that the plaintiff, A. P. Murphy, have and recover of and from the defendants, P. Porter and M. L. Mott, all of his costs in this action, paid out or expended.

An appeal was taken from this decree to the United States Court of Appeals for the Indian Territory, where the decree was affirmed, and the appeal to this court is brought to review that action.

John R. Thomas (Grant Foreman, on the brief), for appellants. William T. Hutchings and Preston C. West, for appellee.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge (after stating the facts as above). Much of the argument in this cause has been devoted to the question whether Mr. Murphy was an officer of the Creek Nation, or simply held a professional employment. It seems to us that both the statute and contract leave little room for doubt on this point. The statute authorizes the principal chief "to contract with, retain and employ an attorney at law or firm of attorneys at law." This is wholly incompatible with the idea of office. A firm of attorneys could not hold an office. The statute also provides that the contract shall be subject to cancellation. If it had contemplated the employment as giving rise to an office, it would have made provision for the removal of the occupant from office. The statute simply conferred authority upon the principal chief to make the contract. It did not direct him to appoint an officer, and the person whom he employed derived his rights from the contract and not from the statute. This case is rauch stronger upon its facts than the case of Hall v. Wisconsin, 103 U. S. 5, 26 L. Ed. 302, in which a similar question was presented, and the Supreme Court held that the relationship was one of contract and not of office.

Being a mere contract for professional employment, the ordinary action at law for damages constitutes a full and complete remedy for its violation. But the Creek Nation is exempt from civil suit to compel performance of its contracts or to recover damages for their violation. Neither can the courts by judicial constraint require the chief officer of that nation to do those acts which if done by him voluntarily would constitute performance of the contract by the nation. Such political societies, like private corporations, can act only through agents, and to constrain those agents is to constrain the society. To say that this tribe is exempt from civil suit on its contracts, and yet compel its principal chief, by judicial process, to take funds from its treasury and turn them over to the court to be applied in discharge of its contracts, is to destroy in practice the very exemption which at

the outset is conceded as a legal right.

This court had before it in the case of Thebo v. Choctaw Tribe of Indians, 66 Fed. 372, 13 C. C. A. 519, an action involving the same fundamental rights as are presented by the present appeal. That suit was brought to recover on a contract for payment of attorney's fees, but the court held upon a full review of the authorities, and examination of the nation's course of dealing with Indian tribes, that the United States Court in Indian Territory had no jurisdiction of an action against the Choctaw Nation, or the chief executive officers thereof, when sued in their capacity as such for an alleged debt or liability of the nation. Upon considerations of public policy such Indian tribes are exempt from civil suit. That has been the settled doctrine of the government from the beginning. If any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judg-

ments. The civilized nations in the Indian Territory, as is pointed out in the Thebo Case, are probably better guarded against oppression from this source than the states themselves, under the eleventh amendment of the Constitution; for the states may consent to be sued, but the United States has never given its permission that these Indian na-

tions might be sued generally, even with their consent.

The complainant throughout this litigation has conceded the exemption of the Creek Nation from civil suit. That fact is put forward in the bill as the very ground for invoking equitable relief. It is there averred "that this plaintiff has no remedy at law by which he could sue the Creek Nation and recover from said Creek Nation the amount of unpaid salary due him under and by virtue of the contract of January 10, 1903, or for damages for the breach of said contract," and hence it is charged that he has no plain, speedy, or adequate remedy at law for his injuries, and therefore is entitled, on a familiar principle, to relief in equity. But the equitable doctrine invoked has no application to the facts of the present case. When the law out of considerations of public policy denies a remedy, equity cannot grant one. The defect of remedy which will support a resort to equity must lie in the legal remedy and not in the legal policy. An action for damages would afford a complete redress of complainant's grievance; but the courts are forbidden to grant the remedy because of the disastrous consequences that would result if the tribe were exposed to civil suit. It is the right, and not the remedy, that is deficient. To say that, when the law denies its remedies out of considerations of sound public policy, a party may have his claim enforced in equity, would be a scandal to our jurisprudence, and render equity less just than the law.

This whole subject has been frequently before the federal courts in attempts to enforce in equity pecuniary obligations against states at the suit of individuals, in violation of the exemption of the eleventh amendment. Such attempts have uniformly failed. The leading authority on the subject is Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448. That action was based upon refunding bonds issued by the state of Louisiana. The statute under which the bonds were issued levied an annual tax of 51/2 mills on the dollar upon all property of the state to pay the principal and interest of the bonds, and set apart and appropriated the revenue derived therefrom to that purpose, and no other. It made the tax a continuing annual tax until the bonds were paid, principal and interest, and made the appropriation a continuing annual appropriation during the same period, and made it the duty of the auditor and treasurer of the state to collect the tax annually, and pay the interest and principal of the bonds. To divert any of the funds derived from this tax to any other purpose than paying the bonds or the interest thereon was made a felony. This act was passed in 1874, and, to provide further security to those who should surrender the old obligations of the state and accept the refunding bonds, the main features of the statute were embodied in a constitutional amendment, and were there declared to create a valid contract between the state and each and every holder of the bonds "which the state shall by no means, and in nowise impair." In 1880 the state adopted a new Constitution, and embodied articles therein which amounted to a repudiation of these bonds in many of their essential features. In the meantime, however, taxes had been levied under the earlier statute, and collected, and a fund of \$300,000 was in the treasury of the state derived therefrom, and large amounts of other taxes levied for the same purpose were still uncollected. A suit in equity was brought against the fiscal officers of the state by holders of these bonds, in which it was sought to have the provisions of the Constitution of 1880 declared null and void as impairing the obligation of the state's contract, in violation of the federal Constitution, and restraining the state officers from failing to carry out the provisions of the earlier enactments. At the same time time a suit at law was instituted in which a mandamus was asked requiring these officers to apply the funds in their hands to the extinguishment of the bonds and coupons held by the complainant. The Supreme Court upon a full examination of the subject held that these were suits against the state, in violation of the eleventh amendment to the federal Constitution. Much was made in that case of the fact that the moneys had been collected under the earlier enactments, and were held in the treasury appropriated to the payment of complainant's bonds, and that the money so held was a "trust fund" which neither the state nor its officers could withhold from the original purpose of the levy. The case was much stronger in this feature than the present case, for here nothing has been done but to make a general appropriation out of the funds in the treasury of the Creek Nation for the payment of the salary of national attorney. The court held that such an appropriation did not make the money in the treasury a "fund" within the meaning of that term as used in equity jurisprudence; that such an appropriation was a matter wholly between the state and its officers, and gave the complainants no right to the money as a trust fund. Chief Justice Waite, speaking for the court, summed the matter up tersely as follows:

"The officers owe duty to the state alone, and have no contract relations with the bondholders. They can be moved through the state, but not the state through them."

The whole doctrine was again examined by Mr. Justice Matthews in the case of In re Ayers, 123 U. S. 502, 8 Sup. Ct. 181, 31 L. Ed. 216:

"Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the state of Virginia by the acts of its General Assembly referred to in the bill of complaint, there is nevertheless no foundation in law for the relief asked. For a breach of its contract by the state, it is conceded there is no remedy by suit against the state itself. This results from the eleventh amendment to the Constitution, which secures to the state immunity from suit by individual citizens of other states or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the state by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the state by name, it is admitted, could not be brought. In Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805, it was decided that in such a bill, where the state was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject-matter of the suit, and defending only as representing the state, where 'the things required by the decree to be done and performed are the very things which, when done and performed,

constitute a performance of the alleged contract by the state,' the court was without jurisdiction, because it was a suit against a state."

Again, the same learned judge says, page 504 of 123 U. S., page 182 of 8 Sup. Ct. (31 L. Ed. 216):

"But where the contract is between the individual and the state, no action will lie against the state, and any action founded upon it against defendants who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the state, is in substance a suit against the state itself, and equally within the prohibition of the Constitution."

The present suit comes squarely within this language. It is a suit for the specific performance of a contract of personal service. Performance of that contract on the part of the Creek Nation consisted in paying the compensation which it provided, and on the part of Mr. Murphy it consisted in rendering the service mentioned in the contract. It is elementary law that a suit in equity for specific performance will not lie as to such a contract. There are two controlling reasons why this is so: First, the remedy at law is adequate; and, second, it would be impossible for a court of equity to supervise the many acts which would constitute performance by the defendant. If we look at the contract from the other side, it will be manifest that the present case falls within the second reason as well as the first. Suppose Mr. Murphy had violated the contract by refusing to render the service mentioned therein, could the Creek Nation have maintained a bill in equity to compel him to perform those services? Manifestly not. No more can he maintain a bill in equity to compel the Creek Nation to pay the compensation which the contract provides. The defendant Porter had no personal interest in any of the matters embraced in the bill. In discharging the complainant he acted in his official capacity, exercising a discretion with which he was clothed by law. If there was just cause for what he did, the contract was not violated. If he erred in the exercise of his official discretion, then he violated complainant's right under the contract, and would have subjected the Creek Nation to an action for damages had it not been for the exemption already considered. The exercise of his official discretion cannot be reviewed in court farther than to declare whether the contract was or was not violated. Even if his conduct was arbitrary, it could produce no result except the violation of the contract, and could not justify a resort to equity either for the purpose of having the complainant reinstated in the employment, or enforcing payment of his salary. The relationship of attorney and client is such as to require perfect confidence between the parties, and, of course, could not be continued by a decree in equity against the will of either party.

Section 2 of the act of June 28, 1898, c. 517, 30 Stat. 495, commonly known as the "Curtis Act," provides that:

"When in the progress of any civil suit pending in the United States court in any district in said territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit."

By reason of this statute it is urged by defendants that the Creek Nation is an indispensable party in the present case. We do not think such is the true intent of that law. One of the prominent features of the Curtis act was to settle by suits between the Five Civilized Tribes. and private individuals, as well as by suits between such private individuals, the right to membership in the tribe, and as a result of such membership the right to share in the tribal funds and lands. It is a matter of general knowledge that many nonmembers were in possession of the valuable lands of Indian Territory, under fraudulent claims of title, and illegal claims of membership in the tribe. Much litigation on these subjects was pending between private individuals at the time the act was passed, and the act itself authorized the bringing of suits both by the tribes, and by the individual members thereof, for the ouster of trespassers from the tribal lands, and the adjudication of the right of membership in the tribes. In such litigation between individuals it would necessarily occur that the rights of the tribe to tribal lands and tribal funds would be, either directly or indirectly, involved. Such rights of the tribe might also be seriously prejudiced by collusive suits between individuals. In order that these questions might be finally settled so as to protect both individuals and the tribe, the provision of the statute above quoted was enacted. It was never intended in this indirect way to abolish the exemption of the tribe from civil suit. This court declared in the Thebo Case that "the intention of Congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms." If the interpretation suggested were to be adopted, it would always be possible for a private person having a claim against the tribe to sue the officer having control of its funds, and then ask that the tribe be brought in as a necessary party under this statute. We cannot believe that it was the intent of Congress, in this indirect manner, to abrogate a settled policy which has hitherto been deemed essential for the protection of these dependent tribes against the schemes of the unscrupulous.

There are three sound reasons why the demurrer to the bill in this cause should have been sustained: First, the remedy at law was adequate, were it not for the exemption of the Creek Nation from civil suit. Second, the contract is one for professional service, and cannot be specifically enforced in equity at the suit of either party. Third, the suit, though nominally against an officer, is in fact against the Creek Nation, and cannot be sustained without violating the exemption of that nation from civil suit.

The moneys received by the clerk of the trial court as an alleged salary accruing to the complainant should be returned to the defendant Adams, or to the proper officer, representative or successor in interest of the Creek Nation, unless the defendant Adams has already made restitution to that nation or to its successor in interest, and then the bill should be dismissed.

The decrees of the courts in the Indian Territory are reversed, and the cause is remanded to the Supreme Court of the state of Oklahoma for further proceedings not inconsistent with this opinion.

AMERICAN LAW BOOK CO. v. CHAMBERLAYNE.

(Circuit Court of Appeals, Second Circuit. December 15, 1908.)

Literary Property (§ 7*)—Right to Control Publication—Sale by Author.

Plaintiff contracted to write an article on the law of evidence, and to deliver the same for a stated compensation to defendant for publication in its Cyclopedia. Defendant was to become owner of the copyright, plaintiff reserving only the right to make use of the material and memoranda collected by him in any manner which did not infringe upon or interfere with such copyright. Plaintiff wrote and delivered only part of the article, and defendant revised and completed the same, and published it with a truthful statement of authorship and editorship. Held that, when the manuscript was written and delivered under such contract, plaintiff ceased to be the owner of the literary property therein, and could not maintain an action for trespass thereto because of the manner in which the article was published.

[Ed. Note.—For other cases, see Literary Property, Dec. Dig. § 7.*

Rights of authors to control of publication, disposition, or use of their productions, independent of statutory copyright, see note to Bobbs-Merrill Co. v. Straus, 77 C. C. A. 620.]

In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon writ of error to review a judgment against plaintiff in error for \$2,500 and costs. The cause was tried by the court without a jury. The testimony being closed, the trial judge stated that he thought he should go upon the record in order to avoid any questions as to findings of fact, and proceeded to set forth his views as to the pleadings and evidence (somewhat in the form of a charge), and concluded that the company should pay the sum of \$2.500. The facts are sufficiently stated in the following opinion.

W. B. Hale and Edmund Wetmore, for plaintiff in error.

F. H. Field, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The plaintiff below was an attorney at law, with a favorable reputation as an author and an authority upon the law of evidence. Defendant was the publisher of the Cyclopedia of Law and Practice, known as "Cyc." On October 1, 1902, they entered into a written contract, the material parts of which are as follows:

Plaintiff agreed to furnish to the defendant an article entitled "Evidence," to be published in the Cyclopedia, and to write said article in conformity with a certain annexed schedule of requirements (Clause I). He further agreed that the said article, if accepted by the company, may be published by it in the Cyclopedia in the name of Mr. Chamberlayne in the company's customary style, to wit: "By Charles F. Chamberlayne" (Clause II). Plaintiff further agreed "that the company shall become the sole owner of the copyright of said article, Mr. Chamberlayne reserving the right to make use of the material and memoranda collected and used by him in the preparation of said article and of any ideas embodied in said article, provided such use shall not in any manner infringe or interfere with the copyright of

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said article 'Evidence' written and prepared by him for the Company' (Clause III). He further agreed that the article should be so constructed when delivered to the company as to constitute when printed as nearly as practicable not more than 1,000 pages all told, including and excluding such matters as were directed by the schedule; that the article when delivered to the company should be finished for the printer, and should be a piece of good professional work; that the article should be completed and delivered on or before January 1, 1904, and that, in case of failure so to deliver it, the damages should be fixed at \$5 a day for every day it should remain unfinished and undelivered (Clause VII).

The company reserved to itself "the right to reject said article or any part of said article provided the same does not in its opinion come up to the proper standard or does not constitute a reasonable compliance with the terms of this contract; and in case said article, or part of the same is rejected, it is hereby mutually agreed that Mr. Chamberlayne shall receive no compensation for the said article, or part thereof, so rejected; and if in the opinion of the company alterations or changes are necessary to make the said article conform in substance, style, or form to the required standard, and it is deemed expedient to have the said alterations or changes made in the home office of the company, the lowest actual cost of making said alterations or changes shall be deducted from the amount which otherwise would be due to Mr. Chamberlayne" (Clause VIII). Plaintiff further agreed that, in case of his death or disability whereby he might become incapacitated for the full performance of the contract, the company should have full permission to take possession of and complete the manuscript of said article, which, when so completed, might be published in his name in the Cyclopedia (Clause IX).

The company agreed to pay him for the said article prepared in conformity with the above conditions \$5,000, subject to certain deductions for clerical or editorial assistance as might be mutually agreed upon (Clause X). The company further agreed that all memoranda of cases and other material used or designed for the writing of said article by or for Chamberlayne should remain at all times his property, but that the same should not, without the consent of the company, be removed from its possession; and that it should have a lien on the same to secure the company in the event of his death or permanent disability prior to completion of the article (Clause XII). It further agreed to furnish him with suitable deskroom, assistants, etc. (Clause

XIII).

The article was not completed by January 1, 1904, but neither party to the contract, at that time or any other, attempted to rescind it because of any alleged breach by the other. At that time plaintiff had worked upon only the first half of the article, and even that portion was not in a fully completed state. The time was extended by mutual assent, and plaintiff continued working at the article until February 27, 1905. During this period there was much friction between the parties. Defendant insisted that it was manifest the whole article would not be completed by plaintiff within such time as to enable it to publish the volumes in which the same was to appear, and there-

fore employed four other persons to complete it, each writing one of the last four sections. The plaintiff eventually completed and revised 13 sections, and these he actually delivered to the defendant, and himself asserts that the manuscript as prepared and written by him and delivered to defendant, with certain incidental changes and additions made by other persons acting under the direction of defendant, constitutes the first 13 sections of the article "Evidence" as printed and published by defendant in the Cyclopedia.

The defendant published the first 10 sections in volume 16 of "Cyc."

They are entitled:

"Evidence.

"By Charles F. Chamberlayne, Charles C. Moore, Wm. Lawrence Clark, A. S. H. Bristow, Hiram Thomas, and Joseph Walker Magrath."

An asterisk calls attention to a note at the foot of the page, which reads:

"The author and editor of particular sections are indicated in a foot-note at the beginning of each section. The entire article was revised and edited by Charles C. Moore and Wm. Lawrence Clark."

An asterisk at the title of each of the 10 sections calls attention to a note at the foot of the page, which reads:

"By Charles F. Chamberlayne. Revised and edited by Wm. Lawrence Clark" (or in some instances "by Wm. Lawrence Clark and Charles C. Moore").

The remainder of the complete article on Evidence was published in volume 17 of "Cyc." with similar headings and footnotes, except that, in connection with the last four sections, plaintiff's name does not appear, the note giving the name of the author who wrote it, e. g. "By A. S. H. Bristow, Revised and Edited by Charles C. Moore and Wm. Lawrence Clark."

The injury of which plaintiff complains is, as averred in the complaint, that the publication "has confused plaintiff's work with that of others, which in important particulars differs from plaintiff's views on those subjects; has rendered the article as a whole, i. e., the whole 17 sections, variable in style, imperfect and unsymmetrical in arrangement; and subjects plaintiff to the unnecessary inference of incompetency to deal adequately with the subject as a whole." Also that the publication "so joins the names of persons other than the plaintiff as editors and revisers * * * as to suggest the inference * * * that his said article was unfit for publication in defendant's series except upon substantial changes and corrections made by persons previously unknown to the legal profession, in connection with the subject 'Evidence,' and so confuses, blends, and intermingles the plaintiff's work with that of others as to prevent him from receiving the public credit which would otherwise accrue to him." Also that, by omissions of statements and authorities which he had written or desired to add to his manuscript, the portion published was rendered "incomplete, unscientific, and inaccurate."

The cause having been tried without a jury, the findings of fact by the court are to be given the same force and effect as would be given to the verdict of a jury. The trial judge found that "the uncontradicted evidence shows consent by the plaintiff to the publication of the manuscript 'Evidence' delivered by him to the defendant, and that the only actual damages which can be assessed, when allowed, are such as grow out of the manner of publication." That there "is no evidence of actual damage," and "nothing shown in the sense of studied desire to injure the reputation of the plaintiff." The statements in the two volumes as to authorship, revising, and editing of the differ-

ent sections were strictly truthful.

Whatever unfair treatment the plaintiff may have received during his employment under the contract, and afterwards by the manner in which his manuscript was published—and we are not to be understood as expressing any opinion as to whether or not there was any unfair treatment—we are satisfied that he cannot recover in this action. The trial court erred, as we think, in giving too broad a construction to the former opinion of this court in Press Publishing Co. v. Monroe, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353. If the evidence warranted it, a party to such a contract as that above set forth might recover damages sustained by reason of the other party's doing or omitting to do something he had agreed to omit or to do. But the plaintiff has elected not to sue upon the contract. If he has sustained damage because his article has been published in a mutilated or altered form or with some misrepresentation as to its authorship, he may, if he can prove his allegations, recover in an action for libel. But this is not an action for libel; plaintiff's counsel so states on page 2 of his brief. The whole theory of the case is that plaintiff has never parted with his literary property in the 13 sections, and that therefore he can maintain "an action for trespass to literary property by the unwarranted, unauthorized, and unlawful publication of plaintiff's manuscript without his consent."

The authority relied upon in support of this proposition is Press Publishing Company v. Monroe, supra. In that case Miss Monroe had written a poem to be delivered at the dedicatory exercises of the World's Fair or Columbian Exposition in Chicago. Copies of the manuscript had been shown to members of the literary committee which had the matter in charge, to enable them to determine whether or not the poem was worthy of the occasion. This, of course, did not operate as a publication. The committee approved her poem and agreed to pay her \$1,000 for the privilege of reading and publishing it on October 21, 1892, the date fixed for the dedication exercises. The agreement between them is quite precisely evidenced by the fol-

lowing document:

"Received Chicago, the 23d day of September, 1892, from the World's Columbian Exposition, \$1,000 in full payment for ode composed by me. It is understood and agreed that said Exposition Company shall have the right to furnish copies for publication to the newspaper press of the world and copies for free disposition if desired, and may also publish same in the official history of the Dedicatory Ceremonies; and subject to the concession herein made, the author expressly reserves her copyright therein."

The date fixed for dedication exercises was October 21st. In some way or other, without the consent of Miss Monroe or the Exposition Company, the New York World on September 23d secured a copy of

the poem. It was notified that the poem was protected by copyright, and publication was forbidden, but published it in full in its issue of September 25th, for which tortious act it was sued by Miss Monroe. This court held that by the plain language of the contract she had reserved to herself the common-law as well as the statutory copyright; that the contract did not contemplate a complete transfer of all rights to the committee; that all that was conveyed was the right to do certain things which, when done, would operate to prevent the taking out of statutory copyright and would destroy all right to restrain future piracy.

The contract in the case at bar is a very different one. Plaintiff reserved to himself only the right to retain and make use of material and memoranda collected by him, and to make use of any of his ideas, provided such use shall not interfere with the copyright of the article written and prepared by him for the company (articles III and XII). He agreed that the company should become the sole owner of the copyright of said article, when it was written and delivered; and subsequently he wrote and delivered it. Under these circumstances he was not the owner of the literary property, nor entitled to maintain this suit for a trespass upon such property.

The judgment is reversed.

MERIWETHER V. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1908.)

No. 2,775.

1. Levees (§ 15*)—Construction—Mode of Doing Work—"Necessary" Acts.

In determining what is reasonably necessary in making a public improvement, and what the authorities having it in charge are therefore empowered to do, the word "necessary" is not to be construed as meaning indispensable, but includes whatever is appropriate and convenient to render the improvement effective.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 10; Dec. Dig. § 15.* For other definitions, see Words and Phrases, vol. 5, pp. 4705–4710; vol. 8, p. 7729.]

2. Levees (§ 9*) — Levee Districts — Discretionary Powers — Review by Courts.

The board of directors of a levee district created for the purpose of constructing and maintaining a levee along the Mississippi to protect adjoining lands from overflow are necessarily vested with a wide discretion in the choice of means and methods, and, if they act in good faith and on reasonable grounds, their judgment cannot be set aside by the courts.

Ed. Note.—For other cases, see Levees, Cent. Dig. § 18; Dec. Dig. § 9.*1

3. Levees (§ 19*)—Damages from Construction—Adequate Remedy at Law.

Under the Constitution and statutes of Arkansas, an owner of land which is injured by overflow as the direct result of the building of a levee by a levee district in the exercise of the powers conferred upon it is given a full and complete remedy at law by the recovery of damages as for a taking of his property for a public use, and a federal court is without

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jurisdiction to grant equitable relief, at least until his remedy at law has been proven inadequate.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 10; Dec. Dig. § 19.*]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

In 1893 the Legislature of Arkansas established the St. Francis levee district, comprising eight counties in the eastern part of the state, to construct and maintain levees against the waters of the Mississippi river, and gave to it the corporate name of the Board of Directors of St. Francis Levee District. The directors were authorized to sue and be sued, to acquire property both by purchase and eminent domain, to determine the crown, height, slope, and grade of the levee, and to make all needful regulations, and do all acts in their opinion necessary to secure the levee district under their charge from overflow by the waters of the Mississippi. The complainant is the owner of a tract of land embracing about 500 acres, which is bounded on the east by the Mississippi river, and on the west by Fletcher bayou. It is alleged in the bill that this bayou is the natural course of drainage for the immediate district, and carries off all surface water which would otherwise accumulate upon the rear portion of the complainant's plantation, and empties the same into the Mississippi river a few miles below. In the month of October, 1901, the plaintiff granted to the defendant the right of way for the levee across the eastern portion of his land, and thereafter during the same year it was constructed over the land, and many miles to the southward, crossing the mouth of Fletcher bayou so as to completely dam it up. No complaint was made of the construction of the levee, but during the summer and fall of 1902, it is charged that, as a result of closing the bayou, a great quantity of water was accumulated on the western portion of plaintiff's plantation, causing more than 300 acres of his land to become a swamp, rendering it unfit for agricultural purposes to which it had theretofore been devoted, injuring pecan trees growing thereon, and rendering the remainder of the plantation unhealthy for human habitation. It is charged in the bill that the damming up of Fletcher bayou "in this way" was wholly unnecessary, and was not originally contemplated by the defendant. In 1902, after the effect of the levee had become manifest, the complainant presented the situation to the defendant, which thereupon promised to provide suitable drainage for carrying off the accumulation of water. It caused its engineer to make surveys and estimates of the cost of providing such drainage, and he reported that the cost would not greatly exceed the sum of \$2,500. The defendant has, however, failed to construct the drainage, and prior to the bringing of suit refused to do so. The bill, upon the foregoing facts, asks judgment for damages already suffered, and a mandatory injunction requiring the defendant to drain said swamp. To this bill a demurrer was interposed, first, upon the ground that it did not state facts sufficient to entitle the plaintiff to any relief; and, second, that it shows on its face that the plaintiff has a full, complete, and adequate remedy at law. The demurrer was sustained upon the second ground, and the bill dis-

Rose, Hemingway, Cantrell & Loughborough and H. M. Meriwether, for appellant.

H. F. Roleson, for appellee.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge (after stating the facts as above). The appellant contends that the obstruction of Fletcher bayou, and the consequent accumulation of water upon his land, constitutes a nuisance

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which he is entitled to have abated. This takes account only of his injury, and overlooks the powers of the defendant in carrying out an important public improvement. If the obstruction of Fletcher bayou is reasonably necessary in building the levee, then the taking or injury of plaintiff's property is not a nuisance, but falls within the power of eminent domain, and constitutes simply an appropriation of private property to a public use. For his damages the plaintiff would be entitled to compensation, but would not be entitled to an abatement or impairment of a great public improvement in order to conserve his private property. It would be wholly impracticable to leave openings in the levee for all the bayous and estuaries leading into the Mississippi river along its line. To determine when the benefits of a continuous levee would exceed the damage to private property from damming up such water courses was one of the subjects committed to the sound discretion of the defendant board. The plaintiff, therefore, is not entitled to the equitable relief which he asks if the obstruction of Fletcher bayou was reasonably necessary in building the levee. The term "necessary" in this connection should not be construed to mean "indispensable," but should be held to cover what is appropriate and convenient in carrying on the public improvement. Detroit Park Commissioners v. Moesta, 91 Mich. 149, 51 N. W. 903; N. J. Railroad Co. v. Hancock, 35 N. J. Law, 537. Municipal authorities under such circumstances must be vested with a wide discretion in the choice of means and methods. If they act in good faith and upon reasonable grounds, their judgment cannot be set aside by the courts, even though some better way be pointed out. The bill in this case alleges that the damming of Fletcher bayou was "wholly unnecessary." This, however, is simply to place the plaintiff's judgment over against the judgment of the defendant. No specific facts are alleged showing that the obstruction is unnecessary. Until such a showing is made, the court is bound by the presumption that the defendant has exercised a sound and honest discretion. The complainant asks the unusual remedy of a mandatory injunction. To justify the courts in awarding that remedy, his bill should contain a full and specific statement of facts from which it would appear either that the defendant had acted wantonly, or that there was no reasonable necessity for the doing of the acts complained of. The bill fails to make any such showing.

The Constitution and statutes of Arkansas require that full compensation be made for property taken or damaged for a public use. Section 2734 of Sanders & Hill's Digest of Arkansas Statutes further enacts that "whenever any corporation authorized by law to appropriate private property for its use, shall have entered upon and appropriated any property, real or personal, the owner of such property shall have the right to bring an action against such corporation in the circuit court of the county in which such property is situated, for damages for such appropriation"; and the measure of recovery is declared by the following section to be the same as that governing proceedings by corporations for the condemnation of property. The general statute of the state dealing with the subject of levees (section 4705) requires the jury to assess and award all damages that are sustained by reason of the

levee.

On the showing made by the bill, these statutes furnish the plaintiff a full and complete remedy for his injuries. If his land has been overflowed or injured as a direct result of the building of the levee, that amounts to a "taking" or "injuring" within the meaning of the constitutional provision which protects private property from public use without compensation; and at common law, as well as under the express provision of the statute just quoted, the plaintiff could maintain an action for his damages though no direct proceeding had been taken to condemn the land by eminent domain. United States v. Lynah, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539; Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557; Springfield, etc., R. R. Co. v. Rhea, 44 Ark. 258. Where such a remedy exists, it is adequate and exclusive. Ex parte Martin, 13 Ark. 198, 58 Am. Dec. 321. This is an instructive case, involving substantially the same questions as those presented by this appeal. The opinion contains a clear explanation by a court, familiar with the local situation, of the necessity of obstructing water courses in building effective levees, and the need of granting a wide discretion on that subject to boards having charge of such improvements. At that time neither the Constitution nor statutes of Arkansas provided for compensation for property thus taken or injured, and for that reason the plaintiff prevailed; but the court plainly declares that if the right to compensation had been secured, no equitable relief would have been granted. "If the acts of assembly for reclaiming the swamp lands provided for compensation to those whose property might be injured or taken for public use by the levees or drains contemplated by those acts, the parties now seeking relief could not be heard except to complain in respect of the due and just administration of the law awarding compensation." 13 Ark. 211, 58 Am. Dec. 321.

The bill leaves us in doubt whether the complainant asked that an opening be made in the levee, or an independent system of drainage constructed. If the latter was the relief sought, the court had no power to command such affirmative action by the defendant. Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 471, 26 Sup. Ct. 660, 50

L. Ed. 1102.

The bill avers that after full investigation the board of directors refused to adopt either of these suggested courses, but alleges no facts which impugn the wisdom or honesty of their judgment. The trial court was therefore right in holding that upon the face of the bill an action at law to recover damages for property taken or injured would be a complete redress of his wrongs. If, when he has established his right at law, it shall appear upon a full disclosure of the facts that equitable relief is necessary to afford him complete redress, he can then apply to equity upon a proper showing. We think, however, that the right of the complainant to resort not only to law but to equity, if need be, after he has established his right at law, should have been left entirely plain by the decree of the court below; and, in order to remove all possible doubt on that subject, the decree of the court below will be modified so as to read that the bill be dismissed for want of equity, but without prejudice to further proceedings. As so modified, the decree is affirmed, with costs in favor of the appellee.

CANADA-ATLANTIC & PLANT S. S. CO., Limited, v. FLANDERS.

(Circuit Court of Appeals, First Circuit. December 2, 1908.)

No. 771.

1. Contracts (§ 321*)—Renunciation of Executory Contract—Right to Elect as to Remedy.

The final renunciation by one party of a contract providing for future performance gives to the other party an immediate right of election, either to continue to assert his strict contract rights or to accept the renunciation and to sue upon that as a distinct cause of action.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1510; Dec. Dig. § 321.*]

2. JUDGMENT (§ 594*) — BAR OF CAUSES — CONTRACT OF EMPLOYMENT—DIVISI-BILITY—SUCCESSIVE ACTIONS FOR BREACH.

Upon the refusal of defendant to further perform a contract by which it employed plaintiff for a term of five years at a salary payable monthly, plaintiff brought an action on the contract in which he expressly limited his demand to such damages as he had sustained and might sustain by reason of the breach to the time of trial, and in such action recovered judgment for the amount of his salary to the time of trial; the contract term not having expired. Held, that the contract was not indivisible, but was capable of successive breaches by defendant, and that such action was not an election by plaintiff to treat it as terminated, nor the judgment therein a bar to a second action to recover subsequent salary and damages for an anticipatory breach.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. $1109 \; [$ Dec. Dig. 594.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 161 Fed. 378.

William M. Richardson (Robert M. Morse, on the brief), for plaintiff in error.

George W. Anderson (Edward H. Ruby, on the brief), for defendant in error.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. The question before us is whether the Circuit Court erred in refusing to rule that a former judgment was a bar, and in giving judgment for the plaintiff below, now defendant in error, notwithstanding the former judgment.

Both the first and second actions were based upon a written contract relating to the employment of James A. Flanders as general agent of the Canada-Atlantic & Plant Steamship Company. The contract was for a term of five years from May 1, 1904, at a salary of \$3,000 per annum, payable in monthly installments. The contract is set out in full in the opinion of this court, handed down May 23, 1906, in Canada-Atlantic & Plant Steamship Company v. James A. Flanders, and reported in 145 Fed. 875, 76 C. C. A. 1.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes $165~\mathrm{F.}{--}21$

The writ in the first action is dated December 28, 1904, and con-

tains this expression, following the description of the plaintiff:

"* * * Who brings this suit to recover such damages as he has sustained to the date of this writ, and also such damages as he may sustain up to the date of trial of this action, but without prejudice to his right to bring subsequent suit or suits for damages accruing after the date of the trial of this cause," etc.

The declaration filed in pursuance of this writ is as follows:

"And the plaintiff says that on or about the 28th day of April, A. D. 1904, an agreement in writing was made and entered into by and between the plaintiff and the defendant company, a copy of which is hereto annexed and made a part of this declaration, whereby the plaintiff agreed to render his services to the defendant company as general agent from the 1st day of May, 1904, to the 1st day of May, 1909, in consideration whereof the defendant agreed to employ the plaintiff in the capacity of general agent as aforesaid, and to pay him for such services at the rate of three thousand (3,000) dollars per year.

"And the plaintiff further says that he entered upon his employment under said agreement and duly discharged all the duties thereof until the 1st day of December, 1904; and although he has ever since been and still is ready and willing and on said last-named day duly offered to perform all the conditions of said agreement upon his part to be performed, the defendant has refused and still refuses to allow him to do so, or to pay him therefor, as the plain-

tiff says, to his great damage."

Annexed to the declaration was a copy of the written contract.

Upon a jury trial verdict was rendered for the plaintiff and judgment entered for \$3,085.61; the amount being merely a correct computation of the amount of salary accruing according to the terms of the contract up to the date of trial. The question of the right of the plaintiff to recover damages for any period after the date of the trial was not mentioned by counsel or court at the trial, and the jury did not consider the question of prospective damages or future rights under the contract. The principal issue tried by the jury related to the validity of the contract, and the jury were instructed, in case they should find the contract valid, to find a verdict for the amount of salary computed to the day of trial.

By the satisfaction of this judgment the plaintiff received in the first action all sums due him according to the terms of the contract up to November 22, 1905. This covered all sums due under the contract prior to the date of the writ, and also all sums due under the

contract up to the date of verdict, November 22, 1905.

The second action in its amended form is conceded to be an action for damages, past and prospective, resulting from the defendant's refusal to employ or to pay the plaintiff. The contract period of five years does not expire until May 1, 1909, yet the plaintiff has sued and claimed damages for an entire breach, and has now elected to treat the contract as rescinded.

The judgment now under review includes full damages for anticipatory breaches of an executory contract, as well as damages for past breaches of particular provisions. The plaintiff in error contends that the first action is identical in nature with the second, is for damages for a general breach of the contract, that the damages awarded in the second action were recoverable in the first action, and that if in the first action the plaintiff voluntarily chose to limit or waive his

recovery of full damages he is thereby concluded, since the cause of action was indivisible and the same in each case. It is contended that no force should be attached to the limitation in the prior writ to which we have called attention; that it has no force to designate the character of the action, but is a mere expression of an intent to waive a portion of the damages for an entire breach of contract. While we do not assent to this view, and are of the opinion that the declaration and writ together should be considered in determining the scope of the prior action, a disregard of the peculiar language of the writ would not assist the plaintiff in error.

Upon an examination of the declaration in the first action we find no allegation that the defendant had finally renounced the contract or had refused to be bound by it in future. The allegations are confined to past breaches of contract. The contract annexed to the declaration is capable of as many particular breaches as there are monthly periods of payment. Once executed, the contract is of continuing obligation according to its terms, and no act of the defendant alone can effect its rescission. A refusal of the defendant to permit the plaintiff to begin his services does not affect the right of the plaintiff to tender his services, to hold himself in readiness to fulfill them, and to insist upon monthly payments according to the terms of the contract.

As a matter of pleading, the action for damages for past breaches of particular provisions of the contract is not the equivalent of an action for damages for an anticipated breach of an executory contract, or for damages due to an unlawful renunciation of liability under the contract.

In the first action the plaintiff has assigned as breaches of contract merely past and particular breaches of a continuing contract, and has not charged a general breach of all the future and unfulfilled obligations imposed upon the defendant by the contract. For all that appears in the declaration the parties, after the particular breaches of contract set forth, may have resumed relations under the contract, and such resumption would in no wise have affected a suit upon a declaration like that filed in the first action. It is now well settled that the final renunciation by one party of a contract providing for future performance gives to the other party an immediate right of election, either to continue to assert his strict contract rights or to accept the renunciation and sue upon that as a distinct cause of action. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Pierce v. Tennessee Coal, Iron & Rd. Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591.

We think it quite clear that nothing in the record of the first action tends to show that the plaintiff elected to accept a renunciation of the contract, or to forego his right to a strict performance according to its terms, and in lieu thereof seek damages for the defendant's unlawful act in putting an end to the contract.

It is not contended that the plaintiff has in fact recovered full compensation, or that he intended to claim it in the first action. The contention is merely that the cause of action first sued upon has been ter-

minated by the satisfaction of judgment, and that the cause of action declared upon in the second action is shown by the record in the former case to have been already sued to judgment. We think this contention erroneous. The plaintiff in error insists that a strict construction be placed upon the word "damages" in the declaration in the first action, and that the suit cannot be regarded merely as for the unpaid installments of salary due as a mere debt. It by no means follows, however, that, if we regard the first action as for damages as distinguished from a debt, we must also regard it as brought for damages for a general or anticipatory breach as distinguished from past and particular breaches. The mere fact that both seek damages for a breach of contract does not make them identical, for the particular

breaches of contract sued upon are distinct.

The notice contained in the first writ of a reservation of a right to claim future damages is accompanied by notice of an intention to claim damages for a period between the date of the writ and the date of trial. This is unusual and is not explained. This, however, does not affect what we have already said—that nowhere in the record does it appear that the plaintiff, by his pleadings or by any act in the former action, elected to accept a renunciation of the contract and to consider it as finally broken. If the contract were indivisible in character, capable only of a single breach, a claim for damages accruing after the date of the writ and prior to the date of trial might possibly amount to an election to seek in that suit all damages for future or anticipated breaches; but as the contract is not in its nature indivisible, but provides for distinct performances at distinct periods, and is thus capable of successive breaches, a claim for damages accruing between the date of the writ and date of trial can relate only to breaches of contract during that period, and cannot relate to any future period. There is no such indivisibility or unity in the subject-matter as makes a claim concerning a part in substance a claim concerning the whole.

We are of the opinion that the first judgment constituted no bar to

the second.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers his costs in both courts. In accordance with a stipulation in writing filed in this court the mandate will direct that said judgment shall be in full for all claims of said Flanders upon the said steamship company by reason of and growing out of the contract in suit, subsequent to the damages assessed by the jury and hitherto paid by said steamship company, as appears in the record of said cause, and that, on payment of the judgment of the Circuit Court, based upon the damages set forth in the agreed statement of facts, all obligations of the said steamship company to the said Flanders under and by reason of said contract shall be forever at an end.

FARRINGTON v. STUCKY et al.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1908.)

No. 2,749.

1. CONTRACTS (§ 123*)-LEGALITY OF OBJECT-LOCATION OF RAILROAD.

A voluntary contract by individuals for the payment to a railroad company of a bonus to secure the construction of its line on a particular route is not illegal or against public policy, even though the line is thereby deflected from its most natural and cheapest route.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 570–575; Dec. Dig. § 123.*]

2. Trusts (§ 25*) — Instruments Creating Trusts — Form — Use of Word "Trustee."

When dealing with equitable considerations, the affixing of the term "trustee" to the name of the assignee of securities is to be given effect, and imports that he does not hold in his own personal right, but for the benefit of another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 34; Dec. Dig. § 25.* For other definitions, see Words and Phrases, vol. 8, pp. 7128–7133, 7822.]

3. EVIDENCE (§ 437*) — PAROL EVIDENCE AFFECTING WRITING — INVALIDATING WRITTEN INSTRUMENT.

The rule which forbids the introduction of parol evidence to contradict, vary, or add to a written contract does not extend to evidence to show that the contract was made in furtherance of objects contrary to law or public policy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2027; Dec. Dig. § 437.*]

 Contracts (§ 123*)—Legality of Object—Location of Railroad Syations.

An agreement by a railroad company not to establish or maintain a station between two given points is void as against public policy, and where it constitutes, in whole or in part, the consideration for contracts to pay a bonus to the company, such contracts are also void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 570-575; Dec. Dig. § 123.*

Location and establishment of stations, see note to Willson v. Winchester & P. R. Co., 41 C. C. A. 219.]

5. CANCELLATION OF INSTRUMENTS (§ 28*) — RIGHT TO CANCELLATION—ILLEGAL CONTRACTS.

The rule that, where parties to an illegal contract or transaction are not equally guilty, the law will grant relief to the less culpable, does not authorize a court of equity to set aside a contract by a complainant to pay a bonus to a railroad company in consideration of its building its line on a certain route and its agreement not to maintain a station between two given points, which agreement has been executed by the company; but in such case the parties are equally culpable, and the complainant cannot plead his own wrongdoing as a ground for affirmative relief.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 43; Dec. Dig. § 28.*]

Appeal from the United States Court of Appeals in the Indian Territory.

A bill in equity was filed in this cause by Alonzo J. Farrington, the appellant, against the defendants, W. L. Stucky, trustee, William Kenefick, trustee, and William Kenefick Company, asking a preliminary injunction to restrain the foreclosure of a trust deed under power of sale therein contained,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and as final relief asking that the trust deed and the notes secured thereby be declared illegal and void, and canceled. The facts out of which the controversy arose are substantially as follows:

The William Kenefick Company was, in the month of November, 1904, engaged in locating and constructing the Missouri, Oklahoma & Gulf Railroad, from Muskogee, Ind. T., southwesterly to a point of connection with the Ft. Smith & Western Railroad, within six miles of the station of Dustin. The defendant William Kenefick was at the time a stockholder, director, and president of both the construction company and the railroad company. He visited the town of Henryetta, in Indian Territory, and informed the complainant and other citizens that, unless a right of way and station grounds and a bonus of \$20,000 were furnished by the citizens of Henryetta, the railroad would be constructed along the line of a preliminary survey about four miles east of that town. In response to that solicitation a written agreement was entered into securing the right of way and station grounds, and checks or notes secured by mortgage, amounting in the aggregate to \$20,000, were placed in the hands of W. B. Hudson, John W. Sullins, and Anthony Crofton as a committee to represent the contributors to the bonus. At the same time this committee, as trustees for the contributors, entered into a written contract with the William Kenefick Company, providing on their part for the assignment of the \$20,000 of securities to William Kenefick, as trustee, and on the part of the construction company binding it to have trains running on a regular schedule into the town of Henryetta on or before January 1, 1906, and to complete the road to its connection with the Ft. Smith & Western Railroad on or before September 1, 1906, and stipulating that, in case these provisions were not complied with, the notes and other securities should be absolutely void, and the trust deeds discharged of record. The complainant, as his contribution to the bonus, executed two promissory notes, for \$250 each, payable to the committee above mentioned January 1, 1905, "or 30 days after trains are running on regular schedule into the town of Henryetta," and the other payable September 1, 1905, "or 30 days after connection is made with some railroad south of Henryetta, by the extension of said road through Henryetta to some point of connection." These notes were secured by a trust deed upon real property, which contained a power of sale to be exercised in case of default in paying the notes. It is further averred in the bill that at the time of the execution of the several instruments above mentioned it was orally agreed that no depot or townsite should ever be constructed or laid out between Henryetta and Dustin, and no stops or stations recognized by the railroad company, and that a written agreement to that effect should be executed and forwarded to the committee representing the contributors to the bonus, on the day following the execution of the other instruments, but that such supplementary agreement had never been given.

It is further averred that on the same day on which these papers were prepared and signed, viz., November 21, 1904, the said committee, to whom the securities were made payable, indorsed and assigned them to William Kenefick. The averments of the bill are, however, contradictory as to whether the assignments were made to William Kenefick personally, or to William Kenefick as trustee. In some parts of the bill the transaction is stated in one form, and in others in the other form. The written contract itself provided, as above stated, that the securities should be assigned to William Kenefick, trustee, and the notice of foreclosure, which is attached as an exhibit to the bill, also states that they were assigned to him as trustee; and the record at other places indicates that the assignment was made in that form. These securities were afterwards assigned by William Kenefick, as trustee, to W. L. Stucky, trustee.

The railroad was constructed in accordance with the agreement between the parties, and, default having been made in the payment of the notes, W. L. Stucky, as trustee, began the publication of a notice for the foreclosure of the trust deed under the power of sale therein contained. Thereupon the present bill was filed, and a preliminary injunction restraining the foreclosure granted. A general demurrer was afterwards interposed to the bill, which was sustained, and a decree entered dissolving the injunction and dismissing the bill upon the merits. An appeal was taken from this decree to the Court of

Appeals of Indian Territory, where the decree was affirmed, and the present appeal is brought to review the action of that court.

W. M. Matthews, for appellant.

Preston C. West, William M. Mellette, and Edward R. Jones, for appellees.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge (after stating the facts as above). It is contended by the appellants that the notes and trust deed are void because the consideration therefor was against public policy and illegal. It is now too late to hold that an agreement for the payment of a bonus to a railroad company to secure the construction of its line along a given route is void as against public policy. That has been one of the conspicuous features of American railroad building. Legislatures in nearly every state in the Union have authorized counties, cities, and other municipal bodies to issue bonds in aid of such enterprises. The conflict and strife of different communities to gain the location of the road in their midst has been a large factor in the building of every important railway line. After Legislatures have authorized the issuing of municipal bonds, and the exercise of the power of taxation, so as to compel every property owner in the community to contribute to these bounties, it would be wholly unwarrantable for the courts to declare that voluntary contributions made by citizens are void as against public policy. The courts as a rule are to get their notions of public policy from the legislative department; and when that department, by a long course of legislation, has indicated its views of what constitutes sound public policy on any subject, the courts cannot set up another standard. We are clearly, therefore, of the opinion that the mere giving of a bounty by the citizens of Henryetta for the purpose of securing the construction of the railroad through that city cannot be held to be illegal or against public policy. Neither can we say that the deflection of the road from the line of its preliminary survey to Henryetta prejudiced either the welfare of the railroad company or the public welfare. The bill contains no such charge, nor any statement of facts from which such an inference could be drawn. Its only averment on the subject is:

"That in causing said road to be built by way of Henryetta it was necessary to deflect the same from its most natural and cheapest route a great number of miles, namely, four miles, at a great additional cost to the Missouri, Oklahoma & Gulf Railroad Company, namely, about fifty thousand dollars."

We cannot hold as a matter of law that, because the route was not the cheapest and most natural, it was therefore not the best route, both for the public and the railroad company. In the early days of railroading, cheapness and shortness were regarded as controlling considerations; but at the present time the avoidance of short curves and high grades is deemed of greater importance. Within the last 12 years the Pennsylvania Railroad Company has expended more than \$50,000,000 in reconstructing its line between Pittsburgh and New York, and now, after the improvement is completed, it is found that the line is

several miles longer than it was originally. The expense, however, is amply justified, because short curves and steep grades have been eliminated. There is no averment in the bill impugning the route selected, except that it was not the cheapest and most natural; but any practical railroad man might still say that the route was best for all interests concerned, because it avoided curves and grades, and reached the traffic and served the convenience of the town of Henryetta.

The complainant, however, bases his charge of illegality mainly upon the contention that the bonus was solicited and received, not for the railroad company, but for the construction company, or for Mr. Kenefick personally. The bill leaves us in doubt on this subject. The written contract was made on the one part by the committee representing the contributors to the bonus, and on the other part by the William Kenefick Company. But we think a fair consideration of the entire record indicates that the securities were immediately assigned to William Kenefick as trustee, and by him assigned to the present holder as trustee. The bill in no way indicates the nature of the trust. It is urged by counsel representing the complainant, that the word "trustee" should be regarded as merely descriptio personæ; but the doctrine which he invokes is confined to negotiable instruments or contracts executed by an agent in his own name. When dealing with equitable considerations, such as are presented by this record, the affixing of the term "trustee" to the name of the holder of securities is to be given effect, and clearly imports that he does not hold in his own personal right, but for the benefit of another. Geyser-Marion Gold Mining Co. v. Stark, 106 Fed. 561, 45 C. C. A. 467, 53 L. R. A. 684. The bill is also obscure as to the relationship between the construction company and the railroad company. The only averment on that subject is that the former was "engaged in locating and constructing" a railroad for the latter. Whether the construction company was an independent contractor, or a mere agent or employé of the railroad company in building the road, is not disclosed. Nor is it stated whether the compensation for the work was fixed at a price per mile, or on the basis of the actual expense of the enterprise. If the construction company was a mere agency devised and employed by the railroad company for the construction of its line, and in soliciting and receiving the bonus the former was acting on behalf of the latter, we are clearly of the opinion that the transaction is valid. On the other hand, if William Kenefick was to receive the bonus, either directly himself or indirectly through the construction company, we are equally clear that the transaction would be void as against public policy. An officer of a corporation, while acting on its behalf, will not be permitted to use his powers for his own personal enrichment. Neither will courts consider whether or not the corporation is in fact prejudiced by the transaction from which the officer gains a personal profit. It will not permit an agent to place himself in a position in which he is tempted to betray his trust for private gain. It is the tendency of such conduct, and not the actual injury of the corporation, which the law condemns. The rule on the subject has been clearly declared by the Supreme Court in the case of Woodstock Iron Company v. Extension Company, 129

U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819. The only question is whether the present bill states a case within the rule there enforced. The basis of that decision is stated by Mr. Justice Field, as follows:

"In determining this question it must be borne in mind that the contract of the Extension Company with the Georgia Pacific Railway Company was to locate and construct the road 'by the nearest, cheapest, and most suitable route from Atlanta, Ga., through Alabama, to Columbus, in Mississippi,' for the consideration of \$20,000 a mile, and that it is averred in the pleadings, and admitted by the demurrer, that in causing the road to be located by way of Anniston it was necessary to deflect the same from the nearest and cheapest and most natural route between the designated termini a distance of five miles, at an additional cost of \$100,000."

From this it will be observed that there was a written contract between the construction company and the railroad company, binding the former to locate and construct the road "by the nearest, cheapest, and most suitable route," and that the compensation was fixed at the rate of \$20,000 per mile. It was there alleged in the bill that in deflecting the road to Anniston the construction company violated the express provisions of this contract. It is also plain, from the terms of the contract, that the construction company, in doing this, not only wronged the railroad company, but enriched itself in the sum of \$100,-000, by adding to the length of the line. The record in that case leaves no doubt upon the question that the bonus was solicited and received by the construction company for its own use, for the suit was brought by that company to collect an unpaid subscription. The bill in the present case is obscure and indefinite as to each of these matters. We cannot assign either to the construction company or to-Mr. Kenefick a corrupt and venal purpose, in the absence of an allegation in the bill to that effect, or the allegation of facts from which such a purpose would be inferred as a reasonable conclusion. The securities having been held both by Mr. Kenefick and by Mr. Stucky as trustees, and there being no charge in the bill that this was a mere cover to conceal Mr. Kenefick's private interest, or the interest of the construction company, we cannot say that the railroad company has not been at all times the beneficiary of the trust. Men are presumed to act honestly. It was the duty of the complainant to state his case, and all obscurities in the bill should be resolved against him, instead of his adversary. If, therefore, we were compelled to decide whether the case set up in the bill comes within the decision in Woodstock Iron Company v. Extension Company, 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819, we should be obliged to hold against the complainant.

There are, however, other grounds upon which our decision can be clearly placed. The agreement that no station or depot should ever be established between Henryetta and Dustin is expressly set up in the bill, and is admitted by the demurrer. It is charged that this was the sole consideration for the bonus. That statement, however, should probably be attributed in part to the zeal of the pleader. It was competent for the complainant to prove this parol agreement for the purpose of showing that the notes and trust deed were given in part at least for an illegal consideration. If any part of its consideration was illegal, the written agreement was void, and the writing cannot

be used for the purpose of foreclosing proof as to its own invalidity. "The rule which forbids the introduction of parol evidence to contradict, vary, or add to a written instrument does not extend to evidence to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law." Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586; Friend v. Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; Gould v. Leavitt, 92 Me. 416, 43 Atl. 17; Sherman v. Wilder, 106 Mass. 537; Lewis v. Willoughby, 43 Minn. 307, 45 N. W. 439; Crawford v. Denyse, 18 N. J. Law, 325. The parol agreement would be void as against public policy. It would divest the railroad company of its power to perform its duties to the public. It comes clearly within numerous decisions in which contracts binding railroad corporations to locate a depot at a given point, and depriving them of the power to construct a depot at any other place, have been held illegal and void. Fuller v. Dame, 18 Pick. (Mass.) 472; Bestor v. Wathen, 60 Ill. 138; Louisville, etc., R. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Williamson v. Chicago, etc., R. R. Co., 53 Iowa, 126, 4 N. W. 870, 36 Am. Rep. 206; St. Joseph, etc., R. R. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357. The bill, therefore, states a case showing the invalidity of the notes and trust deed, and, if this were an action to enforce their payment, the oral agreement pleaded in the bill would be a complete defense.

This, however, is a suit in equity in which the complainant is seeking affirmative relief. He himself was a party to all the wrongdoing which he sets up in the bill. This is especially true as to the oral agreement. That shows upon its face that it was exacted by the complainant and his associates as one of the considerations moving to them for the giving of the bonus. All the facts which the complainant alleges for the purpose of showing that the notes and trust deed were void, as against public policy, show at the same time that he has no standing in a court of equity. The greater the illegality of their consideration, the greater becomes the illegality of his own conduct. This is conceded by counsel for complainant, and he invokes, for the purpose of rescuing his client from its fatal consequence, the rule that, when parties to an illegal transaction are not equally guilty, the law will grant relief to the less culpable. That rule, however, is confined to violations of statutes, or to offenses in which the law violated is intended for the coercion of one party and the protection of the other, or where there has been such fraud or coercion as to destroy the consent of the party seeking relief. Unless one or more of these features are present, the doctrine is never applied to a transaction which involves moral delinquency or is against sound public policy. This distinction was accurately stated early in this country by the Supreme Judicial Court of Massachusetts in the case of White v. Franklin Bank, 22 Pick, 181-186:

"This principle [of comparative guilt], however, is not by law allowed to operate in favor of either party where the illegality of the contract arises from any moral turpitude. In such cases the court will not undertake to ascertain the relative guilt of the parties or afford relief to either."

The doctrine was again asserted in the case of Lowell v. Boston & Lowell Railroad Co., 23 Pick. (Mass.) 24-32, 34 Am. Dec. 33, as follows:

"The rule is, 'In pari delicto potior est conditio defendentis.' If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely malum prohibitum, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

Referring to the same distinction, the Court of Appeals of New York, in the leading case of Tracy v. Talmage, 14 N. Y. 162-181, 67 Am. Dec. 132, says:

"The cases in which the courts will give relief to one of the parties on the ground that he is not in pari delicto form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential to both classes that the contract be merely malum prohibitum. If malum in se, the court will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves moral turpitude nor violates any general principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance."

The same doctrine has been asserted with equal force by the Supreme Court of the United States. The subject is fully discussed and the authorities reviewed in the case of St. Louis, Vandalia & Terre Haute Railroad Co. v. Terre Haute & Indianapolis Railroad Co., 145 U. S. 393, 407, 12 Sup. Ct. 953, 957, 36 L. Ed. 748. It is there said:

"The general rule, in equity as at law, is, 'In pari delicto potior est conditio defendentis;' and, therefore, neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted at law or in equity unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. * * * When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract."

See, also, Harriman v. Northern Securities Co., 197 U. S. 244, 25 Sup. Ct. 493, 49 L. Ed. 739; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117.

Where a transaction involves moral turpitude, if courts were to attempt to weigh the comparative wickedness of the parties, and afford relief upon an estimate of that kind, the administration of justice would be removed from the realm of jurisprudence into the realm of ethics. Each case would depend upon the varying notions of wickedness entertained by the tribunal trying it. The general language of Mr. Pomeroy, at section 942 of his work on Equity Jurisprudence, is altogether too vague to be of any service in the administration of law. If the authorities which he cites in support of the statements of

the text are examined, they will all be found to fall within well-

recognized specific rules.

If we adopt complainant's theory, his conduct clearly involves moral turpitude. In the Woodstock Iron Co. Case a transaction identical with this, according to complainant's interpretation of his bill, was characterized, when the conduct of the acceptor of the bonus was under examination, as a bribe to induce an employé to be faithless to his employer, an officer of a corporation to betray his trust, and a railway company to be false to its duty to the public. But surely in a court of justice it is not more tolerable for a bribe giver than for a bribe taker, and the severe condemnation which was there denounced against the acceptor of such a bonus must here fall upon the complainant as its giver. The fact is that the complainant is in a strait between two matters. He must paint the transaction black enough to make the notes and trust deed void for illegality; otherwise, they stand as valid obligations, and his suit fails for that reason. But, on the other hand, if the transaction was corrupt, he was a prime actor in it, and is obliged to present himself to a court of equity with unclean hands. Whichever alternative he chooses is fatal to his cause. The contract has been fully executed. The complainant and his associates have received all the fruits of their unlawful bargain, and they now come into a court of equity and ask that the price which they paid be returned to them. There was no fraud or oppression which would entitle them to exception from the general rule that courts will not aid those engaged in willful wrongdoing. Courts will not grant relief to a party concerned in an illegal transaction on the ground of fraud, duress, or undue influence, unless the agreement, if lawful, would be set aside upon these grounds at the instance of the party wronged. Wald's Pollock on Contracts, 505. In the present case it would be idle to contend that either of these elements is present.

This case is not ruled by the decision in Stewart v. Wright, 147 Fed. 321, 77 C. C. A. 499. That case did not proceed upon a weighing of the comparative guilt of the plaintiff and defendant. It was governed by considerations of public policy. On the one hand was the public policy which denies to a party concerned in an illegal transaction any judicial relief as a powerful motive to deter people from engaging in such transactions. On the other hand stood the criminal organization known as the "Buckfoot Gang," which, like a lottery, was preying upon the credulity and cupidity of a large section of the country, and the many considerations of sound public policy which demanded that it be deprived of its spoils as the most efficient method of striking down the organization itself. The court, balancing these considerations of public policy the one against the other, sustained the right of the plaintiff to recover. This was done, not out of consideration for him, but as the surest method of protecting society against an institution whose vocation was swindling. The gist of that decision is found in the following paragraph:

"We are also of the opinion that, viewing the conduct of Wright in its most reprehensible light, nevertheless the interest and welfare of the public would be better subserved by causing the loss to fall upon those who aided and assisted in criminal practices followed as an occupation than by the punishment

of the individual victim. It would be doubtful wisdom to extend encouragement to organizations of confidence men who prey upon the public by allowing them the use of the rule 'In pari delicto' as a shield of defense, when a part of the scheme they employ is to place those they seek and then defraud in the position they rely on."

The same public policy, with many circumstances of aggravation, was present in this case which underlies the rule permitting a recovery of money lost in gambling or paid upon usurious contracts. The court, in granting relief to a plaintiff under such circumstances, is not moved by the fact that he is less guilty than the defendant, but by motives of public policy. It is not necessary to review the features of the present case to show that none of the considerations which controlled

the court in Stewart v. Wright are here present.

It must be borne in mind that the plaintiff is here asking affirmative relief, and he pleads his own wrongdoing as the ground for invoking the aid of the court. That is a feature which distinguishes this case from most cases involving similar transactions. Generally such actions have been brought to collect the bonus, while here the giver of the bonus is seeking the aid of equity to get it back. If the situation of the parties were reversed, and the defendants were in court asking its aid for the enforcement of the notes and trust deed, the facts pleaded would be a complete defense. If the time should ever come when the defendants would require the aid of a court to realize the fruits of this transaction, and it were then shown to be of the character alleged in the bill, they would necessarily be denied any assistance.

The case of Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 48 L. R. A. 842, 44 Am. St. Rep. 463, upon which the complainant relies, belongs to a limited class in which actions have been brought to recover back money paid for the purchase of a commission in the military or naval service or appointment to a public office. "Those cases," as the Supreme Court of the United States says (145 U. S. 406, 12 Sup. Ct. 957, 36 L. Ed. 748), "have sometimes been justified upon the ground that, the agreement being against the policy of the law, relief was given to the public through the party." The doctrine has been confined strictly to the class of cases in which it was first enunciated; and at the present time it would seem that the dissenting opinion in the case is based upon the sounder considerations of public policy.

The case must therefore be affirmed.

GALUSHA V. CHICAGO GREAT WESTERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1908.) No. 2,786.

MASTER AND SERVANT (§ 286*) — ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE—DEFECTS IN RAILROAD CAR.

Plaintiff, a switchman employed by defendant railroad company, while switching was riding on the side of a freight car, standing on a stirrup a few inches below the bottom of the car. In stepping down, while the train was moving slowly, he fell in some way, and one of his legs was run over.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It was dark, and he carried a lantern. He testified that on stepping down one of his feet was caught in the stirrup by a bolt which projected from the bottom of the car to within three inches of the stirrup, and such defect was alleged as the ground of recovery. The car was identified as one of four foreign refrigerator cars which had been inspected when received by defendant shortly before. They were again examined by employés immediately after the accident, to discover, if possible, its cause, and other inspections were afterward made by others than defendant, but none disclosed the condition testified to by plaintiff, but, on the contrary, in no case did the bolt reach within less than $7\frac{1}{2}$ inches of the stirrup. Held, that such evidence was sufficient, as against the meager and indefinite testimony of plaintiff, to disprove the existence of the alleged defect, and in any event of any such defect as to show negligence in inspection, and justified the direction of a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. § 286.*]

In Error to the Circuit Court of the United States for the District of Minnesota.

Humphrey Barton (John H. Kay, on the brief), for plaintiff in error.

W. J. Ainsworth (A. G. Briggs and Edward A. Knapp, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The plaintiff brought this action to recover damages for personal injuries which he suffered on November 2, 1906, while employed as a switchman in the yards of the defendant at South St. Paul. The accident occurred at about 6 o'clock in the evening. It was then so dark that the workmen required the use of their lanterns in the performance of their service. We will now follow the account given by plaintiff himself as to how the accident occurred. While testifying as a witness, he stated that the train consisted of a locomotive and seven cars. He was riding on the side of a Swift Refrigerator car, in about the middle of the train, with both his feet in the stirrup projecting below the bottom of the car near the end, and extending parallel with the side of the car. He held on by his hands to a grab iron located on the side of the car about 30 inches above the stirrup. The train was moving at the rate of from 4 to 6 miles an hour. He reached a point where it was necessary for him to get down from the car in the performance of his service, and in doing so let down his right foot. As it touched the ground he released his hold on the grab iron. He then discovered that his left foot was caught in the stirrup. He took one step with his right foot, and just as he was going to take the second step he made his observation of what was holding his foot, and claims to have discovered that the stirrup extended about 6 inches below the bottom of the car, and that immediately inside of the stirrup one or more bolts projected below the bottom of the car about 3 inches; that the toe of his shoe pressed up against the end of the bolt, while the back portion of the shoe pressed down on the stirrup. At the same instant he lost his balance, and fell

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

before taking the second step. Just as he started to fall his left foot became disengaged from the stirrup, and he fell outward and backward. The side of the car projected about 2 feet beyond the rail, and yet in falling as above described, in some manner unexplained in the evidence and quite inscrutable to the lay mind, his right foot got across the track and was run over by the car.

As a ground of recovery it is charged in the complaint that the car upon which plaintiff was riding was defective because the stirrup and the projecting bolt were so related as to render the stirrup dangerous for the purposes for which it was intended to be used. The plaintiff testified that previous to the accident he had never observed either the stirrup or the bolt, and that his observation at that time was momentary, while he was in imminent peril and just as he was falling. It was dark at the time, so that he required the use of a lantern. Testimony based upon such a meager and confused observation rises scarcely above mere conjecture or speculation. The trial judge, who heard and saw the witnesses in the giving of their testimony, found great difficulty in accepting plaintiff's account of the accident, because it seems so inherently improbable and to conflict so directly with what is reasonable and natural. We share in that difficulty after a careful reading of the record.

But accepting plaintiff's account that his foot was caught in the stirrup, that does not take us within the line of defendant's liability. It is urged by counsel for plaintiff that the fact that plaintiff's foot was caught is some evidence of a defective construction of the car. If it were only possible for a brakeman's foot to be caught in a defective stirrup, there would be some force in the argument. But the nature of the appliance shows that such accidents may be caused by the negligence of the brakeman, though the stirrup be in proper condition. To entitle the plaintiff to recover, he was bound to show that the stirrup was defective, and that the defect was of such a character that it would have been discovered by a reasonable inspection. The only proof on these subjects is the testimony of the plaintiff which we have already summarized. That of itself is of such meager probative force as to hardly constitute substantial evidence of the fact.

But when we examine the evidence produced by the defendant a case is made out so strong as to furnish complete support to the action of the trial court in directing a verdict in its favor. The car was a foreign car. The defendant was charged with the duty of exercising reasonable inspection to discover any defects either in its construction or repair. It was identified by a witness produced on behalf of the plaintiff as one of four Swift refrigerator cars, and plaintiff's counsel conceded in the course of the trial that this was correct. All of these cars immediately before the accident had been inspected. Immediately after the accident they were again inspected by two trainmen of the defendant for the purpose of discovering, if possible, the cause of the accident. The same evening three of the cars were turned over to the Northern Pacific Railway Company, and one to the Wisconsin Railway Company. Upon their receipt the employés of these companies subjected them to the usual inspection.

Later their attention was called to the fact of the accident, and they were requested to again examine the cars, which they did. Evidence was also given showing that the cars had been inspected a few days before the accident, and that they were repeatedly inspected at other points after the accident. These numerous inspections by wholly disinterested parties failed to discover any unsafe condition in the cars, and constitute a persuasive showing (1) that there was in fact no defect in the cars, or (2) that the defect, if any existed, was such as would not be discovered by a reasonable inspection. The cars were brought to Minneapolis at the time of the trial in June, 1907. It was shown by entirely satisfactory evidence that no repairs had ever been made upon them in the meantime. Careful measurements were then made which showed that the clearance between the bottom of the projecting bolts and the bottom of the stirrups varied from 7½ to 10 inches, which was concededly not a dangerous condition. Photographs of the cars were also taken and offered in evidence, and they disclosed a similar condition of these appliances.

Upon this state of the evidence we think the trial court was amply justified in directing a verdict in favor of the defendant at the close of the testimony. There are no disputed principles of law involved in this action. Its decision depends entirely upon questions of fact. We have made a general summary of the evidence sufficient to disclose the case as it was presented in the trial court. We do not deem a more specific analysis of the evidence necessary, as no principle can be deduced therefrom which could be controlling in the trial of other causes.

The judgment of the trial court is affirmed.

HOOPER v. REMMEL, U. S. Marshal.

(Circuit Court of Appeals, Eighth Circuit. November 20, 1908.)

No. 2,777.

1. Courts (§ 405*)—Circuit Courts of Appeals—Jurisdiction—Cases Involving Constitutional Questions.

Where an action in a Circuit or District Court involves, not only the constitutionality of an act of Congress, but also the construction and effect of state statutes; the defeated party may, at his election, take it for review to the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. $\$ 1099; Dec. Dig. $\$ 405.*

Jurisdiction in cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.]

2. Habeas Corpus (§ 3*)—Grounds of Remedy—Existence of Other Remedy.

Habeas corpus will not lie for the discharge of a person under arrest for an offense under a federal statute which gives him the right to a trial in which he can raise every question sought to be raised in the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

habeas corpus proceedings and to a review of the judgment therein by the appellate court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Ben S. Henderson, for appellant.

William G. Whipple and Powell Clayton, for appellee.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. This was an appeal from an order of the District Court of the United States for the Eastern District of Arkansas denying the petition of appellant, Hooker, for a writ of habeas corpus. The facts are: He was arrested on a warrant issued by a United States commissioner for the Eastern district of Arkansas, based on a complaint that he had violated the act of Congress approved April 20, 1904 (33 Stat. 187, c. 1400 [U. S. Comp. St. Supp. 1907, p. 533]), as amended by the act approved March 2, 1907 (34 Stat. 1218, c. 2516), by issuing a permit to bathe in the waters of the Hot Springs reservation at a time when he was not a registered physician. This act confers jurisdiction upon any United States commissioner duly appointed by the United States Circuit Court for the Eastern District of Arkansas and residing in that district to hear complaints of its violations and in case of conviction to impose the prescribed penalty. An appeal is provided for from the judgment of the commissioner to the United States District Court for the Eastern District of Arkansas. The act, among other things, provides for the registration of physicians in the office of the superintendent of the reservation and prohibits unregistered physicians from issuing permits for bathing.

The first question requiring consideration at our hands is whether this court has jurisdiction of the present appeal, or whether it should have been taken to the Supreme Court of the United States. Hooker was arrested by the United States marshal in accordance with the command of the warrant issued by the commissioner, and immediately thereafter, and before arraignment or trial, filed his petition in the court below for the writ of habeas corpus to secure his discharge. The petition challenged the constitutionality of certain provisions of the act of Congress empowering the Secretary of the Interior to determine what physicians should be registered, the validity of certain rules and regulations prescribed by the Secretary of the Interior for determining the qualifications and character of physicians seeking registration, and the legality of certain rules of procedure and practice prescribed by the United States District Court for the trial of alleged violations of the The petition particularly charged that the medical board appointed by the Secretary of the Interior to determine qualifications of candidates for registration proceeded to take evidence without notice to him and heard evidence in his absence; that he had received a certificate from the state of Arkansas entitling him to practice his profes-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—22

sion anywhere within the state, including the city of Hot Springs; that he did no act or issued no permit to bathe while physically on the reservation; and that as a result of these and many other things alleged in the petition he was not amenable to the provisions of the act of Congress or to the rules and regulations prescribed by the Secretary of the Interior.

From this analysis of the petition, it appears that the grounds relied upon by petitioner for his release involve, not only the constitutionality and validity of the act, but the construction and effect of state statutes, and the regularity and effect of proceedings taken to disqualify the petitioner from practicing on the reservation. If the case involved the constitutional validity of the act, or the construction or application of the Constitution of the United States, and nothing else, this court would have no jurisdiction of the appeal. It would have rested exclusively in the Supreme Court of the United States. Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 407, 24 Sup. Ct. 376, 48 L. Ed. 496; Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762. But, as the case involves other questions not exclusively cognizable on appeal by the Supreme Court, the appellant had his election to bring it to this court, and it becomes our duty to entertain the appeal and dispose of it.

The petitioner was arrested and taken before a tribunal which had jurisdiction and power expressly conferred on it by Congress to hear and determine the charge made against him. From the judgment of that tribunal an appeal lay to the United States District Court for the Eastern District of Arkansas, and the judgment of that court, if adverse to him, could have been reviewed on writ of error by this court, or by the Supreme Court of the United States, as the questions involved dictated. In this way the law made ample provision for a full hearing of each and every issue of law or fact which the accessed might invoke for his protection. He could have challenged in the course of the trial, either in the commissioner's court, or in the District Court, or both, the constitutionality of the act of Congress, the validity of the rules and regulations prescribed by the Secretary of the Interior, the regularity of the proceedings taken under them, or the applicability of the law, whether state or national, to the facts of his individual case. In other words, he could have tried in those courts every issue of law or fact now sought to be tried in this proceeding by habeas corpus, and finally, in case of conviction, the law afforded him an adequate provision to secure a re-examination of any alleged errors in the appellate courts of the land.

In such circumstances we conclude that appellant has mistaken his remedy. Instead of proceeding under the habeas corpus act, he should have gone to trial on the complaint made against him, and invoked in his defense the several matters relied on in support of his present petition for the writ of habeas corpus. If the District Court had adjudged him guilty, his appropriate remedy was to sue out a writ of error from the proper appellate court to secure a re-examination of the legal questions involved. This we understand to be the general rule, subject to rare and exceptional cases, as laid down and repeatedly affirmed

by the Supreme Court in the following cases: In re Lancaster, 137 U. S. 393, 11 Sup. Ct. 117, 34 L. Ed. 713; In re Chapman, 156 U. S. 211, 15 Sup. Ct. 331, 39 L. Ed. 401; New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80; United States v. Sing Tuch, 194 U. S. 161, 168, 24 Sup. Ct. 621, 48 L. Ed. 917; Riggins v. United States, 199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303; Pettibone v. Nichols, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148; Urquhart v. Brown, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760; Ex parte Simon, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. Ed. 429.

The order of the District Court, denying the petition of appellant,

was right, and is affirmed.

HINDS v. HINCHMAN-RENTON FIREPROOFING CO.

(Circuit Court of Appeals, Eighth Circuit. November 17, 1908.) No. 2.726.

1. APPEAL AND ERROR (§ 216*)—REVIEW—INSTRUCTIONS.

The charge of the court in an action at law, or the manner in which the cause was submitted to the jury, cannot be reviewed, unless the court's attention was called to the particular matters objected to or omitted, by requests to instruct or otherwise, and exceptions taken to its rulings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 627, 628; Dec. Dig. § 216.*]

2. Contracts (§ 321*)—Construction—Implied Conditions.

A contract for a building, for which the owner was to do the excavating, which bound the contractor to have his workmen on the ground in two weeks after being notified and to complete the work within a stated time thereafter, by implication imposed upon the owner an obligation to be ready for the workmen when they came after such notification, and the contractor may recover damages for loss of time resulting from a breach of such obligation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508, 1519; Dec. Dig. § 321.*]

In Error to the Circuit Court of the United States for the District of Colorado.

William P. Malburn (Charles S. Thomas and W. H. Bryant, on the brief), for plaintiff in error.

George S. Redd (George Stidger and John Horne Chiles, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This litigation arose out of a contract between the plaintiff in error and the defendant in error, whereby the latter undertook to do certain work and furnish certain materials in constructing for the former a building to be used as a mill for treating ores. The principal contract was in writing, specifying the character of the work to be done and materials to be furnished in the structure. In addition to asking judgment for a balance claimed as on perform-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

ance of the contract, claim was also made on a quantum meruit for extra work done and materials furnished beyond the specifications of the written contract. The answer raised the issue of noncompliance on the part of the defendant in error with the terms of the written contract, by reason of the work having been badly done and the employment of improper materials. Issue was also made as to the liability for certain items in the account for extra work, especially as to the item, amounting to \$825, claimed as damages for the value of time lost and expenses incurred by the defendant in error while its employés were waiting on the ground to go to work, occasioned by the alleged failure of the plaintiff in error to have the foundation for the building ready for the superstructure work to be done by the defendant in error. The plaintiff in error then pleaded a counterclaim for damages, predicated of the unworkmanlike manner in which the work had been done, and the employment, in the construction, of improper material, necessitating the taking down and reconstruction of a part of the building at great cost. The case was tried to a jury, which returned a general verdict in favor of the defendant in error for the sum of \$3,740.32.

Many errors are assigned on the charge given by the court to the jury, none of which this court can consider, for the reason that no exceptions thereto were taken at the trial. The court's attention was not called to any claimed error in the charge, so as to accord to the trial judge his locus pœnitentiæ; nor did counsel present any request for declarations of law, directing the attention of the court to the particular matters which they now claim were not embraced in the charge. As this is a law action, and this court can only review errors, to invoke its supervisory jurisdiction the errors complained of must have been manifested by the rulings of the trial court, duly excepted to, and specified in the assignment of errors. For instance, it is urged by counsel for defendant in error that, as the construction company had itself broken the contract, the action should have been predicated of a quantum meruit. The vice of this contention, in the first instance, lies in the fact that there was nothing on the face of the petition to indicate that the defendant in error had not in all respects kept and performed the written contract. If the fact was that it had in any respect breached the contract, it was developed only on the trial, and that was a matter to be submitted to and passed upon by the jury. If the plaintiff in error desired a finding by the jury on that particular issue, he should have, by requested instruction, directly presented it, or, if the court omitted in its charge to sufficiently submit it, it devolved upon the party complaining, by appropriate and timely action, to have called the court's attention thereto, and duly excepted to its rulings, if claimed to be erroneous. This counsel did not do.

Especial contention is made that the claim predicated of said item of \$825, on account of loss of time by the workmen, is not sustainable, for the reason that such liability is not within the terms of the written contract. This contract was in the form of a letter from the defendant in error to the plaintiff in error, submitting the terms, and the written acceptance thereof by the plaintiff in error. The paragraph on which the claim in question was predicated is as follows:

"We will have our outfit on the ground in two weeks after being notified, and will complete the work, estimated at 3,000 cubic yards more or less, in 60 days after the same is ready for use. It is understood that you are to do all the excavating, and are to furnish all crushed stone and screenings, so as not to delay us."

The obligatory promise to have the company's outfit on the ground ready for work in two weeks after notice, and to complete the work within a given time thereafter, carried with it the implied agreement of the other party to be ready for the working outfit when it came after such notification. This mutuality of obligation carried with it accountability on the part of the plaintiff in error for the loss of time necessarily occasioned by the detention of the workmen from entering upon the construction work, after having been brought on the ground on notice from him that the preparatory excavation work was ready for the superstructure. This rule of law is aptly stated by Wagner, J., in Lewis v. Atlas Mutual Life Insurance Company, 61 Mo., loc. cit. 538, as follows:

"It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied, as, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract, will be necessarily implied. Pordage v. Cole, 1 Wm. Saund. 319; Churchward v. The Queen, 6 B. & S. 807; Black v. Woodrow, 39 Md. 194."

The answer itself, in effect, concedes that the obligation alleged in the petition was imposed upon the plaintiff in error by the contract, as, after admitting the contract, it pleads facts in extenuation and mitigation. Furthermore, no such question was raised below by the plaintiff in error, nor was the trial court asked to rule thereon.

Counsel for plaintiff in error have presented an elaborate analysis of the testimony to support their contention that the jury must have allowed in any event too much to the defendant in error on account of this item and too little on the counterclaim. The insuperable difficulty in the way of any consideration of these contentions lies in the fact that counsel for plaintiff in error utterly failed to so present such questions on the trial as to enable this court to review them. As already stated, all the issues involved in the pleadings were submitted in mass to the jury, and there was a general verdict. So far from counsel, if they desired to keep the issues submitted to the jury distinct, by requesting the court to direct them to return separate findings, for instance, as to how much was owing on the written contract, how much on the items for extra work, and how much on the item of \$825, and how much, if any, they found on the counterclaim, before the jury retired the court made the following inquiry of counsel:

"Do you want two verdicts, gentlemen—one on the complaint and one on the cross-complaint—or one verdict? If you take two verdicts, you will have to consent that the court may strike a balance and enter judgment accordingly; otherwise, I will direct the jury to return one verdict." Judge Stimson, on behalf of the plaintiff in error, replied:

"So far as the defendant is concerned, we will be satisfied with one form of verdict."

As the jury returned a verdict in a sum less than that sued for and less than that finally conceded by the defendant in error to be recoverable by it, it is practically impossible from the record for this court to determine what items or claims entered into the calculations of the jury constituting the sum of the verdict; and the trial court by its inquiry indicated to counsel how they might avoid the complication into which they walked, and they now assign their mistake as an error of the court.

Other errors are assigned; but they are, in our opinion, without merit. It results that the judgment of the Circuit Court must be affirmed.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. BRIDGES.

(Circuit Court of Appeals, Eighth Circuit. November 20, 1908.) No. 2.737.

1. Compromise and Settlement (§ 6*)—Consideration—Disputed Claims.

While it is the general rule that, where a liquidated sum is due and there is no consideration for the surrender of a part of it, the payment of a less sum, though accepted in satisfaction, is not binding, a payment of a part will extinguish the whole if there be a consideration good in law; and the adjustment of a bona fide dispute as to the existence of conditions upon which it was agreed that a sum certain should or should not be owing is a sufficient consideration, and a compromise and settlement accordingly will not thereafter be disturbed by an inquiry into the truth of the matter disputed.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 38; Dec. Dig. § 6.*]

2. Insurance (§ 579*)—Adjustment of Loss—Settlement Between Parties—Validity—Fraud.

Where an insured, under a life policy providing that all rights thereunder should be forfeited in case he committed suicide, died as the result of drinking carbolic acid, and in subsequent negotiations with the beneficiary the adjuster for the insurer said no more than that he was of opinion or was convinced from his investigations that the deceased committed suicide and that there was no liability, such statements did not constitute fraud which would invalidate a compromise and settlement of the claim agreed to by the beneficiary under legal advice.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1417–1419; Dec. Dig. § 579.*]

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 104 S. W. 672.

N. B. Maxey (A. H. Burnett, on the brief), for plaintiff in error.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. W. F. Bridges was the holder of a beneficiary certificate issued by the Sovereign Camp, Woodmen of the

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

World, a fraternal order organized under the laws of Nebraska. It contained a provision that all rights thereunder should be forfeited if he died by his own act. His death resulted from drinking carbolic acid. The question of suicide being raised by the adjusting agent of the order, a compromise and settlement were made whereby Mrs. Bridges, the beneficiary, signed a receipt in full and surrendered the certificate upon payment to her of \$206. She afterwards sued for the full amount, \$2,000, less the payment mentioned, and obtained judgment, which was affirmed by the United States Court of Appeals in the Indian Territory. This writ of error is to review the judgment.

The law is well settled. The general rule is that where a liquidated sum is due, and there is no consideration for the surrender of a part of it, the payment of a less sum, though accepted in satisfaction, is not binding. But efforts to avoid litigation by amicable arrangement of those interested are regarded by the courts with such favor that it is held the rule should be confined to cases strictly within it (Railway v. Clark, 178 U. S. 353, 365, 20 Sup. Ct. 924, 44 L. Ed. 1099), and a payment of a part will extinguish the whole if there be in the transaction an element recognized by the parties as the moving cause and which in the law of contract is regarded as consideration. The adjustment of a bona fide dispute as to the existence of conditions upon which it was agreed that a sum certain should or should not be owing is a sufficient consideration, and a compromise and settlement accordingly made will not thereafter be disturbed by an inquiry into the truth of the matter disputed.

But it is charged by Mrs. Bridges that she was influenced and persuaded by false and fraudulent representations. The evidence, however, wholly fails to sustain the charge. The entire transaction resulting in the agreement of compromise and settlement, and all of the representations made to her by the adjuster, were in the presence of her brother, who was a member of the bar, and who had requested her to come to his office with the certificate and other papers. The adjuster there told her he had made an investigation and was of the opinion, or under the impression, or was convinced, as she variously expressed it, her husband had committed suicide. The provision of the certificate upon that subject was correctly explained to her. There was no misrepresentation of any fact or of the effect of the instrument upon which her rights depended. At the trial of the case there was no evidence that fairly tended to prove there was not a dispute in good faith as to the character of the act that caused her husband's death. Moreover, Mrs. Bridges was in a better position than the adjuster to judge whether the acid was drunk accidentally or with suicidal intent, for she was present when it occurred and knew the attendant circumstances. Her brother, who was a witness at the trial, admitted that at the time of the compromise he himself thought it was a case of suicide though he knew nothing of the actual fact, and said that for that reason he believed the compromise was a good one. It is true that, after much leading by her counsel, Mrs. Bridges was finally brought to the statement that the impression made on her mind by the adjuster was that there was no liability whether the acid was taken accidentally or not, but at the same time she said those were not his words; and she had previously repeated several times that he had merely expressed his opinion, impression, or conviction that her husband had committed suicide, and said if he committed suicide the order was not liable. Mrs. Bridges was an intelligent woman, and her testimony shows she had a discriminating knowledge of the English language. What the adjuster said to her was plain and clear. It was not calculated to deceive, and could not reasonably have had that effect. There was other conversation, but none that was material or that beclouded the proposition that if the deceased committed suicide there could be no recovery upon the certificate. We think the transaction was wholly free from misrepresentation, duress, or overreaching, and therefore differs radically from that in Commercial Travelers v. Mc-Adam, 61 C. C. A. 22, 125 Fed. 358. The defendant's request for a directed verdict should have been granted.

The judgment is reversed, and the cause remanded for a new trial.

UNIVERSAL CASTER & FOUNDRY CO. v. M. B. SCHENCK CO.

(Circuit Court, D. Connecticut. November 25, 1908.)

No. 1,202.

1. Patents (§ 141*)—Reissue—Validity.

A patentee may extend his claims by a reissue, when the invention remains the same and there is no material change in the drawings and specification.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 208; Dec. Dig. § 141.*]

2. Patents (§ 328*)—Anticipation—Infringement—Furniture Caster.

The Diss reissue patent, No. 11,982 (original No. 654,956), for a furniture caster, was a legitimate reissue, within the invention disclosed by the specification and drawings of the original application, and was not anticipated, and is valid. Claims 1 and 2 also held infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

3. PATENTS (§ 328*)—INFRINGEMENT—FURNITURE CASTER.

The Diss patent, No. 725,325, for a furniture caster, claim 2, held not anticipated, valid, and infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Binney & Ogden, for complainant.

Bartlett, Brownell & Mitchell, for defendant.

NOYES, Circuit Judge. This is a suit in equity to restrain the alleged infringement of reissue patent No. 11,982, dated May 6, 1902, and patent No. 725,325, dated April 14, 1903—both granted to Albert B. Diss for improvements in casters for furniture.

The inventions embraced in both patents relate to the casters used in metallic tubular legs of furniture, known as the "rectangular spring frame type." As the pintle of a caster is necessarily very small in comparison with the size of the tubular leg in which it is placed, it is necessary to devise some method for holding and centering it in the leg and for supporting the weight of the furniture. This is effected in casters of the present type by a spring frame spanning the pintle and acting frictionally against the inner surface of the leg. The particular object of the invention in the reissue patent is thus stated by the patentee:

"Not only to insure the central position of the pintle, but to limit the movement that can be given to the spring frame heretofore employed and which spans the pintle within the tubular leg and to prevent undue strain upon said spring frame."

The claims of the reissue patent alleged to be infringed are as follows:

"1. The combination with the caster wheel, jaws, and pintle of a disk surrounding the pintle and upon which the tubular leg rests, a spring frame spanning the pintle, fitting within the tubular leg and acting frictionally against the inner surface of the tubular leg to hold the caster in place and prevent the same accidentally dropping out, and means for limiting the compressive movement of the free portion of said frame, substantially as set forth.

"2. The combination with the caster wheel, jaws, and pintle of a disk surrounding the pintle and upon which the tubular leg rests, a spring frame spanning the pintle and having a hole at its folded portion to receive the pintle near its free end, said frame fitting within the tubular leg and acting frictionally against the inner surface thereof to hold the caster in place and prevent the same accidentally dropping out, and means for limiting the compressive movement of the free portion of said frame, substantially as set forth."

The defenses to the reissue patent are: (1) Invalidity as a reissue, by reason of embracing a different invention from that of the original patent. (2) Invalidity by reason of anticipation in prior pat-

ents. (3) Noninfringement.

The claims of the original patent (No. 654,956, dated July 31, 1900) called for, as a distinct element, particular means for insuring the central position of the pintle. The specification and drawings described and showed a guide plate surrounding the pintle and carried upon the leg supporting disk. This guide plate fitted within the bottom of the tubular leg and thus centered the pintle. Obviously, however, other means than a separate device for insuring the central position of the pintle were readily available, and this requirement as an element narrowed the claim. The patentee, therefore, applied without undue delay, upon substantially the same specification and drawings, for a reissue, which was duly granted with the claims amended so as to embrace those already quoted. These amended claims omit the distinct leg-centering element of the original claims.

The reissue broadened the patent, but the invention was the same. The object of the patentee was accomplished as well by a structure in accordance with the claims of the reissue as by one in accordance with the original claims. The former merely permitted the accomplishment of the desired result with fewer distinct and separate elements than the latter. It is my opinion that the claims of the reissue might properly have been included in the original patent, and that the reissue was valid. Inventors have the right to extend their claims, when the invention remains the same and there is no material change in

the drawings and specification. Topliff v. Topliff, 145 U. S. 156, 12

Sup. Ct. 825, 36 L. Ed. 658.

Taking another view of the case, the same result is reached. The reissue claims may be considered as covering a subcombination of the means for restricting the movements of the spring frame and as not embracing the leg-centering means. Such a subcombination may be covered by a reissue, although embraced in the original patent only as a part of the larger combination. In this aspect, also, the reissue was valid.

With respect to the contention that the provisions of the reissue statute were not duly complied with, it is sufficient to say that, in my opinion, a case is not presented warranting the overruling of the action

of the commissioner.

The next question is whether the reissue patent was valid in view of the prior art. In examining this question we must look for prior patents which show a spring frame, spanning the pintle, with free ends of limited movement and a separate leg-supporting disk. These are essential elements of the reissue patent, and a prior patent which

does not embrace them does not anticipate.

The prior Diss patent of 1890 is for a caster of the socket type, and has no spring frame and no leg-supporting disk. The weight of the leg comes upon the top of the pintle. The Neuberth & Ill patent (No. 556,020) has no spring frame analogous to that of the reissue patent. Two pieces of metal are fitted together to form a bulged cylinder, into which the pintle is driven. The Noelting patent (No. 626,439) is for a caster socket. There is no separate disk and no spring frame similar to that of the reissue patent. The Neuberth patent (No. 631,579) is for a caster of the tubular socket type, having a vertical tube with upwardly extending ears which contact with the inner surface of a tubular leg and prevent the caster from falling out. No spring frame spanning the pintle with free ends, whose expansive and compressive movements are limited, is present.

It appears, therefore, that none of the foregoing patents referred to by the defendants anticipates the reissue patent. The only other prior patents cited are Nos. 643,482 and 645,387 granted to Diss—the patentee of the reissue patent. But these patents had not been granted and the applications therefor were pending when the application for the original of the reissue patent was filed. These co-pending patents cannot be treated as anticipating, and the question of double patenting is not raised. Moreover, I am not satisfied that these patents, if earlier in date, would have anticipated. I do not find present the tangs and perforations for limiting the movement of the spring

frame.

The defendant, however, contends that these two Diss patents, if not strictly anticipating, should be treated as dedicating the subject-matter of the reissue claims to the public. It is not clear, however, that such subject-matter is disclosed by the two patents referred to. Certainly, in my opinion, no case of dedication is made out sufficient to bar a legitimate reissue of the patent. This is in no sense a case where a patentee describes two devices, claims one, and thereby dedicates the other to the public.

The next question is whether infringement of the reissue patent is shown. It is evident that the defendant's device is similar to that described in the first claim of the reissue. Both have a caster wheel, jaws, and spanning spring frame, in combination with a separable disk surrounding the pintle and upon which the tubular leg rests. In both the spring frame has free ends, and acts frictionally against the inner surface of the tubular leg, and holds the caster in place. In both similar means are provided for limiting the compressive and expansive movements of the free ends of the spring frame. The defendant's structure also has a hole in the folded portion of the spring frame to receive the pintle, as required in the second claim of the reissue patent. It is therefore held that the defendant's structure infringes the first two claims of the reissue patent.

Only claim 2 of the second patent (No. 725,325) is claimed to be

infringed. This claim is as follows:

"The combination, with the caster wheel, jaws, and pintle, of a disk surrounding the pintle and upon which the tubular leg rests, means for stiffening the said disk to enable it to act more perfectly as a support to the tubular leg, a spring frame spanning the pintle within the tubular leg and acting outwardly against the inner surface of the tubular leg to maintain the same centrally in position and the caster frictionally in the tubular leg, said spring frame having parts coacting with the said disk to limit both the expansive and the compressive movements of said spring frame, substantially as set forth."

The defenses as to this claim are: (1) Invalidity in view of the prior art. (2) Noninfringement. This claim is for a specific form of spring frame caster. It is much narrower than the reissue patent, and consequently the examination of earlier patents already made demonstrates that none of them anticipates; and the later Diss patents, referred to, but not particularly examined, come little nearer than the

others. The patent is held to be valid.

The remaining question is whether the claim is infringed. This claim has four elements: (1) A caster wheel, jaws, and pintle; (2) A disk surrounding the pintle and upon which the tubular leg rests; (3) A spring frame spanning the pintle within the tubular leg and acting outwardly against the inner surface of the leg, maintaining the same centrally in position, and the caster frictionally in the tubular leg, said spring frame having parts coacting with said disk to limit both the compressive and expansive movement of said spring frame; (4) means for stiffening the said disk to enable it to act more perfectly as a support to the tubular leg.

It is obvious that the defendant's caster has the first three elements. I am also clearly of the opinion that it has the fourth element. The claim does not specify any particular means for stiffening the disk, and the corrugation of the defendant's disk furnishes a good illustration of means adapted to that end. It comes within the language of the claim; and even if the claim had employed more specific language, and designated the flanges—which the patentee merely preferred in his specification—as the means of stiffening, I am not at all certain that the corrugation would not be an equivalent therefor. Claim 2 of the

second patent is therefore held to be infringed.

A decree in the usual form may be entered with respect to the first two claims of the reissue patent and the second claim of the second patent for an injunction, an accounting, and costs.

TIME-SAVER CO. v. STAMFORD TRUST CO.

SAME v. PEQUONNOCK NAT. BANK.

(Circuit Court, D. Connecticut. November 30, 1908.)

Nos. 1,230, 1,231.

PATENTS (§ 32S*)—ANTICIPATION—ACCOUNT BOOKS.

The Wever and Parmerter patent No. 632,769, and the Rand patent No. 746,157, relating to account books, are both void for anticipation.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Roberts, Roberts & Cushman, for complainant. Emerson R. Newell, for defendant.

PLATT, District Judge. This is a patent suit in the usual form, based upon two patents alleged to be capable of conjoint use, viz., Wever & Parmerter, No. 632,769, and Rand, No. 746,157, relating to account books and ledgers.

On March 16, 1908, at the beginning of the rebuttal testimony, complainant gave notice that it would dismiss the bill of complaint so far as it charges infringement of the Wever & Parmerter patent, and proceeded at the hearing upon the assumption that the only open issue was the validity of the Rand patent and its infringement. Upon the record, however, the case remains intact, the validity and infringement of both patents being at issue, and, even if complainant had perfected the notice given, the validity of the Wever & Parmerter patent would still remain at issue.

A cursory examination of the proofs prior to rebuttal will disclose the reason for complainant's action. The defendant's proofs thoroughly demolish the Wever & Parmerter patent. The spark of invention which carried that patent through the office had been exercised by others long before the application of the patentees. It would be a perversion of justice to stop at the point of finding that the Wever & Parmerter patent is not infringed. It is clearly invalid, and the decree which will follow this opinion must say so. Having done that, we are brought at a bound to the real contention, which circles around the Rand patent.

At the threshold the court desires to express sympathy for the complainant. On the face of it, Mr. Rand was entitled to some consideration because of his patent. The complainant under that patent has acquired a large clientage, and the real defendants have taken the benefit of what the Patent Office professed to give to Mr. Rand. If the rights of the patentee were as clear as counsel for the complain-

For other cases see same topic & S NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Inderes

ant claims them to be, if the defeat of the patent were a matter of serious doubt, it would have been better for the real defendants to pay tribute to the owner of the patent. In the case at bar, however, they have apparently undertaken to maintain what they conceived to be their manifest right. I cannot believe that they are wanton and malignant trespassers. To my mind, the gist of the case lies in the fact that the Patent Office ought not to have granted Rand his patent, in view of the disclosure contained in the Weyer & Parmerter specifications. That grant loses its prima facie force, because, upon careful scrutiny, the oversight on the part of the examiner who had the matter in charge is so obvious. I am of the positive opinion that the disclosure anticipates fully the principle which, it is insistently claimed, furnishes the novelty to Rand's claims of invention, and I cannot blame intelligent gentlemen for taking advantage of so plain a situation. The cause of the oversight is unimportant, but it was probably due to the fact that no drawing was furnished to illustrate the alternative construction which we are now about to briefly consider.

In the Wever & Parmerter patent, Fig. 3 shows Saturday's balance column at the extreme left of each page, as in Rand, but with the name column between this balance column and the transactions of Monday; but in lines 95 to 101 of the specifications, in referring to Fig. 3, the patentees say that "the first balance column and transactions of the first day may be placed before the name column without varying the principle of our invention." When Fig. 3 of Wever & Parmerter patent is treated as suggested in this disclosure, taking into account the general purpose of that patent, we find the exact thing which is illustrated in Fig. 2 of the Rand patent. The disclosure is clear enough to enable one with very moderate skill to construct a bank ledger which will meet the spirit of the Rand claims 1, 2, and 3, and, unless the words "midway," "center," "middle," and "meet" are to be construed with hair-line accuracy, it will also meet the terms of those claims.

The complainant attempts to dodge the force of the disclosure by putting forth divers contentions. It is urged that "transactions of the first day" cannot be understood to refer to Monday's balance column, because a balance is not a transaction. It seems to me that the purpose of a ledger account is to set forth in plain arithmetical terms the relations between a customer and the bank. The transactions of the day, to be complete, ought to show what happened to the account during the day, and how it was left at the close of the day. Its condition at the close of the day is just as much a transaction with the customer as its variations during the day.

It is also claimed that in following the disclosure one might carry the crease much further to the right, because it would still be beyond the transactions of the first day; but one cannot imagine a man of ordinary skill doing such a thing as that, for, in such event, the page when turned back would cover the name column and thus defeat the object sought to be obtained.

It is also persistently contended that the crease must be "double acting." Rand does not call attention to that function of his crease.

but, assuming that function to be an inherent feature of his construction, it must be remembered that Wever & Parmerter told us about a vertical crease, or "line of perforations," and such a crease as theirs would have the same inherent double acting or hinge function.

It is said to be an advantage under the patented construction that the names and balances are in alignment, so that it is easy to carry the appropriate figures forward, but I can see no trouble in doing that under the alternative construction of Wever & Parmerter. The crease being vertical, the lines must be opposite each other, and they would be near enough together so that the eye could easily follow straight across the open gap between the leaves.

Complainant's efforts to escape the force of the alternative disclosure are not persuasive. If claims 4 and 5 can be differentiated from the alternative disclosure of Wever & Parmerter, they would be outside of the invention which is insisted upon, viz., a centrally located, double-acting crease capable of being so treated as to facilitate the transferring of balances from one week to the next, because, when the name column is placed as suggested in those claims, it would be covered up when the leaf is folded back, and the tired bookkeeper could rest from his labor, because there would be no work in sight for him to do. Claims 4 and 5, then, do not present a combination of elements which will do anything, and are therefore unpatentable.

These observations have been made with a running pen, and much more might be said, but the conclusion of the whole matter is that, when Rand went to the Patent Office with his application, he took nothing there which was new, and, but for the carelessness of a minor official, he would have come away empty-handed.

Both patents ought to be found invalid, and the bill dismissed, with costs. So ordered.

FLANNELLY v. DELAWARE & H. CO.

(Circuit Court, M. D. Pennsylvania. November 28, 1908.)

No. 8, January Term, 1904.

NEW TRIAL (§ 104*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence is not ground for a new trial, where it is merely cumulative, and in the event of a new trial would have to be submitted with the other evidence on the same point to the jury.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220; Dec. Dig. § 104.*]

On Rule for New Trial.

See 164 Fed. 303.

James H. Torrey, for the rule.

Paul J. Sherwood, opposed.

ARCHBALD, District Judge. Applying the ordinary rules which prevail in applications of this kind, the new trial which is asked for must be refused.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

While the evidence which is now brought forward relates to matters which took place since the trial, and therefore could not be produced before, it is of the same general character as that which was submitted to and passed upon by the jury, to the effect that the plaintiff was not in fact injured as she claims, but falsely and fraudulently pretends to be, for the purpose of recovering damages. It is, in other words, merely cumulative of that which we already have, however it may seem to be more convincing, and would have to be submitted with the rest for the jury to pass upon in the event that a new trial was ordered. The defendant would thus be simply given another chance, with little, if any, better assurance of success, and that is not enough to justify a second trial.

It is not as though the court could lay hold of the case as a fraud and throttle it (Cochran v. Elridge, 49 Pa. 365), or direct a verdict on the preponderant evidence (Robinson v. Denver, etc., Co. (C. C. A.) 164 Fed. 174. The case would still have to take its course and be disposed of by the jury, who are very likely to decide the same way as before.

erore.

The rule for a new trial is discharged.

THE MACKINAW.

(District Court, D. Oregon. November 23, 1908.)

No. 4,976.

ADMIRALTY (§ 20*)-JURISDICTION-MARITIME TORT-"LAND."

A pontoon floating upon the water of a navigable stream, between high and low water mark, rising and falling with the tide and used as a landing in connection with a ferry, although fastened to the shore by a cable is not land, and an action for an injury to a person thereon by a moving vessel is for a maritime tort and within the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. $\$ 216; Dec. Dig. $\$ 20.*

For other definitions, see Words and Phrases, vol. 5, pp. 3975-3984; vol. 8, pp. 7700, 7701.]

In Admiralty. On exceptions to libel.

Oglesby Young and Bauer & Greene, for libelant. Williams, Wood & Linthicum, for respondents.

WOLVERTON, District Judge. On November 17, 1907, the steamer Mackinaw was lying at anchor at the Irving dock, a short distance south of the landing of the steam ferry W. S. Mason, operated by the city of Portland and Multnomah county between the east and west banks of the Willamette river. While the libelant was standing upon one of the pontoons of the approaches used by the ferry, the Mackinaw changed her berth by backing downstream, and the libel alleges that she negligently allowed her anchor to drag along the bottom of the river, resulting in the anchor fouling the ferry cable, whereby the cable was torn loose from its fastenings. This resulted in its

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suddenly sweeping across the pontoon upon which the libelant was standing, striking and severely injuring him. He has libeled the ship, and respondents except to the jurisdiction of this court upon the ground that, the pontoon being secured in place by fastenings to the shore, the injury occured on land. The locus in quo is thus described by the amended libel:

"That the slips or approaches to said ferry landings, and the pontoons at which said W. S. Mason lands for the purpose of discharging and receiving freight, passengers, and vehicles, are constructed and placed between highwater mark and low-water mark on said Willamette river, and said pontoon hereinafter referred to was not and is not a part of the land, but is a movable and floatable structure attached to land by cables at one end and below highwater mark and extending into the navigable waters of said river, and at the time of the injury to libelant hereinafter described was within and upon the navigable waters of said river, and was and is raised and lowered with the tide and current thereof; and said pontoon, together with said cable, are used in the operation of said public ferryboat, and constitute, and on the date hereinafter mentioned were, state governmental instruments and aids to navigation in the port of Portland, and to the transportation of freight, passengers, and vehicles on and across the navigable waters of the United States in said port."

A pontoon is nautically described by the Century Dictionary as "a lighter; a low, flat vessel resembling a barge," etc. On the facts alleged, then, it seems reasonably clear that this court has jurisdiction, unless the fastenings described are sufficient to impress upon the pontoon the character of land, and to divest it of nautical significance. That this is the result of the situation taken as a whole is the theory of the exceptants. There certainly is plenty of authority to sustain them in asserting the basic principle that a maritime tort can never occur upon the land; that the damage must be inflicted upon the water; and, although the instrument or cause of an injury, as a vessel, may be upon the water, if the result of the tortious act is impressed against an object upon the land, the admiralty is without jurisdiction to grant relief. The leading case having relevance to this claim is The Plymouth, 3 Wall, 20, 18 L. Ed. 125, where the cause of the injury was a fire aboard ship, resulting from the carelessness of the crew, while the injury itself was the result of the flames spreading to and consuming adjacent wharves or buildings. The causative negligence was clearly upon the water, but the injury was as clearly on land. That case has directed the current of opinion and decision for almost half a century. The Mary Stewart (D. C.) 10 Fed. 137; The Professor Morse (D. C.) 23 Fed. 803 (marine railway case); City of Milwaukee v. The Curtis (D. C.) 37 Fed. 705 (swing bridge); The Mary Garrett (D. C.) 63 Fed. 1009 (wharf); The Belle of the Coast (D. C.) 66 Fed. 62; The Albion (D. C.) 123 Fed. 189; Johnson v. Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447.

If these cases indubitably settled the point that the pontoon in question is realty, as understood at common law, and their authority were insurmountable, further comment on the case made by the libel would be inapposite. But further inquiry is fitting and pertinent: First, because The Plymouth, supra, as regards this situation, is somewhat overshadowed by the later case of the Blackheath, 195 U. S. 361, 25

Sup. Ct. 46, 49 L. Ed. 236; and, second, because other cases, not classified with The Plymouth and its offshoots, have a decided influence here.

As to the first observation, a superficial analysis of the language of the Supreme Court in the Blackheath Case sets the mind running irresistibly toward an enlarged jurisdiction of the admiralty as respects the shore. The court begins its discussion by conceding outright that the beacon, the subject of the injury in that case, "was attached to the realty, and that it was a part of it by the ordinary criteria of the common law." If one thing can be attached to the realty by some projection to the land or shore and still be the subject of a maritime tort, where or how is the line to be drawn against the next thing so attached that is injured by a craft? The manner of connection ought not to be inclusive or exclusive; for an object that is attached by piles certainly is not to be preferred over one that is attached by a cable, or a rope, or other like means of binding to the shore. The eminent iurist who wrote the opinion in The Blackheath Case seems to have had in mind just such incongruities, for, as if emphasizing as an absurdity the deprivation of the admiralty of jurisdiction over things floatable merely because they are in some manner attached or anchored to the shore, we have the following significant expression:

"It would be simple, if simplicity were the only thing to be considered, to confine the admiralty jurisdiction, in respect of damage to property, to damage done to property affoat. That distinction sounds like a logical consequence of the rule determining the admiralty cognizance of torts by place."

And, further:

"But, as has been suggested, there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was. The Arkansas, 17 Fed. 383, 387; The F. & P. M. No. 2 (D. C.) 33 Fed. 511, 515; Hughes, Adm. 183. And, again, it seems more arbitrary than rational to treat attachment to the soil as a peremptory bar outweighing the considerations that the injured thing was an instrument of navigation and no part of the shore, but surrounded on every side by water, a mere point projecting from the sea."

The decision, in fine, makes it apparent that at least not all things attached to the land along the shores of navigable waters are outside the admiralty jurisdiction, and it seems to me that it would take a great deal of dexterity to deploy around this opinion and succeed in getting back to the jurisdiction circumscribed by The Plymouth. To do so would result in treating a great deal of what is said in The Blackheath Case as obiter. But it is not obiter that a court advances reasons necessary to substantiate its position, which is all the court did in that case in finally concluding that a thing attached to the realty may yet be the subject of a maritime tort. True it is that Justice Holmes says, in effect, that it was unnecessary in The Blackheath Case to reconcile it with The Plymouth, because, as he said, the court was dealing with an injury to an aid to navigation, always the subject of admiralty disposition, which was perhaps one way to avoid saying that the principle of The Plymouth has been carried far beyond its legitimate intendment. But Mr. Justice Brown, a distinguished admiralty judge, in his concurring opinion, says that he accepts the decision as

overruling The Plymouth; and due weight must be given the fact that he was a member of the court, participated in its deliberations, and knew what practical effect the decision was expected to have. However it may be as to whether The Blackheath Case has overruled or modified the principle of The Plymouth, it is an unmistakable authority to the effect that the libelant in this case did not necessarily receive his injury on land simply because the pontoon on which he was standing when injured was attached to the land by a cable. Nor is the case alone in this particular field of assertion. The M. R. Brazos, Fed. Cas. No. 9,898, is equally emphatic. The injury there was to a bathhouse, moored to the shore "by poles and chains, so arranged as to allow it to rise and fall with the tide, one end of the chains being fastened securely to the structure itself, and the other end being attached to pins inserted in holes drilled in the rocks." No pretense was made that this structure was in aid of or used in connection with navigation; yet, notwithstanding, it was held a subject of maritime tort, and the fact that it was attached to the land was not considered to make the injury any the less one taking place on the water, which is clearly within the principle of The Blackheath Case. The court in this last case observed:

"It is clear that the libelant's bathhouse, though described in his libel as a 'vessel,' was not a vessel constructed or used or intended to be used as an instrument of commerce or navigation. The test, however, of the jurisdiction of the courts of admiralty in respect to torts is whether the place of the alleged injury was 'on the water.' The Maud Webster, Fed. Cas. No. 9,302, and cases cited. This structure cannot be said to have become a part of the land. Its connection with the shore was for a temporary purpose. The testimony shows that it was a movable structure, moored in this place in tide waters, for use as a bathhouse during the summer months, the design of the owner being to disconnect it from the shore in the autumn and float it away to some more suitable place for laying it up during the winter. The mode of its attachment to the shore was adapted to this purpose, and was such that it could be readily disconnected. I do not see that the case is any different from what it would be if the bathhouse had been moored at anchor in the same place or out in the middle of the river. The case is clearly distinguishable from the case of The Maud Webster, cited above, in which it was held that the place where the derrick which was injured stood had become a part of the land. The libelant, therefore, has the right to have the case determined on the merits.'

The Arkansas (D. C.) 17 Fed. 383, is a case said by the Supreme Court in The Blackheath Case to be responsible for the assertion that the fact that the injured property was afloat should have no more effect upon the jurisdiction than the fact that the cause of it was afloat, and such ruling is readily extracted from this portion of the opinion:

"The solution of the question of jurisdiction does not depend, in my judgment, upon the fact of the structure being solid or floating, realty or personalty, firmly affixed to the bed of the river or otherwise. It is a question of place, and of the rightfulness of the structure."

For cases more or less to the same effect, see: The F. & P. M. No. 2 (D. C.) 33 Fed. 511; Simpson v. The Ceres, Fed. Cas. No. 12,-881; The Haxby (D. C.) 95 Fed. 170.

After the decision of the Blackheath Case come three adjudications, and only three, to which my attention has been called, upon this sub-

ject. The first of these cases is Bowers Hydraulic Dredging Co. v. Federal Contracting Co. (D. C.) 148 Fed. 290. The action was to recover the hire of a dredge, under a contract in the performance of which the discharge pipe extended continuously from the dredge to a point about 1,200 feet from the bank of the river. The pipe was run from the dredge over pontoons to the shore, and thence on land to the place of deposit for the dredged material. The libel was resisted, under this state of facts, because the dredge was not at the time engaged in the performance of a maritime contract. The court (after noting the authorities opposed to jurisdiction in such a case) said:

"Upon the above authorities, it would seem that the question of jurisdiction here should be decided in favor of the respondent, but the admiralty jurisdiction has been broadened very considerably by the recent decision of the Supreme Court in The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236.

* * * It seems, in view of what has been said in this authority, that such artificial distinctions as arise out of the work of a dredge being performed partly on land, and for the purpose of a land transaction, should not oust the court of jurisdiction of a floating structure which in its ordinary purpose is distinctly maritime."

In The Curtin (D. C.) 152 Fed. 588, the court declined jurisdiction of a libel for damage to a pier, saying that it did not understand The Blackheath to overrule The Plymouth. The latest decision is West v. Martin, 47 Wash. 417, 92 Pac. 334, where the Supreme Court of Washington exhaustively reviews the authorities down to The Blackheath, and reaches the conclusion that it was justified by that case in holding the destruction of a pier supporting a bridge over a navigable river to be a maritime tort. Whether this is following the impetus of The Blackheath Case toward an enlarged jurisdiction to the uttermost is beside the question that this court is certainly warranted in taking jurisdiction in this case on the facts alleged in the libel as above set forth, and, if the proofs substantiate the allegations, in retaining jurisdiction to the end. If it be said the Supreme Court sustained the libel in The Blackheath finally because the beacon was an aid of navigation, as much must be said here for the pontoon. It was a part of the ferry equipment, necessary and essential, and actually used, in its operation. It was, moreover, on the navigable waters of the river, or at least partly so, between high and low water marks, raising and lowering with the tide. It necessarily follows that, when libelant was injured by the vessel while standing upon the same, he received his injury by a maritime agency and in a maritime locality.

For the foregoing reasons, the exceptions to the libel should be

overruled.

STOCKTON MILLING CO. et al. v. CALIFORNIA NAVIGATION & IM-PROVEMENT CO.

(District Court, N. D. California. November 20, 1908.)

1. Shipping (§ 124*)—Injury to Cargo—Liability of Vessel.

Respondent contracted to transport a barge load of flour for libelants, and to load the same, but at libelants' request employed a certain company to do the loading. When partly loaded, and while lying unattended at night, the barge grounded at one end at low tide, by reason of which her seams opened and she sank, injuring a part of the cargo. *Held*, that the loss was through the negligence of respondent or of its agent, the loading company, for which it was responsible.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 458; Dec. Dig. § 124.*]

2. Shipping (§ 141*)—Contract of Affreightment—Limitation of Liability.

A provision of a contract for the carriage of a cargo of flour on a barge by which the shipper assumed the risks of carriage did not relieve the barge owner from liability for a loss of flour by reason of its negligence or that of its agent in failing to properly care for the barge while being loaded

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497; Dec. Dig. § 141.*]

3. Shipping (§ 132*)—Action for Injury to Cargo—Defenses.

It is not a defense to an action by a shipper against a vessel owner to recover the value of goods lost through the latter's negligence that the goods were fully insured and the insurance has been paid to libelant, although it does not appear from the pleadings or evidence that the suit is brought by the direction or for the benefit of the insurer.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*]

In Admiralty. Suit for injury to cargo.

Page, McCutchen & Knight, for libelants.

A. L. Levinsky, for respondent,

DE HAVEN, District Judge. The libelants seek, in this action, to recover damages from the respondent on account of an alleged breach of contract. The contract was verbal, and it appears from the evidence that by its terms the respondent agreed to transport for libelants in open barges a quantity of flour from South Vallejo to the port of Stockton for 65 cents per ton, the libelants to assume the risks of carriage, and to unload the flour, at their own expense, upon its arrival at the port of destination. The flour was, at the date of the contract, in the warehouse of the Port Costa Milling Company, at South Vallejo, and was to be delivered by that company to respondent upon the wharf, alongside the barges upon which it was to be carried. Some time after the contract was made, and before any flour was delivered to respondent thereunder, the libelants requested the respondent to employ the Port Costa Milling Company, to continue the delivery of the flour from the wharf onto the barges; that is, to take the flour from the wharf and load it on the barges. The reason for the request was that, as the flour belonged to different owners, it required segregation in order to facilitate its delivery at Stock-

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ton, and it was thought this segregation could be more easily made by the employés of the warehouse company, in loading the barge than by stevedores brought by the respondent from Port Costa for that purpose. This was agreed to by the respondent, and the Port Costa Milling Company was employed by it to load the flour. The respondent then towed one of its barges, the Jersey, to South Vallejo, and the work of loading was commenced by the stevedores of the Port Costa Milling Company. The barge was brought to the wharf bow on, for the purpose of receiving her cargo, and, when in this position, the water was deep under her stern and more shallow at the bow. The work of loading progressed for two days, during which time about 300 tons of flour was placed on the barge. On the morning of the third day it was discovered that the barge was leaking through seams at the stern. Her bow was at this time resting in the mud, and the stern was still afloat, but lower than the bow. An unsuccessful effort was made to pump the water from the barge, and her stern sunk in the waters of the bay, and part of the flour with which she was laden was thereby damaged. The evidence shows that the bow of the barge grounded during the night when there was no one on her, nor at the wharf where she was being loaded, to care for her; and it does not appear that any one was charged by the respondent with the special duty of looking out for her, and keeping her bow away from the wharf, and in the deep water of the channel, when the tide ebbed, unless that obligation rested upon the Port Costa Milling Company by virtue of its employment to load the barge.

1. The damage to libelants' flour resulted from the sinking of the Jersey; but I think it clearly appears from the evidence that the barge was in a seaworthy condition when brought to South Vallejo by the respondent, that she was subsequently rendered unseaworthy by the opening of the seams in her stern, and that this was caused by the strain to which she was subjected when lying at the wharf partly aground, and that she was thus rendered unseaworthy by the failure to take any precaution to keep her bow from grounding while lying at the wharf. The failure to take such precaution was negligence, and I am of the opinion that this negligence was that of the respond-It is undoubtedly true, as claimed by respondent, that where a shipper, for his own convenience, undertakes to load his goods upon a vessel, he must himself bear any loss occasioned by the negligence of himself or servants in so doing. But the evidence does not bring this case within the rule just stated. The Port Costa Milling Company was employed by the defendant to load the Jersey, and was paid by the respondent for that service. The Port Costa Milling Company was the agent of the respondent in loading the barge, and therefore its negligence in that matter, and that of the men who were employed by it to do the work, is for the purposes of this case to be deemed the negligence of respondent. The fact that the warehouse company was so employed upon the suggestion of the libelants did not release the respondent from the obligation of its contract to attend and care for the barge and its cargo while the work of loading was being done. Certainly there is nothing in the evidence to justify a finding that the

Jersey was ever placed under the control of the libelants, or that there was any express or implied agreement upon their part to care for her,

or the cargo, while at the South Vallejo wharf.

2. Nor did libelants, by their contract assuming the risks of transportation, assume the risk of respondent's negligence in the loading of the Jersey, or any negligence of respondent or its agents by which she might be rendered unseaworthy while engaged in taking the flour on board. New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 382, 383, 12 L. Ed. 465. While it is true the carrier may limit the extent of its common-law liability as an insurer of goods intrusted to it for carriage, still "the rule is as well settled and almost as universally maintained that the carrier cannot contract to relieve itself from liability for loss or injury which is the result of its own negligence or that of its servants." Moore on Carriers, p. 287. And again, on page 319, the same author says:

"But a common carrier is not released from damages, occurring through his own negligence, by stipulating that the goods are shipped 'at the owner's risk.' At most that would only protect against loss occurring from the ordinary and known risks of transportation."

3. It appears from the evidence that the flour referred to in the libel was insured by libelants for its full value, and that prior to bringing this action they were paid in full by the insurer for all the damage sustained by them on account of the sinking of the Jersey. The libel does not mention this fact, nor is it alleged that the action is prosecuted for the benefit of the insurer, nor is there anything in the evidence tending to show that the action is being prosecuted for the benefit of the insurer in the name of the libelants by direction of the insurer. It is claimed by respondent that upon this state of facts the action cannot be maintained, because libelants are not the real parties in interest. That upon these facts the insurer could have maintained the action in its own name or that of the libelants, or that the action could be maintained by the libelants if the libel expressly averred that they were prosecuting for the use of the insurer, is well settled. Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; Phœnix Insurance Co. v. Eris Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; Liverpool & Great Western Steam Co. v. Phœnix Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; United States v. American Tobacco Co., 166 U. S. 468, 17 Sup. Ct. 619, 41 L. Ed. 1081. My attention has not been called to any case in which it has been directly held that when the shipper sues for the loss of his goods, in his own name, and, so far as disclosed by the proceedings and evidence, without the direction of the insurer, and without specially alleging that the action is prosecuted for the benefit of the insurer, the carrier may successfully defend against such action upon the ground that such goods were insured and the insurance thereon paid to the shipper. In Phœnix Insurance Co. v. Eris Transportation Co., 117 U. S., the court, at page 321, 6 Sup. Ct., at page 753 (29 L. Ed. 873), says:

"From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity

agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from the damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law, it can only be asserted in his name, and, even in a court of equity or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured."

Such being the well-settled rule of law, it has been held—

"that, if the assured recover before payment by the insurers, the recovery stands as a credit against the insurance; if recovery is after payment by the insurers, the assured holds it as trustee for the latter." The St. John (D. C.) 101 Fed. 469, 473.

And in the case of The Potomac, 105 U. S. 630-634, 26 L. Ed. 1194, the Supreme Court said:

"The mere payment of a loss by the insurer does not indeed afford any defense, in whole or in part, to a person whose fault has been the cause of the loss, in a suit brought against the latter by the assured. But upon familiar principles, often recognized by this court, the insurer acquires by such payment a corresponding right in any damages to be recovered by the assured against the wrongdoer, or other party responsible for the loss, and may enforce this right by action at common law in the name of the assured, or, when the case admits of proceeding in equity or admiralty, by suit in his own name."

The insurance company has not intervened for the protection of its rights, but under the law, as above stated, it will be entitled to receive from libelants the amount recovered in this action, and it would seem to be a matter of no concern to the respondent that the action is brought in the name of the libelants without disclosing that it is for the benefit of the insurer, as the judgment herein will protect it against any subsequent claim which may be made against it by the insurance company on account of the matters alleged in the libel.

Let a decree be entered in favor of the libelants for the damages sustained by them, and costs, and the case will be referred to United States Commissioner Krull, to ascertain and report the amount of such damages.

MILLER et al. v. WATTIER.

(Circuit Court, D. Oregon. June 22, 1908.)

No. 1,123.

1. Courts (§ 339*)—Federal Courts—Conformity to State Practice—Revival of Suit.

There is no statute of limitations against an application to revive a suit in a federal court of equity after the death of parties, nor is the right governed by local statutes, and it is seldom denied on the ground of laches if any right is shown.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 339.*]

2. ABATEMENT AND REVIVAL (§ 75*)—DEATH OF PARTY—REVIVAL—APPLICATION.

Pending a suit to enjoin the flooding of land owned by complainant by a dam, all parties thereto died, complainant having conveyed the land by

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

deed to his daughter and heir at law, and the ownership of the dam having descended to defendant's heirs at law. Held that, by complainant's conveyance of his interest, the suit became defective even in his lifetime, rendering a substitution of parties complainant necessary, and by the death of defendant it abated, and that a bill of revivor and supplement was the proper procedure to revive it, and for substitution of parties.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 446; Dec. Dig. § 75.*]

On Petition for Revival and Substitution of Parties.

W. H. Holmes and Webster Holmes, for petitioner, Wanna Stuart, successor to plaintiffs.

Williams, Wood & Linthicum and George G. Bingham, for defend-

ant heirs of Vallier Wattier.

WOLVERTON, District Judge. This cause came here originally by removal from the circuit court for Marion county, Or.; the transcript being filed March 27, 1885. A motion to remand to the state court was denied June 17, 1885. 24 Fed. 49.

It is unnecessary to notice the pleadings in detail. It is sufficient to observe that, by their complaint, the plaintiffs sought to enjoin the defendant from maintaining a dam on Little Pudding river, in Marion county, upon the ground that it caused the water to flow back upon plaintiffs' lands, to their injury. Since June 17, 1885, when the order denying the motion to remand was made, no step has been taken to prosecute the suit, which remained dormant until May 27, 1907—a lapse of 22 years—when one Wanna Stuart appeared and filed a "motion and petition," in which she asks that the "cause of suit mentioned in the amended complaint herewith proposed to be filed be revived," and that she be substituted as the sole plaintiff in the suit. In this proposed amendment she alleges that she is the sole surviving heir at law of William P. Miller; that subsequent to the commencement of this suit John F. Miller conveyed all his interest in the subject-matter thereof to William P. Miller; that thereafter, on May 17, 1895, William P. Miller conveyed to the petitioner, and that she is now the sole owner thereof; that William P. Miller died on the 25th of September, 1895; that John F. Miller died on the 19th day of February, 1901; and that Vallier Wattier, the original defendant, died on September 19, 1901. She further sets up that Josephine Holland, William Wattier, and four others are the sole heirs at law of Vallier Wattier, and have succeeded him in the ownership of the dam sought to be abated. These persons she asks to have substituted as defendants in the place of their ancestor, and that, with the new personnel as it respects both plaintiffs and defendants, the cause be proceeded with. All the original parties to this suit, both plaintiffs and defendant, have been dead since September 19, 1901, now nearly seven years, and in this condition of the record it is sought, by this latest proceeding to have the suit revived, and continued with an entire change of parties, both plaintiff and defendant. The proposed defendants resist the petitioner's effort to so proceed, and have filed a motion praying the court

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to deny the application to revive the cause, urging numerous objections thereto; the principal points being (1) that petitioner is barred by laches, and (2) that she can have no such substitution as she seeks.

It is not necessary to notice at length the first ground of objection, as it might be were the petitioner regularly in court and that defense presented as a bar to relief on the merits. The question of laches could hardly be relevant, except in the view that the petitioner was in default and appealing to the court for leave to come in as a matter of grace. The court would then be at liberty to scrutinize the proposed amended complaint for the purpose of ascertaining whether her cause of suit is stale, or the complaint destitute of equity, and, if found to be so, to deny her application upon that ground. But substitution or revivor is seldom denied, under the fifty-sixth and fiftyseventh rules in equity, if the party applying therefor shows any right to the order. There is no statute of limitations against such an application in the chancery courts of the United States; nor is the right to revive the suit governed by local state statutes. The right and the procedure seem to be governed entirely by the equity rules and the practice in the courts of the United States. In re Connaway, as Receiver of the Moscow National Bank, 178 U. S. 421, 433, 20 Sup. Ct. 951, 44 L. Ed. 1134; Dillard's Adm'r v. Central Virginia Iron Co. (C. C.) 125 Fed. 157, 159; Brown v. Fletcher (C. C.) 140 Fed. 639. Besides, as it relates to the question of substitution, the objection of laches does not appeal strongly for consideration in the absence of a statute, for it seems that the defendant was neglectful as well as the plaintiffs in not applying long ago for a dismissal of the suit for want of prosecution. Defendant certainly had the right to do so, for, as said by Mr. Justice Story, in Picquet v. Swan, 5 Mason, 561, Fed. Cas. No. 11,135:

"The general principle is perfectly well settled, that the defendant may have the bill of the plaintiff dismissed for nonprosecution, if the plaintiff does not proceed therein within a reasonable time."

That a suit in equity abates on the death of either party is so well understood that it is scarcely necessary to do more than state the proposition. The fifty-sixth equity rule, which, as has been seen, largely controls here, provides that:

"Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time," etc.

The effect of an abatement in equity does not, however, as in law, amount to a termination of the suit, but only to a suspension thereof for want of parties capable of proceeding with the cause. The result is a state of suspension, which may be lifted on the coming in of proper parties. Clarke v. Mathewson, 12 Pet. 164, 9 L. Ed. 1041. Where the suit has abated, then, the way to have it revived is pointed out in the fifty-sixth rule in equity, supra, and who are proper parties within the meaning of the rule is settled by the authorities. In Rose's work on Federal Procedure, § 960, the author says:

"Privity in law, and not merely in estate, is necessary. That is, it lies only where there is some one who represents the former party, such as an heir in the case of realty, or the executor in case of personalty, and not in favor of a devisee, purchaser, assignee, or other person having merely a privity of estate." Citing Judge Story in Slack v. Walcott, 3 Mason, 508, Fed. Cas. No. 12,932.

And in Brown v. Fletcher (C. C.) 140 Fed. 639, a case similar in many respects to the one at bar, Judge Swan says:

"In Dunn v Allen, 1 Vern. 426, it is said that an assignee or purchaser cannot have a bill of revivor for want of privity. So a devisee, being but a purchaser, and not representing the devisor, cannot have a bill of revivor for want of privity, but must have an original bill. Story v. Livingstone, 13 Pet. 365, 10 L. Ed. 200; Hinde's Practice, 49, 69; Russell v. Craig, 3 Bibb. 377; Peer v. Cookerow, 14 N. J. Eq. 361; Bowie v. Minter, 2 Ala. 406. In Lube's Eq. Pl. 140, it is said that only the heir, executor, or administrator of a deceased party, or the husband of a feme covert, can have a bill of revivor. See, also, Benson v. Wolverton, 16 N. J. Eq. 110; Slack v. Walcott, 3 Mason, 508, Fed. Cas. No. 12,932.

"If, therefore, Brown has, by assignment or devise, acquired the interest of the original complainant and his heirs and personal representatives, this suit cannot be revived, but he must file an original bill. This fact also authorizes the dismissal of the suit. Barribeau v. Brant, 17 How. 43, 15 L. Ed. 34; Campbell v. City of New York (C. C.) 35 Fed. 14."

This last case, it should be remarked, is one where the original complainant assigned all his right, title, and interest in the subject of the suit to the new complainant, and the latter had substitution as if the cause were one for revivor pure and simple. The court held that the suit could not be so continued. It was a case for a bill in the nature of a bill of revivor, and not for a bill of revivor. Where a privity of estate exists with the original party, arising after the commencement of suit by deed, such as assignee's, purchaser's, and devisee's, not constituting privity in law, but merely in estate, a bill in the nature of a bill of revivor will lie. The procedure is well recognized by authority. Says Mr. Justice Story, while sitting as Circuit Justice, in Slack v. Walcott, Fed. Cas. No. 12,932:

"When a party plaintiff claims a title by purchase or devise, he introduces a new title not previously in the case, and which is controvertible, not merely by the defendants in the bill, but also by the heirs at law. As to these parties the suit is original; it does not merely revive the old suit, but it states new supplementary matters calling for an answer. So far, then, as it states such matter, it is an original bill; and so far as it seeks to revive upon that matter, it is in the nature of a bill of revivor. The practice conforms to this view of the doctrine."

So, therefore, there is a remedy by revivor meeting the exigency in either case, whether there be a succession by privity of law or by privity of estate merely—the one by bill of revivor, and the other by bill in the nature of a bill of revivor. Beyond this, there is still another procedure for revivor, when both exigencies arise in the same suit, which is known as a "bill of revivor and supplement." 2 Bates on Federal Equity Procedure, 701. Speaking of this species of procedure, Rose, in his Code on Federal Procedure, vol. 1, p. 915, says:

"The authorities recognize the existence of bills of 'revivor and supplement,' and 'supplemental bills in the nature of bills of revivor,' but there seem to be few federal cases in which either of these phrases is used or their exact

significance discussed. The former is defined as a bill which revives a suit after abatement, and also supplies a defect arising since its institution. In other words, a bill of revivor and supplement is necessary when a suit has become both 'defective' and 'abated.'"

Now, in this case Wanna Stuart, the complainant in the proposed bill which is submitted for filing has succeeded by deed to the interest of William P. Miller, her father; and this occurred since the original suit was begun. She having so succeeded, the suit has become defective; that is to say, the interest of the original complainant has been acquired by another, and, under the well-established equitable practice, it becomes necessary for the successor to be substituted, to the end that the cause may be carried in litigation to its termination. That William P. Miller died subsequent to the transfer by him of his interest to Wanna Stuart can have no effect in this case. In other words, the cause would not abate by reason of that circumstance, because he had parted with his interest by deed prior to his death. This much as it relates to the complainant.

The defendant, Vallier Wattier, as is shown by the statement of the cause, died since the commencement thereof, and the defendants whom the petitioner, Wanna Stuart, seeks to have substituted for Wattier, are his heirs at law, and by reason of the death of Wattier the cause has abated as it respects the defendants. Hence we have the combination of a defective suit with one that has also abated, and the procedure by bill of revivor and supplement is the appropriate one for reviving the cause in either aspect. The bill prepared apparently states facts

showing both relations.

The petitioner, Wanna Stuart, will therefore be granted leave to file her bill, and the defendants may, of course, take such action against it as they may deem advisable.

In re SHIEBLER et al.

(District Court, E. D. New York. November 30, 1908.)

1. Bankbuptcy (§ 328*)—Claims—Effect of Surrender of Preference.

A claim against the estate of a bankrupt duly proved within the year allowed by Bankr. Act 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), may be increased after the expiration of that time where made necessary by a requirement that the creditor shall return preferences received as a condition to its allowance.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 328.*]

- 2. Bankbuptcy (§ 184*)—Liens—Validity—Nonfiled Chattel Mortgages.

 Under Laws N. Y. 1897, p. 536, c. 418, § 90, which as construed by the highest court of the state makes a chattel mortgage void as against general creditors unless filed as therein required, such a mortgage given by a bankrupt within four months prior to his bankruptcy, and when insolvent and known to be so by the creditor, and which was not filed until more than three months thereafter, is void as against the creditors in bankruptcy, either prior or subsequent, although it was taken for a present consideration and was valid when given.
 - [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. § 184.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. On report of special commissioner. See, also, 163 Fed. 545.

Lewis Squires, for trustee.

Thompson, Vanderpoel & Freedman, for Charles W. Osborne.

CHATFIELD, District Judge. On August 22, 1907, the abovenamed bankrupts filed a voluntary petition in bankruptcy in this court, under which a receiver was appointed and ultimately a trustee elected. Certain property, comprising a stock in trade, was sold and certain book accounts collected, and the proceeds from these matters are now in the hands of the trustee. The machinery, tools, etc., in the factory of the bankrupts were also sold under stipulation by the trustee, and the proceeds of that sale held subject to a determination as to the validity of the chattel mortgage, which will be referred to later.

The bankrupts had for a number of years borrowed money from Charles W. Osborne, the brother-in-law of George W. Shiebler. Osborne is a reputable business man of New York City, whose integrity is not questioned. These loans amounted to a large sum of money, and were secured from time to time by the assignment of book accounts, from the sales of merchandise, and for a considerable period these loans were repaid. In August, 1906, the method of making these loans was changed, and a list of merchandise entered in the books of the firm as assigned to Osborne, such assignment being contained in a writing at the foot of the list of merchandise. It was also stated that the assignment was made as collateral to a note. method of assignment was also extended, in the month of September, 1906, to cover the entire stock of merchandise then in the store, as collateral security for a note then made, but dated August 1, 1906. Subsequently, as sales of the merchandise were made and cash received, the sales and amount of cash were entered in the books, and from week to week the proceeds turned over to Osborne, until the 15th of August, 1907. At that time a number of credit sales were uncollected, and it is from these that the trustee has in part received the fund now in his hands. The trustee in bankruptcy has claimed not only that the funds in his hands (proceeds of the sale of the stock and these collections) are free from any lien or claim of title because of the assignment to Osborne, but also that the payments to Osborne from the sales of the merchandise above mentioned, within four months of the filing of the petition in bankruptcy, were preferential and must be repaid by him before any proof of claim can be presented on his behalf in the bankruptcy proceedings, under section 57g of the bankruptcy law. This matter was referred to the referee in bankruptcy as special commissioner, and he has made a report in which he finds that the assignments prior to August, 1906, while made in an unusual manner, were valid, and for a present consideration; that the assignment made in August, 1906, and the further note and assignment, or arrangement for collateral security, above mentioned, based upon the inventory taken in September, 1906, were invalid, this being conceded by the attorney for Osborne, and that any so-called assignments of accounts, as the goods contained in said inventory were sold

from time to time, were not for a present consideration, and in fact were not assignments at all. The referee has also found that Osborne knew of the financial condition of the bankrupts, and that, whether intentional or not, he must be legally held responsible for the reasonable effect of his knowledge of the bankrupt's condition, and, as a conclusion therefrom, that the payments to him within four months of the bankruptcy must be deemed preferential, especially in view of the fact that within those four months no further advances of cash were made by Osborne to the bankrupts. The commissioner has therefore directed that the preferential payments must be returned, and that Osborne's claim thereto, or to any proceeds of the stock or accounts for stock sold, must be dismissed. The present application is to confirm this report.

The attorneys for Osborne point out that before the amendment of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 560, 561 JU. S. Comp. St. 1901, p. 3443]), by chapter 487, Act Cong. Feb. 5, 1903, § 57g, 32 Stat. 799 (U. S. Comp. St. Supp. 1907, p. 1030), the statute required the return of preferential payments, under much broader conditions than after amendment. Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, determined the scope of section 57g before amendment, and it is apparent that under the present form of the law the requirements of section 60b and section 67e must be found present before payments within four months can be held to have been preferential, and necessarily to be returned before the creditor who received those payments can present his claim. The commissioner has expressly found that the Shieblers were insolvent throughout the entire period, that their liquidation was merely postponed by the payments of Osborne, and that his relations with the bankrupts and his knowledge of the facts were such that he should have anticipated the likelihood of their being thrown into bankruptcy at any time, and that he took the risk, at the time of making each advance, of having to face the filing of a petition in bankruptcy within four months of the payment. In other words, he has formed a decision based upon section 60b of the statute, but has quoted part of the language of section 60a.

There seems to be evidence to support these findings and conclusions of the commissioner. The testimony of the witnesses was heard by him. The responsibility for this finding, and the effect of the finding, cannot be shifted by any amount of argument or belief that Osborne did not intend to defraud other creditors, and it seems to the court that the report of the commissioner must be confirmed.

It is needless to add, but perhaps the matter should be disposed of at this time, that the proof of claim for money advanced by Osborne, now pending before the referee, the amount of which will be increased if the preferential payments are repaid to the trustee, is not, under the present circumstances, governed by the provisions of section 57n of the bankruptcy law.

As to the chattel mortgage, an entirely different situation arises. Having ceased to make advances on account of stock, upon the 1st of May, 1907, Osborne, in order to furnish money to the Shieblers for

the payment of wages and necessary running expenses at the factory, loaned \$5,000 in cash, for which he took back a chattel mortgage upon fixtures, tools, etc. This mortgage was for a present consideration, and when made was valid in every particular, but was not recorded in the office of the proper official of the county of Kings until the 10th day of August, 1907. At that time chapter 418, p. 536, Laws N. Y. 1897, was in force as follows:

"Sec. 90. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels * * * which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article."

The statute provides where the mortgage shall be filed, but not when. The commissioner has reported that, when the mortgage in question was made, Osborne must be held to have known the financial condition of the bankrupts, and while the delay in the filing of this chattel mortgage was occasioned by a desire to sell the factory, nevertheless the commissioner has found that the mortgage was not filed either immediately or within a reasonable time, and was therefore absolutely void against the creditors as a lien upon the articles covered by the mortgage. There has been no payment, and no question of preference arises except as the lien of the mortgage is claimed by the mortgagee.

The discussion of this question in Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, goes so fully into the numerous cases decided in the courts of the state of New York and of the United States that it is unnecessary to do more than refer to that opinion. This case also determines, so far as the highest court of the state of New York can, the question of the validity of a chattel mortgage lien, under the circumstances set forth in that case. The case of In re New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, was there distinguished, and the doctrine of Skilton v. Codington has been followed in the Matter of Gerstman & Bandman, 19 Am. Bankr. Rep. 145, 157 Fed. 549, 85 C. C. A. 211.

It will be observed that the case of Skilton v. Codington, supra, however, had to do with the question of a stock of goods, by the terms of the chattel mortgage expressly intended to be sold in the ordinary course of business, and thus brought within the category of many cases in which a chattel mortgage of this sort has been held void. This court has already made a distinction with reference to such matters, in the case of In re Davis (D. C.) 155 Fed. 671. And inasmuch as the chattel mortgage now under consideration was originally made for a present consideration, within four months of bankruptcy, and inasmuch as the filing of the chattel mortgage and the attempted acquisition of a lien thereby was also within the four months' period, this court has considered carefully the question whether the mortgage should be declared void on the ground of unreasonable delay in the filing thereof, or whether the whole transaction, including both the filing and the making, should be deemed presumptively preferential, and the matter referred back to the special commissioner for determination as to the good faith and propriety in the making of the loan by the mortgagee, and to ascertain whether any creditors became such or dealt with the bankrupts subsequent to the making of the chattel mortgage, and relying upon the possession of the assets by the bankrupt, with no mort-

gage on file.

The case, however, of Tooker v. Siegel-Cooper Co., 55 Misc. Rep. 68, 106 N. Y. Supp. 277, in the Supreme Court of New York, seems to answer the question raised, and to extend the doctrine of Skilton v. Codington, supra, to all chattel mortgages made under such circumstances, as to which there is an unreasonable delay in filing, without reference to whether the goods mortgaged were intended to be consumed or sold, or not.

It is difficult to apply this doctrine or to draw the line. To say that a chattel mortgage upon fixtures and tools, valid when made, and for full consideration, but as to which some unreasonable delay in filing inadvertently occurred, shall be absolutely void as against a prior creditor, who, for the sake of example, had not investigated the matter of his debtor's standing, nor even thought of collecting his debt, until the question is brought to his attention subsequent to the filing of the mortgage, seems to this court to be an exceedingly harsh proposition. But in the case under consideration, the commissioner having found that the parties were insolvent, and that their condition must have been known to both the mortgagor and the mortgagee, that the delay in filing the chattel mortgage, while honest in its purpose, was nevertheless during a period in which other creditors could have instituted proceedings in bankruptcy, and under circumstances out of which bankruptcy actually resulted in less than four months, the delay in filing such a chattel mortgage would seem to be inexcusable, unless done with the full responsibility therefor, including the probability that the mortgage would be declared void if any creditors' rights were affected thereby, whether they be creditors whose claims originated subsequent to the date of the making of the chattel mortgage or prior thereto.

For the reasons above stated, therefore, the report of the special

commissioner will be confirmed.

WEBSTER v. IOWA STATE TRAVELING MEN'S ASS'N. (Circuit Court, W. D. Missouri, W. D. January 25, 1904.)

No. 2,727.

1. Insurance (§ 26*)—Foreign Corporations—Actions Against—Service of Process.

To bind a foreign insurance company by service of process on the state superintendent of insurance, under Rev. St. Mo. 1899, § 7991 (Ann. St. 1906, p. 3799), it must appear that the company is within such statute by doing business in the state, or that it has been doing business in the state and still has policies or liabilities outstanding therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.*

Service of process on foreign insurance corporations, see notes to Eldred v. American Palace Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. Removal of Causes (§ 112*)—Proceedings After Removal—Motion to Quash Service.

A motion to vacate the service of summons may properly be presented to the federal court after removal of the cause, where defendant has appeared only for the purpose of such removal, whether specially so limited or not; and such motion must be determined on the facts appearing of record at the time of removal, which cannot be supplemented by evidence taken after removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 238; Dec. Dig. § 112.*]

On Motion to Set Aside Sheriff's Return of Service. Fyke Bros., Snider & Richardson, for plaintiff. Frank Hagerman, for defendant.

PHILIPS, District Judge. This is a motion to set aside the sheriff's return on the writ of summons issued herein. The suit is by the plaintiff, as the widow of Walter W. Webster, deceased, to recover on an accident policy issued by the defendant on the 20th day of March, 1899, to said deceased. There is nothing on the face of the petition to show either that the certificate of insurance sued on was a Missouri contract or at the time of the institution of suit that the defendant company was doing business in this state. Nor does the petition even disclose by its averments that the defendant is a non-resident corporation. The suit having been instituted in the circuit court of Jackson county, Mo., without more, it was presumptively brought in conformity with section 997 of the Revised Statutes of Missouri of 1899 (Ann. St. 1906, p. 878), which provides that:

"Suits against corporations shall be commenced either in the county where the cause of action accrued, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business."

The writ of summons would accordingly issue as prescribed in section 994 (page 876), and it would be served, as directed in section 995 (page 876) of the statute—

"on the president or other chief officer of such company, or, in his absence, by leaving a copy thereof at any business office of said company with the person having charge thereof; and if the corporation have no business office in the county where suit is brought, or if no person shall be found in charge thereof, and the president or chief officer cannot be found in such county, a summons shall be issued, directed to the sheriff of any county in this state where the president or chief officer of such company may reside or be found, or where any office or place of business may be kept of such company."

Instead, however, contrary to the statutory prescribed course, the writ of summons was directed to the sheriff of Cole county, Mo., commanding him "to summon Iowa State Traveling Men's Association if it be found in your county." Evidently neither the company nor any of its officers was found in Cole county; but the sheriff certifies that he served the writ in Cole county—

"upon the within-named defendant Iowa State Traveling Men's Association, on the 20th day of September, 1902, by delivering a true copy of this writ, together with a copy of the petition, * * * to Edward E. Yates, superin-

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tendent of the insurance department of the state of Missouri, he being the person authorized by law to acknowledge and receive, and upon whom to serve, process issuing out of the courts of the state of Missouri, for and in behalf of said defendant, under and by virtue of section 7991 of the Revised Statutes of Missouri" of 1899 (Ann. St. 1906, p. 3799).

This was a mere assumption of the sheriff, a mere conclusion of law, unauthorized by the command of the writ. Section 7991, referred to in the return, pertains solely to the service of process upon—

"any insurance company not incorporated by or organized under the laws of this state, desiring to transact any business by any agent or agents in this state."

Its first prescription is the requirement that such companies shall file with the superintendent of the insurance department a written instrument or power of attorney—

"appointing and authorizing said superintendent to acknowledge or receive service of process issued from any court of record," etc., "and upon whom such process may be served for and in behalf of such company, * * * and consenting that service of process upon said superintendent shall be taken and held to be as valid," etc.

The second provision of this statute is that service of process upon the superintendent shall be valid, etc.—

"so long as it shall have any policies or liabilities outstanding in this state, although such company may have withdrawn, been excluded from or ceased to do business in this state."

As there was nothing in the petition and nothing in the command of the writ to indicate that the situation of the defendant company subjected it to the operation of this statute, it was a bald assumption on the part of the sheriff to undertake to serve the writ upon the state superintendent of insurance. This statute contemplates a state of case where the nonresident insurance company is doing or has been doing business in the state in any event. No substituted service can be valid, unless bottomed on the fact that the company sought to be called into court has been doing business in the state; and until it has been doing business in the state, and maintains here an agent or officer in connection therewith, or has ceased to do business in the state and has policies or liabilities outstanding in this state, where it has withdrawn or been excluded from the state, can this statute be invoked to bring a nonresident corporation into court. If served on the state superintendent of insurance, it is upon the condition that the nonresident corporation was doing business in the state or had ceased to do business in the state. This is the clear import of the opinion of Mr. Justice Field in St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. See, also, Construction Company v. Fitzgerald, 137 U. S. 98, 106, 11 Sup. Ct. 36, 34 L. Ed. 608; Hazeltine v. Insurance Company (C. C.) 55 Fed. 743, 745; Modern Woodmen of America v. Noyes, 158 Ind. 503, 64 N. E. 21; Strain v. Chicago Portrait Company (C. C.) 126 Fed. 831.

This proposition I understand the learned counsel for the plaintiff does not controvert. Therefore he has taken the deposition of the secretary of the defendant company in Des Moines, Iowa, in the effort to

develop a state of facts aliunde from which the court might infer that at the time the writ was served on the state superintendent of insurance the defendant company was doing business in this state, but without attempting to show or claiming that the contract of insurance was made in this state. This deposition is objected to by the defendant as inadmissible on the hearing of this motion. The court is of opinion that the objection is well taken. The question raised by the motion to set aside the sheriff's return stands in the precise attitude of the record when the cause was removed by the defendant from the state court. The defendant in its petition for removal expressly stated that it appeared only for the purposes of the application. Even without such express limitation in the application for removal, the defendant did not waive the objection to the service of process. Western Railway Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. The motion to vacate the service of process was properly presented to this court after removal, and the only question presented by it is as to the jurisdiction of this court over the defendant. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. Such motion is predicated of the record just as it stood at the time of the removal. It is well settled that the record as it came from the state court, for the purpose of such motion, cannot be amended. It can neither be added to nor subtracted from in this court. The motion must rest upon the facts as they appear of record, which in this case is the petition and writ of summons and return thereon. The deposition taken by the plaintiff is, therefore, pertinent to no fact alleged in the petition or the return sought to be set aside. It is sought by it to bring in a fact in pais and dehors the record.

If the defendant were now to withdraw its motion and refuse to appear to the merits of the action, any judgment taken by the plaintiff on the record as it stands would be void. Mr. Justice Field, in

St. Clair v. Cox, supra, speaking to this question, said:

"In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the state when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the state court, gave no information on the subject. It did not, therefore, appear, even prima facie, that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded."

Without going further, and discussing other questions raised by defendant's counsel, it is sufficient to say that for the reasons above stated the court holds the service of summons to be bad, and the motion is sustained.

IVY v. WESTERN UNION TELEGRAPH CO.

(Circuit Court, E. D. Arkansas, W. D. November 6, 1908.)

No. 5,424.

CONSTITUTIONAL LAW (§ 243*) — EQUAL PROTECTION OF LAWS—CIVIL REMEDIES—LAWS AFFECTING TELEGRAPH COMPANIES.

Act Ark. March 7, 1903 (Acts 1903, p. 123, No. 68), Kirby's Dig. Ark. § 7947, providing that "all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages," is based upon a reasonable, and not an arbitrary, classification, and is not unconstitutional as depriving telegraph companies of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Dec. Dig. § 243.*]

2. COMMERCE (§ 59*)—REGULATION—METHOD—TELEGRAPHS AND TELEPHONES.

Nor is such statute unconstitutional as an interference with interstate commerce because it applies incidentally to contracts for the transmission of interstate messages.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 87; Dec. Dig. § 59.*

Measure of damages in action against telegraph and telephone companies, see notes to Western Union Telegraph Co. v. Coggin, 15 C. C. A. 235: Western Union Telegraph Co. v. Morris, 28 C. C. A. 59.]

3. STATES (§ 4*)—STATUS UNDER FEDERAL CONSTITUTION—POWER TO ENLARGE.

CIVIL REMEDIES.

There is nothing in the Constitution of the United States prohibiting a state from changing the common law by permitting the recovery of damages for injuries sustained, for which at common law there could be no recovery.

[Ed. Note.—For other cases, see States, Cent. Dig. § 2; Dec. Dig. § 4.*]

4. CONSTITUTIONAL LAW (§ 130*) — OBLIGATION OF CONTRACTS—FOREIGN CORPORATIONS—SUBJECTION TO LAWS GOVERNING DOMESTIC CORPORATIONS.

Under Const. Ark. art. 12, § 6, which provides that "corporations may be formed under general laws, which laws may from time to time be altered or repealed," and section 11, which provides that foreign corporations may be authorized to do business in the state under such limitations and restrictions as may be prescribed by law, and that "they shall be subject to the same regulations and liabilities as like corporations of the state, and shall exercise no other or greater powers, privileges, or franchises than may be exercised by like corporations of this state," a foreign corporation coming into the state to do business is subject to any change in the laws affecting such business which apply to all like corporations, both foreign and domestic, and such change is not an unconstitutional impairment of any contract between it and the state.

[Ed. Note.—For other cases, see Constitutional Law, €ent. Dig. § 301; Dec. Dig. § 130.*]

5. Corporations (§ 639*) — Foreign Corporations — Subjection to State Laws—Effect of Acceptance of Federal Statute.

The fact that a telegraph company has accepted Act Cong. July 24, 1866, c. 230, 14 Stat. 221 (Rev. St. § 5263 et seq.; U. S. Comp. St. 1901, p. 3579), does not affect its status as a foreign corporation doing business in another state.

fEd. Note.—For other cases, see Corporations, Dec. Dig. \$ 639.*!

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. On demurrer to answer.

This is an action to recover damages for a failure to deliver a telegraphic message sent on behalf of the plaintiff from Hot Springs, Ark., to a person at Terre Haute, Ind. In addition to the small sum of money claimed as actual damages for expenses incurred in sending the message and other incidentals, the plaintiff seeks to recover \$10,000 for mental anguish suffered by reason of the failure to deliver the message, the latter being claimed under the statute of the state of Arkansas approved March 7, 1903 (Acts 1903, p. 123, No. 68), which is as follows:

Kirby's Digest of the Revised Statutes of Arkansas, § 7947. "All telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages; and in all actions under this section the jury may award such damages as they may con-

clude resulted from the negligence of said telegraph company."

The answer of defendant, among other defenses, pleads in paragraphs 6, 7, 8, 9, and 10 that this act of the General Assembly of the state is unconstitutional. In paragraph 6 the act is attacked upon the ground that it does not distinguish between acts of telegraph companies that are a part of interstate commerce and those that are to be performed wholly within the state, and imposes upon that part of defendant's business which is strictly interstate commerce an oppressive burden. The plea sets up fully the fact that the defendant is engaged in intra as well as inter state commerce, and that the message for whose failure to deliver this action was instituted was an interstate

message.

The seventh and eighth paragraphs challenge the constitutionality of the act upon the ground that it is limited strictly to telegraph companies, and for this reason is in violation of the equal protection clause of the fourteenth amendment to the United States Constitution. The ninth paragraph claims that under the laws of the state of Arkansas, as enacted on March 31, 1885 (Acts 1885, p. 176), foreign telegraph companies were permitted to enter the state of Arkansas and do business therein upon certain terms and conditions; That at the time of the enactment of this law the Constitution of the state of Arkansas prescribed that foreign corporations could be permitted to do business in the state on such terms and conditions as the Legislature should prescribe, but that as to contracts made, or business done in this state, they should be subject to the requirements, limitations, and liabilities and entitled to like privileges of corporations of this state; that in pursuance of said invitation expressed by said state the defendant entered the state, expended large sums of money in establishing its business, and has at all times since then complied with the laws of the state until the enactment of the above act of 1903, known as the "Mental Anguish Act," and it is now claimed that the laws in force then constituted a contract with the state, and the enactment of this statute is an impairment of the obligations of this contract, in violation of section 10 of article 1 of the Constitution of the United States.

The tenth paragraph pleads the act of Congress authorizing telegraph com-

The tenth paragraph pleads the act of Congress authorizing telegraph companies to erect its line over the post roads in consideration of their agreement to serve the government in the manner prescribed in that act, and it is alleged that prior to the enactment of the mental anguish statute of the state of Arkansas this defendant had complied with the act of Congress, and for that reason the statute is void as against it. The plaintiff demurs to each of these para-

graphs.

Whipple & Whipple, for plaintiff. Rose, Hemingway, Cantrell & Loughborough, for defendant.

TRIEBER, District Judge (after stating the facts as above). The objections raised by paragraphs 7 and 8 are that the act under consideration, because it applied only to telegraph companies and not to other corporations, is class legislation and violative of the provisions of the fourteenth amendment. These objections are clearly

untenable, in view of the numerous decisions of the courts. Whatever doubt might have existed at one time on this question has been removed by a uniform line of decisions of all courts, and especially the Supreme Court of the United States. Cases directly in point are: Atchison, Topeka & Santa Fé Ry. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746; Fidelity, etc., Association v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821; Missouri, etc., Ry. Co. v. May, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971: Northwestern Life Ins. Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. Ed. 168; Bachtel v. Wilson, 204 U. S. 36, 27 Sup. Ct. 243, 51 L. Ed. 357; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195; Heath & Milligan Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236; Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551; Seaboard Air Line Ry. Co. v. Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108; and the following late decisions of the Supreme Court of the state of Arkansas: Union Sawmill Co. v. Felsenthal, 85 Ark. 346, 108 S. W. 217; Arkansas Insurance Company v. McManus, 110 S. W. 797; Ozan Lumber Co. v. Biddie (November 2, 1908), 113 S. W. 796. In Atchison, Topeka & Santa Fé R. R. Co. v. Matthews, an act of

In Atchison, Topeka & Santa Fé R. R. Co. v. Matthews, an act of Kansas provided for the recovery of attorney's fees in cases of a recovery against a railroad for a loss sustained by fires caused by the negligence of the railroad company. It was claimed in that case, as it is in the case at bar, that, as the act applied to railroads only, it was class legislation and therefore void. But the court, after a careful consideration of the former adjudications on this subject, in over-

ruling this contention said:

"It is the essence of a classification that upon the class are cast duties and burdens different from those resting on the general public. Thus, when the Legislature imposes on a railroad corporation the double liability for stock killed by passing trains, it says, in effect, that, if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the court under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damages which it has done but twice that amount. If it succeeds it recovers nothing. On the oher hand if it should sue an individual for destruction of its live stock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of rights in the courts, is of no significance on the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." 174 U. S. 106, 19 Sup. Ct. 613, 43 L. Ed. 909.

In the Mettler Case, the validity of a statute making life and health insurance companies (but none others) liable in case of a failure to pay a loss at maturity, in addition to the amount of the loss, of 12 per cent. damages and a reasonable attorney's fee, was questioned. It was claimed that the statute was unconstitutional as being class legislation, but was by the court overruled. The statute was sustained not

only on the ground that it was an amendment to the laws of Texas regulating corporations and permitting foreign companies to do business in the state, but also upon the distinct ground that it was a proper exercise of legislative discretion in classifying such companies. The Chief Justice, who delivered the opinion of the court, on that point said:

"If, however, notwithstanding the acceptance of these conditions, the constitutionality of the particular condition were nevertheless open to question, we must decline to sustain the objection. The reasoning in Railroad Company v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, applies rather than that in Railroad Company v. Ellis. The ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious, and we think that putting them in a different class for mutual benefit and relief associations, doing business through lodges, and benevolent associations of the character mentioned in the Texas statute, is not an arbitrary classification, but rests upon sufficient reason." 185 U. S. 326, 22 Sup. Ct. 669, 46 L. Ed. 922.

In the Riggs Case, a statute of Missouri cut off any defense by a life insurance company based upon false and fraudulent representations in the application, unless the matter actually contributed to the death of the insured. This statute was held to be not such class legislation as to be within the prohibition of the fourteenth amendment. Mr. Justice Harlan, who delivered the opinion of the court, said on that point:

"As the present statute is applicable alike to all life insurance companies doing business in Missouri, after its enactment, there is no reason for saying that it denies the equal protection of the laws." 203 U. S. 255, 27 Sup. Ct. 129, 51 L. Ed. 168.

In Bachtel v. Wilson the court on that point say:

"The selection, in order to become obnoxious to the fourteenth amendment, must be arbitrary and unreasonable, not merely possibly, but clearly and actually so." 204 U. S. 41, 27 Sup. Ct. 245, 51 L. Ed. 357.

In Heath & Milligan Co. v. Worst the court on that subject say:

"We will omit from citation the cases in which this court has passed upon the power of the states to classify objects for the purpose of government. A review of them is not necessary in this case. Counsel have collected and an alyzed them, applied and rejected them, as they have thought they supported or opposed their respective contentions. We have declared many times, and illustrated the declaration, that classification must have relation to the purpose of the Legislature. The logical appropriateness of the inclusion or exclusion of objects or persons is not required. The classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it results in 'ill-advised, unequal, and oppressive legislation.'" 207 U. S. 354, 28 Sup. Ct. 119, 52 L. Ed. 236.

In Seaboard Air Line R. R. Co. v. Seegers, a statute of South Carolina, which provided for a penalty of \$50 for failure to pay for loss or damage of property while in the possession of a common carrier within a certain time, was attacked upon the same ground, and Mr. Justice Brewer, in overruling this contention, and holding the statute constitutional, said:

"It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others,

and imposes a not exorbitant penalty for failure to perform that duty within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification. While in this case the penalty may be large, as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this. If a large amount is in controversy, the plaintiff can afford to litigate." 207 U. S. 78, 28 Sup. Ct. 30, 52 L. Ed. 108.

In Ozan Lumber Co. v. Union County Bank a statute of Arkansas which exempted dealers from the provisions of an act in relation to notes executed for patented articles was attacked as an unjust and unconstitutional classification, but by the court overruled, the court saying:

"In a classification for governmental purposes, there cannot be an exact exclusion or inclusion of persons and things."

The question, therefore, which controls the constitutionality of this act upon that point is whether the classification is purely arbitrary. Is there no substantial foundation or basis therefor? This must be answered that there is a substantial foundation for the classification. The act applies to all telegraph companies doing business in this state, whether foreign or domestic. The transmission of messages by telegraph differs materially from all others. It enables persons to communicate with others at a very great distance, in a very short time, while communications by mail or other means may take days, even weeks. In cases of serious illness or death, the near relatives may be advised or summoned almost instantly. It is for this reason that persons are willing to pay the high toll, as compared with cost of the mails. It would be impossible for the Legislature to put any other persons or corporations in the same class, except it be telephone companies. The classification is based solely on the nature of the business, which is of a public character, and for this reason is clearly within the rule laid down in the cases hereinbefore cited and many others.

Is the statute unconstitutional for the reason that it is an interference with, and places burdens on, interstate commerce, as claimed in paragraph 6 of the answer? That the language of the statute is broad enough to apply to interstate messages is beyond question, and has been so construed by the Supreme Court of the State. Western Union Telegraph Co. v. Ford, 77 Ark. 531, 92 S. W. 528; Gentle v. Western Union Telegraph Co., 82 Ark. 96, 100 S. W. 742.

This action is based upon a message sent from this state addressed and to be delivered in another state. Is that fatal? That an action for the recovery of actual damages sustained by the sender or addressee of the telegram, by reason of the negligence of the company to transmit or deliver the same after it had, for a valuable consideration, contracted to do so, will lie at common law regardless of the fact whether it is an inter or intra state message, no one will dispute. It is well settled that a contract of affreightment for the carriage of goods from one state or country to another is governed by the laws of the state or country in which it is made.

In Liverpool, etc., v. Phenix Insurance Co., 129 U. S. 453, 9 Sup. Ct. 476, 32 L. Ed. 788, it was said:

"This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed, and acted on the general rule, that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting party clearly appear to have had some other law in view."

And this rule has been applied to contracts for telegraph messages. Reed v. Western Union Telegraph Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; Wharton on Confl. of Laws, § 471f. For this reason, were this an action to recover actual damages, or if the statutes of Arkansas only permitted the recovery of such damages, the fact that they applied to inter as well as intra state messages would not affect their validity as an unlawful burden on interstate commerce. Damages for injuries to feelings, or mental anguish unattended by physical injury, could not be recovered at common law, as decided by the Supreme Court of Arkansas in Peav v. Western Union Telegraph Co., 64 Ark, 538, 43 S. W. 965, 39 L. R. A. 463. As in most instances the failure to transmit or deliver a telegraphic message causes only mental suffering, unattended by physical injury, the Legislature of the state has seen proper to change the common-law rule and permit the recovery of such damages. The act attacked is not intended to inflict a penalty, as was the case under the statute of Indiana, involved in Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, and for that reason that case is not applicable. An earlier statute of this state enacted March 31, 1885, provides for a penalty for a refusal of a telegraph or telephone company to transmit messages. That statute is digested as section 7946, Kirby's Dig. Stat. Ark. The plain object of the act now under consideration is to permit the recovery of damages for the negligent breach of a contract to safely transmit and properly deliver the message, which at common law it had been held by the highest court of the state could not be recovered. The statute now under consideration, in the language of the Supreme Court in St. Louis & San Francisco R. R. Co. v. Mathews-

"is not a penal one, imposing punishment for violation of law, but it is purely remedial, making the party doing a lawful act for its own profit liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered." 165 U. S. 1, 27, 17 Sup. Ct. 243, 253, 41 L. Ed. 611.

There is nothing in the fourteenth amendment, nor in any other provision of the Constitution of the United States, prohibiting the state from changing the common law in permitting the recovery of damages for injuries sustained for which at common law none could be recovered. Wilmington Mining Co. v. Fulton, 205 U. S. 60, 74, 27 Sup. Ct. 412, 417, 51 L. Ed. 708. In that case the court said:

"And even although the liability imposed upon the mine owners to respond in damages for the willful failure of the mine manager and mine examiner to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant, it being competent for the state to change and modify those principles in accord with its conceptions of public policy, we cannot infer that the selection of mine owners as a class upon which to impose the liability in question was purely arbitrary and without reason."

That the statute incidentally affects interstate transactions does not make it unconstitutional, for it is hard to imagine any law affecting contracts for the carriage of goods or passengers, or telegraphic messages, which may not in some way incidentally have that effect. Among the many decisions sustaining such acts are: Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Railway Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; Chicago, etc., R. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688.

Cases sustaining the power of the state to regulate the relation of master and servant by extending the liability of the master to injuries for which he was not liable at common law, although incidentally these acts may affect interstate commerce, are Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; Missouri Pacific R. R. Co. v. Mackey, 127 U. S. 210, 8 Sup. Ct. 1161, 32 L. Ed. 107; Minneapolis, etc., R. R. Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; Chicago, etc., R. R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; Tullis v. Erie Ry. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Peirce v. Van Dusen, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705; and inferentially the Employer's Liability Cases, 207 U. S. 463, 496, 28 Sup. Ct. 141, 52 L. Ed. 297. And this rule has been applied to telegraph companies. Western Union Tel. Co. v. James, 162 U. S. 650, 661, 16 Sup. Ct. 934, 40 L. Ed. 1105; Gray v. Telegraph Co., 108 Tenn. 47, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706.

Did the fact that the telegraph company entered the state and constructed its lines before the enactment of this statute prevent the state from enacting a law changing the liability of such corporations? Is such an act of the state an impairment of the obligation of a contract, and therefore in violation of section 10, article 1, of the national Constitution? Counsel for the defendant did not very earestly insist upon this point, and for this reason the court would probably be justified in treating it as abandoned, but as this is not a court of last resort it is deemed best to dispose of it now. Assuming that when a foreign corporation, by permission of the state, as evidenced by its legislative acts, enters it for the purpose of engaging in business therein, it is such a contract as will be protected by that provision of the Constitution, it must be conceded that the contract would be subject to the Constitution of that state then in force, and if the acts of the legislature are in conflict with the Constitution they are void; therefore, if, as this defendant claims, when it entered this state under the provisions of the act of the Legislature of March 31, 1885 (Acts 1885, p. 176), regulating the admission of foreign telegraph companies into this state, it thereby entered into a contract with the state, then every part of that legislative contract was subject to the Constitution then in force, and if it conflicted therewith it is, to the extent of such conflict, unconstitutional. The Constitution of the state of Arkansas in force since 1874, and still in force, provides:

"Art. 12, § 6. Corporations may be formed under general laws, which laws, may, from time to time, be altered or repealed."

And section 11 of that article:

"Foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law. * * * They shall be subject to the same regulations, limitations and liabilities, as like corporations of this state, and shall exercise no other or greater powers, privileges, or franchises than may be exercised by like corporations of this state."

Therefore, when the defendant came into this state, it did so subject to the same regulations, limitations, and liabilities as domestic corporations, and, as the power to amend the corporation laws was expressly reserved by the state, defendant was subject to such changes as the Legislature might make, provided no greater burdens were placed on foreign corporations than on like corporations created under the laws of the state. That such legislation is discretionary was expressly decided in Fidelity, etc., Co. v. Mettler, supra, and that it may be done under the Constitution of this state was decided by the Supreme Court of Arkansas in Woodson v. State, 69 Ark. 521, 65 S. W. 465, and Ozan Lumber Co. v. Biddie, supra. In the Mettler Case the court said:

"The power of the state in the matter of the imposition of conditions on its own and foreign corporations has been repeatedly recognized by this court."

If the statute in question applied only to foreign corporations, exempting domestic telegraph companies from the liabilities imposed by it, then it would probably come within the principle established in American Smelting Co. v. Colorado, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393.

By referring to the Revised Statutes of this state (Kirby's Digest), it will be noticed that this act is a part of chapter 151, the title of which treats of "Telegraph and Telephone Companies"; the same chapter, of which the act of 1885 pleaded by the defense is a part; the chapter which, in effect, covers all the laws of the state on the subject of the title.

As to the plea set up in the tenth paragraph, that the defendant had complied with the act of Congress of July 24, 1866, c. 230, 14 Stat. 221 (U. S. Comp. St. 1901, p. 3579) relating to telegraph companies, it is deemed sufficient to refer to Western Union Telegraph Co. v. Pennsylvania R. R. Co., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, and 195 U. S. 595, 25 Sup. Ct. 150, 49 L. Ed. 332.

The demurrer to each of the paragraphs in the answer will be sustained.

COSTELLO v. FERRARINI et al.

(Circuit Court, D. Massachusetts. June 8, 1908.)

No. 112.

1. Exceptions, Bill of (§ 50*)-Presentation for Allowance.

Where a draft of a bill of exceptions is presented to the trial judge for allowance within the time prescribed by rule 17 of the Circuit Court, it is immaterial whether it is so presented by the party, his counsel, or the clerk of the court, although it is doubtful if any duty to present it rests upon the clerk merely because it is filed.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 50.*]

2. Exceptions, Bill of (§ 41*)—Presentation for Allowance—Time for Allowance.

An order, entered by a Circuit Court at the end of a term, that "all things not acted on stand continued," reserves the court's control over a draft bill of exceptions, which has been presented for allowance, but not acted on, and the same may be allowed at the succeeding term.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 65, 66; Dec. Dig. § 41.*]

On motion for Allowance of Bill of Exceptions.

S. A. Fuller and Charles Toye, for plaintiff. Warren, Perry & Codman, for defendants.

BROWN, District Judge. After the direction of a verdict for the defendant, and within seven days therefrom, the plaintiff filed in the clerk's office a draft bill of exceptions, which bears file mark "March 15, 1906." The clerk presented this draft bill to the trial judge, who made thereon and signed the following indorsement: "Presented for allowance March 16, 1906."

Whether the mere filing of a bill of exceptions in the clerk's office is a compliance with rule 17 of the Circuit Court we need not consider, for in this case the draft bill of exceptions, containing a written request for its allowance, was seasonably brought to the attention of the trial judge. It is immaterial whether the draft bill came to the judge from the hand of the plaintiff, his attorney, or a messenger. If, through the plaintiff's good fortune, the clerk voluntarily became his messenger, and brought the draft bill to the judge's attention, the plaintiff came fully within the requirements of rule 17. It may be well, however, to suggest that it is exceedingly doubtful if any obligation is placed upon the clerk of the court to present bills of exceptions filed with him to the trial judge. It is the duty of counsel to see that this is done, and reliance upon the clerk to perform this duty for them involves serious risk of noncompliance with the rule.

The defendant contends that this draft bill of exceptions should be now disallowed for the reason that it was not allowed by the trial judge before the expiration of the trial term, and for the further reason that no specific order continuing the time for allowance was entered during the term. It is contended that the court is now without power over the matter. The case of Michigan Insurance Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162, is said by de-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant to contain the best recent statement of the rule applicable. I am of the opinion, however, that this case is not controlling under the present facts. It was said:

"After the term has expired without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend the bill of exceptions already allowed and filed, is at an end. * * *"

Upon the presentment to the trial judge of the draft bill of exceptions for allowance, it is usual to give notice to the prevailing party, in order that he may offer objections and amendments thereto. It is the usual practice to require the petitioner to submit his draft, and, if an agreement cannot be had, to set the matter down for hearing for settlement of the bill of exceptions. It was agreed at the hearing that attempts were made by the parties in this case to agree upon a bill of exceptions, and that different drafts were submitted by counsel to each other. The dates at which this was done do not appear, and I am therefore unable to determine with what degree of diligence counsel on either side have proceeded towards the settlement of a bill of exceptions.

In contending that the court has now lost control of the matter, defendants' counsel have overlooked the fact that by a general order, entered at the conclusion of the trial term and of each term thereafter, it was:

"Ordered by the court that all things not acted on stand continued, and that judgment be rendered on all verdicts, nonsuits, and defaults where judgments have not been previously rendered, and that the court be adjourned without day; and the court is accordingly adjourned."

The consideration of a proposed bill of exceptions and objections thereto is often a matter requiring long and laborious examination of many details. It is quite as necessary that matters of this kind should be continued from term to term as that the ordinary case under consideration by the court be continued. In my opinion it is the purpose of the entry of the general order at the end of the term to continue applications for the enlargement of the record by bill of exceptions, as well as other matters, and that the court's control over this matter has been expressly reserved. The general direction for the entry of judgments contained in this order has not been considered applicable in cases in which motions for the allowance of a bill of exceptions have been duly presented to the judge.

Rule 17 of the Circuit Court, unlike the rules relating to exceptions in some other circuits, is confined merely to the matter of presentment for allowance, and does not limit the time for allowances. Such a rule, in conjunction with a general order continuing all matters not acted on, does not seem unjust to the opposite party. If there is undue delay, he may move for judgment, or by motion procure a day certain for action.

This case was set down for hearing both upon the plaintiff's motion for the allowance of his bill of exceptions and upon the motion to dismiss, and the court reserved the consideration of the motion to allow until after disposing of the motion to dismiss, and further hearing

will be necessary as to the allowance of the draft bill of exceptions. Counsel for defendants may, within 12 days from the date of the entry of this order, file objections and propose amendments to the draft bill.

Motion to dismiss denied.

RUPRECHT v. DELACAMP et al.

(District Court, S. D. New York. November 25, 1908.)

1. Shipping (§ 43*)—Charter Party—Right to Cancel—Ready for Loading "by" a Date Stated.

A provision of a charter party giving the charterer the option to cancel if the vessel was not "ready for loading by November 20, 1903, at Yokohama," required her to be ready on or before that date, and the charterer was not entitled to cancel because she was not ready at the beginning of the day, where she was a few hours later.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. 166 Dec. Dig. 43.*

For other definitions, see Words and Phrases, vol. 1, pp. 929-932.]

2. Shipping (§ 43*) — Charter Party—Right to Cancel—Vessel "Ready for Loading."

A sailing ship was ready to load on the date required by her charter, except for the fact that she had taken in a quantity of mud ballast which would require to be removed before one of the hatches could be used. Ballast of some kind was necessary to stiffen the ship and render her seaworthy after removal of her prior cargo, and the master had applied to the charterers to know the character of her next cargo, but had not been informed, and had put in the mud ballast temporarily. Held that, the same being necessary, its presence did not prevent her from being "ready for loading," nor entitle the charterers to cancel.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. 165; Dec. Dig. 43.*

For other definitions, see Words and Phrases, vol. 7, p. 5935.

Cancellation, surrender, or rescission of charter of vessel, see note to McNear v. Leblond, 61 C. C. A. 569.]

In Admiralty.

Convers & Kirlin (J. Parker Kirlin, of counsel), for libelant. Robinson, Biddle & Benedict (Edward Grenville Benedict, of counsel), for respondents.

HOLT, District Judge. This suit was brought to recover the sum of \$5,000, as liquidated damages for the breach of a charter party. The libelant chartered the ship Lawhill to the respondents. The charter contained a clause providing that the charterers should have the option of canceling the charter party if the vessel was not "ready for loading by November 20, 1903, at Yokohama." On the morning of November 20th the charterers gave notice that they canceled the charter on the ground that she was not ready for loading by November 20th. Thereafter, on November 28, 1903, a supplementary agreement was entered into, by which the respondents agreed to load the vessel under the terms of the original charter at a reduction of \$5,000 in the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

freight, without prejudice to the subsequent determination of the question whether the charterers were justified in canceling the charter.

This suit was brought to determine that question.

The Lawhill was not ready for loading on November 20th at the beginning of the working day. The cargo was not entirely out until shortly before noon. The respondents claim that it was necessary that she should be ready for loading at the beginning of November 20th, and that the clause of the charter party allowing the charterers to have the option of canceling the charter "if vessel is not ready for loading by November 20" required that the vessel should be ready for loading before November 20th. I think that the expression "by November 20" means on or before that date. That is a common meaning of the word "by" as shown in the definitions in the dictionaries, and has been so construed in many cases. Oxley v. Bridge, Doug. 67; Coonley v. Anderson, 1 Hill (N. Y.) 519; Ferguson v. Coleman, 3 Rich. Law (S. C.) 99, 45 Am. Dec. 761.

The principal ground, however, upon which the respondent claims that it had a right to cancel the charter is that the vessel was not "ready for loading by November 20 at Yokohama," because at that time she had taken on board a lot of mud ballast, which occupied a portion of the hold. The evidence shows that a sailing vessel like the Lawhill requires some ballast in her when all the cargo is taken out, otherwise she is in danger of capsizing, and is not seaworthy. Usually, on voyages from Japan, sufficient mineral ore or other heavy freight is shipped to serve the purpose of ballast, and it is customary, before the outgoing cargo is entirely discharged, to put in the hold sufficient of the new cargo to keep the ship properly stiffened. Several days before November 20th the captain of the Lawhill applied to the charterers at Yokohama to know what kind of a cargo was to be furnished, but received no information. Thereupon the captain took on board what is called "mud ballast," about 300 tons of clay, which was placed in the hold, near No. 2 hatch, in a pile about 30 by 20 feet square and rising up about 17 or 18 feet, and thereupon the cargo was all taken out and the vessel ready for reloading by about noon on the 20th. The respondents insist that while this mud ballast was in the ship the vessel was not completely "ready to load" in all her holds. There is no doubt that the right of cancellation is stricti juris, and that, as a general rule, a vessel is not ready to load, within the meaning of such a clause, unless her cargo is completely discharged and she is ready for loading in all her holds, so that the charterer has complete control of every portion of the ship available for cargo. But to this general rule there is an exception, that the presence of stiffening ballast sufficient to keep the vessel upright does not prevent her from being ready. Carver on Carriage by Sea (5th Ed.) § 221; Vaughan v. Campbell, 2 T. L. R. 33. The respondents claim that, instead of mud ballast, shingle or stone ballast should have been taken in, and refer to a clause of the charter which provides:

"Cargo not to exceed what the vessel can reasonably stow and carry over and above her tackles, provisions and furniture, and the necessary dry shingle ballast, dunnage and matting which are to be provided by the master."

If dry shingle or stone ballast is placed in the bottom of a ship, cargo can be put upon it, but it cannot be placed upon mud ballast. Mud ballast, as I understand the evidence, is always a mere temporary ballast to stiffen the ship. If heavy merchandise is carried, it in itself constitutes ballast. If light merchandise is carried, stone ballast is taken in and the merchandise put upon it. In this case, freights had gone down, and the respondents were therefore anxious to cancel the charter party. They declined to say what kind of a cargo they wished to ship. They had a strict right to do so, but their position was very technical. The master was bound to tender the ship on the day designated. But I do not think he was bound to put in stone ballast, which is more expensive than mud ballast, so long as the charterers refused to tell him what kind of a cargo they proposed to ship. If they should afterwards decide to ship mineral ore, the stone ballast would all have to come out, for the charterer is entitled to the entire carrying capacity of the ship if he wishes to ship a kind of cargo which will dispense with the use of ballast. I think, under these circumstances, that the master, in order to make a formal tender of the ship, was entitled to use the cheapest kind of stiffening ballast that he could get. The respondents claim that the fact that the captain ordered 600 tons of stone ballast on November 18th shows that he recognized his obligation to furnish shingle ballast, and that his failure to obtain the entire 600 tons and put it in the ship on the 20th shows that the ship was not ready for delivery on that day. But I think that that fact is immaterial. The respondents had taken a very technical position. They wanted to cancel the charter party because freights had fallen. The captain wanted to hold them to their contract for the same reason. Each was standing on his technical rights. Under such circumstances, I think that the intentions of the captain in regard to the ultimate use of stone ballast are immaterial. He tendered the ship, ready to load in all her holds, except that portion of the ship's space which was occupied by stiffening ballast, and I think such a tender was sufficient.

My conclusion is that the libelant should recover \$5,000, interest and costs, as demanded in the libel.

In re BERMAN.

'District Court, E. D. Pennsylvania. December 3, 1908.)

No. 2,431.

1. BANKRUPTCY (§ 136*)—SUMMABY PROCEEDING AGAINST BANKRUPT—ORDER TO SURRENDER PROPERTY.

Evidence held insufficient to warrant a summary order requiring a bankrupt to pay over money to his trustee under the rule that such an order should not be made unless the bankrupt's ability to comply therewith is plainly and affirmatively shown.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

2. Bankruptcy (§ 399*)—Rights of Bankrupt-Exemptions.

That a bankrupt squandered money in gambling and other wasteful practices does not establish fraud which will deprive him of the right to his exemption under the law of Pennsylvania.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

In Bankruptcy. On certificate from referee.

Owen J. Roberts, for trustee.

Preston K. Erdman, for bankrupt.

J. B. McPHERSON, District Judge. It is certainly true that the bankrupt has failed to account satisfactorily for all the money and other property that came into his hands during the period from, say, September 1, 1905, to the date of his bankruptcy in January, 1906. How large the discrepancy is, cannot be ascertained with accuracy, owing in part to the loose methods of bookkeeping that prevailed in his business, and in part to the inadequacy of the testimony; but that an unexplained discrepancy to some extent exists is not denied. It is not necessary to make the effort to approximate it, however; for, in obedience to the decisions in Trust Co. v. Wallis, 11 Am. Bankr. Rep. 360, 126 Fed. 464, 61 C. C. A. 342, and Samel v. Dodd, 16 Am. Bankr. Rep. 163, 142 Fed. 68, 73 C. C. A. 254, I am constrained to deny the trustee's application for an order upon the bankrupt to pay over. No doubt these cases set up a high standard of proof, to which it is very difficult for creditors to conform when they seek to obtain an order directing a bankrupt to hand over money or property that he appears to have had shortly before his failure, but, as long as the rules announced by these appellate tribunals remain unmodified, it is my duty to apply them.

The attack upon the bankrupt's exemption is supported by the same considerations as enforce the motion for an order to pay over, and is

evidently expected to meet the same fate.

The action of the referee in refusing both motions is therefore af-

^{*}For other cases see same topic & \(\) NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CITY OF OWENSBORO, KY., v. WESTINGHOUSE, CHURCH, KERR & CO.

(Circuit Court of Appeals, Sixth Circuit. November 27, 1908.)

No. 1801.

1. JUDGMENT (§ 704*)—CONCLUSIVENESS OF ADJUDICATION—PERSONS CONCLUDED—CODEFENDANTS.

Where joint defendants appeared by different attorneys, made separate answers and defenses, and separate judgments were rendered as to each, there being no cross-pleadings or issues between them, neither a judgment against the one nor in favor of the other in said action created any estoppel as between them which affected a subsequent action by the one against which judgment was rendered to recover the amount of the same from the other as primarily liable therefor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1229; Dec. Dig. § 704.*]

2. Compromise and Settlement (§ 11*)—Construction of Agreement.

An agreement between a city and a contractor for constructing an electric light plant for the city, who were joint defendants in an action for damages alleged to have resulted from the negligent construction or operation of such plant, recited that it was for the purpose of compromising and settling all matters of difference between the parties, among which was the question which, if either, was ultimately liable for such damages, and provided that in case of a judgment against the city it might maintain an action over against the contractor, but that if required by the contractor it should appeal from such judgment and should not have the right to sue the contractor unless the same should be affirmed. Held, that the effect of such agreement was not merely to authorize the city to sue the contractor, which right it already had, but that when fairly construed it acknowledged the liability of the company for any judgment which should be finally recovered against the city.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 51; Dec. Dig. § 11.*]

3. ACTION (§ 27*)-NATURE AND FORM-CONTRACT OR TORT.

Defendant contracted to construct an electric light plant for plaintiff city "in a workmanlike, safe and skillful manner." After the plant was in operation a boy was killed as the result of the defective insulation of a wire, and a judgment therefor was recovered against the city. Held, that an action by the city to recover the amount of such judgment from defendant was not one sounding in tort for negligence, but was one for breach of the contract in consequence of which the city had suffered damages, and that the fact that the city was operating the plant at the time of the injury would not preclude a recovery, provided it was itself without fault.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 160–176; Dec. Dig. \S 27.*]

4. Indemnity (§ 14*)—Conclusiveness of Judgment Against Indemnitee.

To such an action the negligence of the boy contributing to his own injury would not constitute a defense, in the absence of any claim that the city had in bad faith failed to present that defense in the action against it.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. § 14.*]

5. Trial (§ 207*)—Instructions to Jury—Purpose and Effect of Evidence.

Where in such action plaintiff introduced in evidence the record in the damage suit to show the amount of damages it had sustained by reason of defendant's breach of contract, and which also showed that a

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—25

verdict had been returned and judgment rendered against it and in favor of defendant, who was a codefendant in such suit, it was prejudicial error to charge the jury that they might consider such record generally and give the facts therein shown such weight as they thought them entitled to.

[Ed. Note.—For other cases, see Trial, Cent. Dig. $\$ 498; Dec. Dig. $\$ 207.*]

In Error to the Circuit Court of the United States for the Western District of Kentucky.

R. W. Slack, for plaintiff in error. Helm Bruce, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. On July 25, 1900, the City of Owensboro, Ky., having resolved to itself supply electric light to the city and its citizens, entered into a contract with the defendant in error whereby the latter should for the consideration of \$43,700 furnish satisfactory plans and specifications for a system of structures and apparatus for that purpose, and should thereupon erect and equip the same for service in the city. And, in terms, the said defendant company undertook as follows:

"That the said company doth hereby for itself, its successors and assigns, covenant, promise and agree to and with the corporation, its successors and assigns, that the said company, its successors and assigns, will, for the consideration hereinafter mentioned, fully execute and faithfully perform in a good workmanlike manner, all the work required and furnish all the material and machines, which material and machines are warranted to be of good quality and in every respect suitable for the purpose intended, necessary in the erection and installation of the said electric light plant in accordance with the plans, drawings and specifications prepared for said work, which plans, drawings and specifications are hereto attached and which are identified by the signatures of the parties hereto, and are hereby incorporated in and made parts of this contract; and that said company shall find and provide such plant, labor, tools, implements, cartage and materials as shall be proper for the execution, completing and finishing of the contract, and that it will deliver the said electric light plant as aforesaid within the period of one hundred and fifty days from the date hereof and on or before the 25th day of December, next, provided the building to be erected by the corporation for the boilers, engines, etc., is so far completed as to enable the company to put in said boilers, engines, machinery, etc., within sixty days from this date, and the company shall have the right to take persections from this date; and the company shall have the right to take possession of said building when the same is so far completed as aforesaid."

When the time arrived for the completion of the work, it was not yet finished, and the city was allowed to take partial possession, the extent of which is not clearly shown and has been the subject of controversy. For the present purpose we need not go into the particulars of it. On May 15, 1901, James P. York, a lad 12 years of age, while playing at the intersection of two streets in the city, laid hold of the end of a suspension wire hanging down by the side of a pole and by which an arc lamp at that place was lowered and raised again to its place. As he laid hold of the wire he received an electrical current

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of great violence, which caused his death. It was found that the cause of the accident was the coming into contact of the suspension wire with the wire carrying the current at that place, and that it happened in consequence of the neglect to put a brake arm or some such device to carry a loop to effect the insulation of the current wire from

the guy wires and suspension wire.

An administrator of the estate of the deceased boy was appointed and brought suit, under a statute of Kentucky, in the circuit court of the state for that county, against both the city and the company, alleging their joint occupation of the electrical system in the city and their joint negligence. Each defendant filed a separate answer, each denied that they had jointly occupied, and each insisted that the other was in the occupation, and, further, each denied that there had been negligence on its part. Both averred contributory negligence on the part of the boy. The case was tried before a jury, which rendered a verdict against the city alone for \$5,000. A judgment was rendered against the city, and another judgment was rendered in favor of the company and for its costs. While that suit was pending another action against the city in the same court was brought by one Knox to recover damages for similar negligence in another part of the system, and the city had notified the company and required it to make defense. Thereupon, on November 6, 1901, the city and the company entered into a written agreement, wherein, after reciting that various matters were in dispute between them which they had compromised, it was among other things agreed:

"Third: That whereas there are now three law suits pending and undecided in the Daviess circuit court for the recovery of damages for alleged injuries, one of Ware's Admr. v. Cumberland Telephone & Telegraph Company and another one of York's Adm'r. against the city and said company and one of Herbert Lee Knox against the city, and it is claimed by the city that as between it and the said company the said company is ultimately liable for the amount of any and all judgments, together with interest and costs, that may be recovered in said suits, or any of them, and this claim of the city

is denied by said company.

"Now, it is agreed between said city and said company, that if judgment shall be recovered in any of said suits against the city of Owensboro, and said company shall not pay or settle the same when requested so to do by the city, and the said city shall desire to commence and prosecute a suit, or any suits against said company for the recovery of any sum or amount for which any judgment, or judgments, may be obtained in said actions above mentioned, the said city may commence and prosecute any suits, or actions it may deem necessary for the recovery thereof, or about said matters, in the Daviess circuit court, in the state of Kentucky. * * * The right of said company to transfer any suits or actions that may be brought by said city, as hereinbefore mentioned, into the United States Circuit Court, for the Western District of Kentucky, within the time, and in the mode prescribed by law, is reserved by said company. If any judgments shall be recovered in any of said suits for damages, above mentioned, against the city of Owensboro in said Daviess circuit court, the said company shall have the right to require said city by giving to it written notice to that effect, to prosecute an appeal to the court of appeals from such judgment or judgments. But such notice must be given to the city within thirty days after the rendition of the judgment in said circuit court. And the city shall not have the right to institute any of said suits or actions against said company, as aforesaid, until said city shall have in good faith prosecuted an appeal to the court of appeals under said notice, if same shall be given as aforesaid, and said judgment affirmed."

Pursuant to this agreement, the company gave notice to the city that it required the city to carry the judgment against it in the York Case to the Court of Appeals of Kentucky. The city complied with this request, and took the case to the Court of Appeals, where, after argument, the judgment was affirmed with costs. 117 Ky. 294, 77 S. W. 1130. Upon demand the company refused to pay the judgment, and the city brought its action. It was tried in the court below before a jury, and, under instructions which seem to have left narrow room

for the jury, a verdict was rendered for the company.

Conflicting claims are made by the parties in respect to the effect of the judgment in the York Case against the city. Ingenious arguments are made that estoppels were thereby founded in respect to several of the issues pending in this case. But laying aside for the moment the consideration of the effect of the so-called compromise agreement of November 6, 1901, and what was done in the York Case in pursuance of it, we think nothing in the nature of an estoppel in respect to any question now pending between these parties exists in that record. It is true these parties were joined as defendants. But they appeared by different attorneys, made separate answers and defenses; there were, in effect, different verdicts and separate judgments. There was no cross-pleading, nor were any issues made between these parties, nor was anything adjudged as betwixt them, even if such proceeding were permissible under the law of Kentucky. Neither defendant had any control over the pleading or defense made by the other, and neither could take up for review an adverse judgment against the other. To all intents and purposes, the conditions were the same as if independent suits had been brought against each of the defendants. The record and judgment in that case would be prima facie evidence that a judgment had been rendered against the city, and for what amount, on a cause of action which it claims arose from the primary fault of the company; but the question of its arising from the fault of the company would of course still be open, or, if the company could show that the city had not made defense in good faith, that would probably rebut the prima facie effect of the former judgment. 1 Wharton on Evidence, § 820, and the numerous cases there cited; 2 Black on Judgments (2d Ed.) § 604. It must have been anticipated by the company that, if it performed its contract in a careless and negligent manner, the city would be exposed to recoveries for damages in consequence thereof for injuries after the city would have taken possession. If the city made all the defense it could, it had performed its whole duty to the company, and the judgment was a proximate consequence of the fault of the company, the city itself being without fault.

Another question arises in this connection, which is, what was the effect of the agreement made by the parties on November 6, 1901, above set forth? It seems to us that when fairly interpreted it meant to acknowledge the liability of the company if the York suit should go against the city, but provided that in that event the company might require the city to carry the case to the Court of Appeals, and that, in the event the judgment should be affirmed, the company should pay it. What other reason could there be for allowing the company to interfere with the right of the city to control its own case? If the com-

pany intended still to deny its liability notwithstanding a final adverse judgment, what motive could the city have for surrendering its control over the case and exposing itself to the costs and expenses of further litigation in the Court of Appeals? We think the city had a reasonable expectation that if the final judgment should go against it the company would pay it, and that the motive of the company was, by gaining that control over the litigation, to avoid, if it could, its liability. It is stipulated in the agreement that until the liability of the city shall become fixed by final judgment "it shall not have the right to institute any of said suits or actions against said company, as aforesaid, until said city shall have in good faith prosecuted an appeal to the Court of Appeals under said notice, if same shall be given as aforesaid and said judgment affirmed." The alternative is that the city shall upon the condition stated have such right. Does this import a bare privilege common to everybody, or a substantive right? But it is suggested that the company had therein agreed to accept service of process. Other matters, however, might be in controversy, such as the question whether a notice had been duly given, or whether the city had prosecuted the appeal in good faith, or the liability for the costs and expenses incurred. There is nothing so irreconcilable as to require a construction which would give the agreement a merely frivolous or elusive effect. The agreement was made as a compromise and settlement of "all their differences," and one of the recited differences was whether the company was "ultimately liable for the amount of any and all judgments" that might be recovered against the city. If the contention now made in behalf of the company is maintainable, that question was not settled, nor was any substantial approach made to it; but the city came out with the same old controversy still pending, and with a further disadvantage attached.

Upon the trial of this cause the court instructed the jury that there were three vital points. The court said:

"The first inquiry is: Did the injury to young York result from the defective construction of the plant by the defendant, in such a way and within such a period, as to bind the defendant for the judgment obtained against the city of Owensboro?

"The second is: Was the plant operated by the plaintiff on May 15, 1901? And if it was, can the defendant be held liable for the damages resulting from the death of the boy?

"Third: Did the boy's death result from any cause, in a primary sense, except his own ignorant and unfortunate act?"

As to the first we make no comment. But as to the second, the court charged the jury that:

"If the injury occurred after the plaintiff took charge of the plant and began to operate it, if you should find that to be the fact, then the plaintiff's action would not have been properly brought for the specific item of alleged damages set up in this suit, but it would have had to be for damages resulting from the breach of the contract, whatever those damages, in such a suit, should be determined to be. Whether it embraced this item along with others or not, we need not now determine.

"But, I repeat, in order to entitle the plaintiff to recover in this case, it must show not merely that the brake arm was not there, but that that was the cause of the injury to York, and that it occurred before plaintiff began the

operation of the plant.

"The plaintiff cannot recover at all if at any time before the death of the little boy, York, the city began, in fact, operating the plant, even if the defendant's experts or employes were instructing them."

It would seem that the court misconceived the nature of the action. It was not an action sounding in tort for negligence from which the city was the sufferer, but was an action for the breach of the company's contract to construct the electric light plant "in a workmanlike, safe and skillful manner, according to plans and specifications agreed upon by the defendant and the plaintiff; that in the erection of poles, stringing wires and placing arc lamps, it would use the best material, and have perfect insulation in the transmission of the electric current; that each cross-arm shall be provided with its full number of pins and insulators, whether required by the number of wires or not," in consequence of which breach the city had suffered damage by being compelled to pay for an injury. But aside from this, it was erroneous to instruct that if the city was operating the plant at the time of the injury it could not recover. The mere fact that it was operating the plant at the time of the injury would not prevent a recovery. If, as the plaintiff alleged, the defendant had broken its contract by not properly constructing the works, and the city without knowledge of the fact had taken possession of them, and while it was so in possession, and in consequence of the improper construction, an injury had happened for which it had to pay, the plaintiff was entitled to recover, unless for some other reason it was disentitled. Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298. Then, as to the third, the court said:

"But when we come to the other proposition, gentlemen, the last one, I instruct you that if the boy, York, knew the wire was charged with electricity at the time, and if, notwithstanding such knowledge, he voluntarily took hold of it, and was killed, the plaintiff cannot recover at all, even though the unfortunate boy may then have mistakenly supposed that standing on a plank would prevent injurious results."

By this the court meant, as subsequently explained, that if York was guilty of contributory negligence the plaintiff in this case could not recover, and that the facts stated would constitute contributory negligence. This instruction was at fault in stating that such facts in the case of a little boy would as matter of law amount to contributory negligence, although it might be so in the case of an adult. But the larger fault was in giving that instruction at all, and submitting it as a decisive question. There could have been no recovery in the York Case, whatever the fault of the boy was, without it was also established that there was fault in the construction of the electrical apparatus. The question of contributory negligence on the part of the boy was not an issue in this case, unless it had been claimed that the city had in bad faith failed to present that defense, and this was not pretended.

Again, the record in the York Case had necessarily been put in evidence to make out the plaintiff's case. The court in its instructions said:

"The case in the state court was brought both against the city and this defendant, and the judge who tried that case instructed the jury as counsel has pointed out to you, and the jury found a verdict upon those issues and instruc-

tions to the effect that the city of Owensboro alone was responsible for the damages in that suit. While I have held that that was not a bar to the action, the evidence, without objection, has been introduced in this case. You may attach such importance to that evidence as you think it is entitled to."

This was not, in our opinion, justifiable. The record of the former case was brought into the case for no such purpose, and the evidence, the instructions of the court, and the verdict of the jury were not competent to be considered and given such importance as the jury might think them entitled to. The court developed the fact that the jury in the former case had found that the city of Owensboro alone was responsible for the damages in that suit. Quite naturally the jury would have said to themselves, "This question has been already determined. True, the court says we are not bound by it, but it would not be proper for us to say that that jury was wrong, and decide it the other way." If a witness who had heard the trial had been called and his opinion asked as to what the verdict should be, his answer could not be more harmful than this reference to the result in the former action.

There are some other assignments of error which we need not consider. They may not arise upon another trial.

The judgment should be reversed with costs, and a new trial awarded.

WOOLSEY et al. v. HAYNES.

(Circuit Court of Appeals, Eighth Circuit. November 10, 1908.)

No. 2,723.

1. DEEDS (§ 211*)—VALIDITY—SUFFICIENCY OF EVIDENCE.

To entitle a grantor to the cancellation of a deed for fraud, mistake, or the like, the evidence must be clear, unequivocal, and convincing. [Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 643, 645; Dec. Dig. § 211.*]

2. Principal and Agent (§ 156*) — Action Against Principal — Evidence —

Representations of Agent.

Authority to an agent to negotiate for and purchase real estate does not render statements or declarations made by the agent after the deed had been delivered and recorded binding on the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 583-587; Dec. Dig. § 156.*]

3. EVIDENCE (§ 271*)—DECLARATIONS—SELF-SERVING DECLARATIONS OF PARTY.

Self-serving statements made by a party in letters written after he had reason to believe a controversy was impending are inadmissible in his behalf

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1068; Dec. Dig. § 271.*]

4. DEEDS (§ 211*)—VALIDITY—FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence considered, and held insufficient to entitle a complainant to the cancellation of a deed on the ground of the fraud of the grantee's agent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 645; Dec. Dig. § 211.*]

Appeal from the Circuit Court of the United States for the District of Colorado.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Julius C. Gunter (Joseph W. Clarke, on the brief), for appellants. E. T. Wells and W. O. Temple, for appellee.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is a suit in equity to cancel a deed and for specific performance. The controversy grows out of the following state of facts, substantially: The appellee, Havnes, from February 9, 1905, to August 16, 1905, was the owner of an undivided onefifth part of certain mining claims situate in what is known as the "California Mining District," in Lake county, Colo. The other interests belonged to various parties, which, prior to August, 1905, had passed by deeds to the appellant Fanny T. Fackler, the sister of the appellant Kate T. Woolsey. Mrs. Fackler resided during the times in question in the republic of Old Mexico, and was reputed to be wealthy. Mrs. Woolsey claimed to be acting in behalf of said sister in making investments of her moneys in and developing said mining properties. Prior to the acquisition of said titles by Mrs. Fackler the appellee had option contracts with the several owners of the four-fifths interests, and had an arrangement with Mrs. Woolsey for organizing a holding corporation for all the interests of said property, the shares of stock therein to be apportioned among them as agreed. At the time of the conveyances of said four-fifths interests to Mrs. Fackler the options thereon held by the appellee had expired. The claimed scheme for organization of said holding corporation fell through.

The claim now advanced in the bill of complaint is that in the fore part of August, 1905, the appellee came to another convention with Mrs. Woolsey, in which it was verbally agreed that a corporation should be organized under the laws of Colorado with a capital stock of \$50,000, of which the appellee should have one-fifth, and an additional sum of \$1,000 in cash; Mrs. Woolsey further agreeing to provide the funds for developing the mines. To that end he was to convey his said one-fifth interest to such corporation when organized; and that accordingly on August 16, 1905, he executed and delivered to Mrs. Woolsey such deed, with the name of the grantee blank, to be filled in with the name of the proposed corporation when organized; but in violation of this pact she inserted in the deed the name of said Fanny T. Fackler as grantee, and caused the same to be filed for record in said Lake county, and thereupon failed and refused to organize such corporation and issue to him the stock therein. By its decree the court denied the prayer for specific performance, but ordered cancellation of said deed, leaving the appellee in possession of the \$1,000 cash payment made to him at the time of the execution of the deed.

The sole question for decision is, does the evidence sufficiently support the decree? The well-settled rule in practice in case of an executed contract, such as the execution, acknowledgment, and delivery of a deed to real estate which the grantor seeks to annul or correct for fraud, mistake, or the like, is that, to invoke this extraordinary power of a court of equity, the evidence must be clear, unequivocal, and convincing. It will not be exercised upon a mere preponderance of the

evidence, which, in any essential degree, leaves the issue in doubt. Maxwell Land-Grant Case, 121 U. S., loc. cit. 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; Treat v. Russell, 128 Fed., loc. cit. 855, 63 C. C. A. 575; Mastin v. Noble, 157 Fed. 506, 85 C. C. A. 98.

In Atlantic Delaine Company v. James, 94 U. S. 207, 214, 24 L. Ed. 112. Mr. Justice Strong said:

"Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

In Jackson v. Wood, 88 Mo., loc. cit. 78, Norton, J., said:

"When the grantor in a deed seeks its cancellation and a reinvestiture of title on the ground of fraud or mistake, the onus of establishing the fraud is upon him or her, and before relief can be granted the fraud or mistake must be established by clear and convincing evidence. This class of cases is analogous to that class where a resulting trust is sought to be established by parol evidence, in which, in the cases of Johnson v. Quarles, 46 Mo. 423, and Forrester v. Scoville, 51 Mo. 268, the rule is laid down that to warrant a decree the evidence must be so clear, definite, and positive as to leave no reasonable ground for doubt."

Has the appellee met this requirement of courts of equity? He testified directly to his understanding of the compact between him and Mrs. Woolsey, while the latter testified as directly to the contrary. What are the correlative facts and circumstances confirmatory of the one and contradictory of the other? That the appellee, prior to August 14, 1905, consented to convey his one-fifth interest in the land is clearly inferable from the letter of Mrs. Woolsey written to him on the 14th day of August, 1905, in which she inclosed the deed for execution, saying:

"Kindly ack, the enclosed and send to me in enclosed env. at once. I started to fill in the description, but as my papers are in the Trust Co. I have not got same."

It appears from his letter, hereafter noted, that he received the letter of the 14th inclosing the deed on the 16th day of August. On the 15th day of August he wrote the following letter to Mrs. Woolsey;

"I hereby agree to accept \$1,000 cash for my one-fifth undivided interest in and to the Silver Nugget mine at Leadville, Colo., being U. S. Survey No. 1030, if in addition thereto I am permitted to retain 100,000 shares of the capital stock of the Little Johnny Extension Gold Mining Co. of Arizona, you to form a company under the laws of Colorado with 50,000 shares of stock of the par value of one dollar each, and to give me 10,000 shares of said last named stock when the Co. is formed. And I hereby authorize you to change the name of the grantee in the mining deed and assignment of option on said mine now held by you, and if it cannot be done to your satisfaction I will make new deed and assignment when requested by you."

This proposition Mrs. Woolsey testified she refused, and distinctly advised Haynes that the sole consideration to be paid for his interest in the properties was the \$1,000 in money; that, while he seemed much depressed and disappointed, he assented thereto. This is confirmed by the fact that, without waiting for any written reply from Mrs. Woolsey to his proposition of the 15th, he filled out the description of

the property in the deed, signed and acknowledged it on the 16th day of August, 1905, and sent it to her in the following letter:

"Your letter and deed just received. I am suffering so with disappointment and toothache that I can hardly write, but I have executed and acknowledged the deed you sent, but if it makes no difference to you erase the word thousand mentioned in the consideration. I have my reasons for not wanting the real consideration to appear and you know its customary and just as legal to say one dollar. I'll explain to you if I ever see you again. You are certainly a runabout—I thought you'd be in not later than tomorrow, there are a number of things I want to talk over with you."

The deed expressed as the consideration therefor the sum of \$1,000, the receipt of which was therein acknowledged. On the same day, in payment of said \$1,000, Mrs. Woolsey sent him a check, drawn by Mrs. Fackler on the Title Guarantee & Trust Company of New York, on the face of which were written the words "In full." This check he indorsed and cashed. An examination of the original deed confirms the fact of the description of the land having been written therein by a hand and with ink different from that of the other written matter in the deed. Indeed, no question is made that the appellee so wrote in the deed the description of the property. But there is nothing on the face of the deed to indicate that the name of Fanny T. Fackler was written therein at a time and with pen or ink different from the other writing in the deed sent to the appellee by Mrs. Woolsey.

The statements contained in the letter of the 16th of August, 1905, strongly tend to confirm Mrs. Woolsey's contention. He makes reference to "suffering with disappointment." He admits that "the real consideration" is \$1,000; and he uses the expression, "I'll explain to you if I ever see you again;" which is little consistent with his claim that as part consideration for the conveyance Mrs. Woolsey was to go about at once the organization of a holding corporation, to be inserted in the deed as grantee, in which he was to have 10,000 shares of stock. If that was his understanding, naturally enough he would have expected to make it his business to see her soon and often. The check he received and cashed advised him that the purchase money was furnished by Mrs. Fackler; and as a lawyer of experience it is reasonable to infer that he understood the significance of the words "In full" written on the face of the check—that it was intended by the drawer to indicate her understanding that it was in full payment for the deed made; and when, without objection, he retained and cashed the check, he ratified that understanding. His suggestion in the letter respecting the concealment of the real consideration, by changing it from \$1,000 to \$1, shows that he expected the usual custom would be observed of putting this deed to record within a reasonable time after its delivery; otherwise, why should he be so concerned about the named consideration at that time? The placing of this deed on record in Lake county within eight days after its execution is hardly consistent with the imputation that Mrs. Woolsey was acting fraudulently in inserting the name of Mrs. Fackler as the grantee.

Further confirmation that Mrs. Woolsey was acting for and on behalf of Mrs. Fackler in taking the deed to the latter is found in the fact that immediately after the delivery thereof she wrote to the man-

ager of the mining properties advising him that Mrs. Fackler was now the owner of the entire property, and that he was to look to her as his

principal or employer.

The recitation in the decree of the lower court that the purchase money for this property was that of Mrs. Woolsey is not sustained by the evidence. In addition to the uncontradicted fact that the check for \$1,000 purchase money was signed by Mrs Fackler, the correspondence conducted afterwards by Mrs. Woolsey with the managing agent in charge of the mines, before any controversy arose with the appellee respecting the deed, shows that she expressed keen anxiety and concern respecting the heavy drafts being made upon Mrs. Fackler for development work on the mines, which had grown to \$17,000, with no returns and little prospect therefor being made to Mrs. Fackler.

About the only countervailing circumstance relied upon by appellee is certain letters which passed between him and Mrs. Woolsey after the delivery and recording of the deed. It must not be lost sight of in determining the real question in this case that the record title to the property in question was in Mrs. Fackler. She furnished the money consideration expressed on the face of the deed. The placing on record of that deed, as to Mrs. Fackler, performed the office of livery of seisin at common law, and evidenced to the world her title to the fee. Perry v. Price, 1 Mo., loc. cit. 555; Kane v. McCown, 55 Mo., loc. cit. 198. It is this title in Mrs. Fackler, and not in Mrs. Woolsey, that the bill seeks to cancel and divest. The statements and acts of Mrs. Woolsey leading to the obtaining of the deed are admissible against and in favor of Mrs. Fackler, on the ground that Mrs. Woolsey was the active person in bringing the transaction to a consummation, and as to Haynes she was ostensibly the real party in interest. If during the period of negotiation, and at the time the deed was made and delivered by Haynes, Mrs. Fackler was an undisclosed principal, she was bound by the acts and statements of Mrs. Woolsey in connection therewith, whether or not she had any knowledge thereof. But after the purchase money was paid and the deed put to record, the fraud, if any, committed against Haynes was fully consummated. No statement made or act done thereafter by Mrs. Woolsey in the absence of Mrs. Fackler, without proof of her knowledge and assent, could bind the latter or impress her title. The bill does not allege any conspiracy between these women. It does not even allege that Mrs. Woolsey was acting as the agent of Mrs. Fackler. It is true that after the making and recording of the deed Mrs. Woolsey acted for Mrs. Fackler, according to her statements, in directing the management of the mining properties; but the funds employed therein were furnished by Mrs. Fackler. From anything appearing in this record, that was the entire extent of Mrs. Woolsey's relation to the property. It did not extend her agency to binding Mrs. Fackler by any statements made to a third party so as to affect the title of her principal to the property she was managing, or to recognize that it was impressed with any implied trust in favor of a third party. In this respect Mrs. Woolsey's statements, made after the delivery of the deed, would be as to Mrs. Fackler mere hearsay. The utmost limit of their competency would be their employment for contradicting any contrary testimony of Mrs. Woolsey, but not as primary evidence to support the bill for the cancellation of Mrs. Fackler's deed.

Turning to the letters in question, of any pertinency, from Mrs. Woolsey: On September 18, 1905, she wrote to Haynes:

"I got a wire yesterday fr Leadville saying the Atty. I had written to to organize a company would be away a month & asking me to await his return there."

On October 8, 1905, she wrote to Haynes to the effect that she had been very ill since she went to Covington, Ky.:

"I do not expect however to remain more than a couple of weeks longer. On my return I shall call at yr office at once. I wrote my atty, at Leadville to organize a Colorado Co. for \$50000. & he wrote me he would take it up at once on his return. As I have not heard fr him I suppose he is still away fr home. I will write again to day."

This is practically the extent of her statements, which are sought to be construed into a recognition of Haynes' contention respecting the agreement to organize the corporation and issue to him the 10,000 shares of capital stock. Her explanation of these supervenient communications, given in her deposition, is as follows:

"After the deed was made and recorded at Leadville I met Mr. Haynes. He seemed seriously ill and very upset over his domestic as well as financial difficulties. Knowing that he had lived in Leadville and had a large and influential acquaintance there, I said to him in a general way that some day I would organize a company and give him some stock therein. I did not specify any date or any amount of stock. I went so far as to ask my attorney at Leadville to organize such a company as I have stated before, in the belief that Mr. Haynes could indirectly be of some value towards furthering my aim."

The appellee further sought to confirm his contention by exhibiting with his deposition two letters written by him to Mrs. Woolsey; one dated December 2, 1905, in which he stated that he had made the deed of August 16, 1905, in blank, and that she promised to organize a holding company of \$50,000 capital stock, of which he should have \$10,000, or one-fifth. He then referred evidently to her letters above mentioned, and wanted to know what was the trouble. He then adverted to his family misfortunes and some other unimportant matters, and concluded by asking her to write to him what she was doing in the mine and whether the \$50,000 corporation had been formed or not; if it had been, to send him his \$10,000 of stock. He then requested her to send him the deed he executed in blank, with the name of the new company, so he could insert the name of the grantee in the deed. This latter request is somewhat remarkable, in view of the fact that his bill of complaint charges that Mrs. Woolsey was to fill in the blank in the deed with the name of the corporation when organized.

Then on the 18th day of December he wrote Mrs. Woolsey as follows:

"I hear that there has been a good strike in the Silver Nugget. I am doing nothing fiere (Portland, Oregon), don't you think I'd better go to Leadville and take charge of the property? One of us, as the only owners, should look after the business and as you can't stand the altitude in Leadville and it don't hurt me may be I'd better go. What salary are you willing I should have? Are you

operating under the old or new Co.? If under the latter send me my stock. Please answer at once and oblige."

These are self-serving statements made by the writer after he had reason to believe a controversy was impending respecting this matter; for shortly thereafter, as shown by his letter to Miss Miller, hereinafter adverted to, he was preparing other evidence for this lawsuit, which he instituted on the 7th day of January, 1906. A party may not thus make evidence for himself. He did, however, write two letters which are of special significance. On January 2, 1906, he wrote to Miss Miller, the notary public who took the acknowledgment of the deed of August 16, 1905, in which he stated that he acknowledged a deed before her, and that when he handed her the deed she called his attention to the fact that there was no grantee named in the deed. After stating that he was to fill that in later, she remarked, "I didn't know you could do that." He then proceeded:

"In other words you said you didn't know that a deed could be made without the grantee's name being in it. Do you remember this? The deed was to be returned to me to have the grantee's name filled in but the party to whom it was given fraudulently filled in a name and recorded it. The mine has struck rich gold ore and is valuable, and there may be a law-suit grow out of it. If so I will want your evidence and will pay you well for the time you spend in giving it."

Receiving an unfavorable answer to this letter, he returned to the effort of persuading this witness, in a letter of May 21, 1906, in which he called her attention to his letter of January 2d, reciting in effect what he wanted her to remember, after she had advised him that she had no recollection of asking him about the deed, in which he said:

"I thought perhaps that after a lapse of several months, you might remember it and therefore I write to again ask you if it has been called to your mind by my letter and ask you to answer in the enclosed stamped, addressed envelope as soon as convenient. If you remember the circumstances send me the name of a notary public before whom your deposition could be taken. I will pay the notary and also pay you for the time whatever it is worth."

The seductive intent of these letters to this woman, working for a living, is in the bait thrown out that "the mine has struck rich gold ore and is valuable, and there may be a law-suit grow out of it." Following this up immediately with the offer to pay her well for her time was most sinister. It was a covert suggestion that as the mine promised to be rich in gold, if her testimony should aid him in winning the lawsuit her payment might be measured accordingly. The cunning of his mind manifested itself in not asking her to state in the first instance what she recollected of the occurrence and conversation had. but in stating himself what occurred, to which he wanted her to testify. Although advised of her inability to depose as desired by her answer to his first letter, he waited four months and approached her with the suggestion that perhaps after the lapse of several months she might remember it. This was a remarkable suggestion, that when she did not remember the occurrence after the lapse of a little over five months, he thought she might remember it after a much longer time; and then added a postscript that he would pay her for her time whatever it

was worth. A just cause does not invite to its assistance improper methods, and an honest mind does not consent to their employment.

The record in this case fails to furnish that clear, unequivocal, and convincing proof essential to support the decree; and it must, therefore, be reversed, and the cause remanded with directions to dismiss the bill.

MARTIN v. NEW YORK & ST. L. MINING & MFG. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1908.)

No. 2,801.

1. Trusts (§ 76*)—Real Estate—Resulting Trust from Unauthorized Use of Money of One to Buy Land in Another's Name—Ownership of Money by Alleged Cestui Que Trust Indispensable.

It is indispensable to the existence of a resulting trust in land on the ground that the money of the complainant has been used without his consent to acquire the title to the land in another that the complainant should have been the owner of the money when it was used.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 108; Dec. Dig. § '6.*]

2. Trusts (§ 80*)—Trust vs. Loan—Ownership of Money—Facts—Conclusion.

Suit was brought against C. and his corporation to charge the property and profits of the latter with a trust because C. had used complainant's money without the latter's knowledge to acquire land in the name of the corporation. Complainant testified that he gave C. \$4,000 with the understanding that he should place it in escrow with a trust company to be held there to assure the vendors of land that the required payment would be made by C.'s mining company, and to be returned to him at the end of 10 days, when C. said he would have secured a loan upon some bonds of his company which he was about to obtain. C. testified that he borrowed the \$4,000 of the complainant, that nothing was said or understood about placing it in escrow or in trust, and that he used it, not to pay for the land, but to buy materials for and to pay expenses of his corporation. At the time the \$4,000 was paid over to C. by the complainant the latter gave to the former his promissory note for \$4,000 and interest payable in 10 days, and a written agreement to give him 40 shares of the stock of his company "in consideration of loan and other promotion benefits." Complainant urged C. to pay, and some years later, and before this suit, C. did pay, the note.

Held, the transaction was a loan. The money the complainant gave to C. upon receipt of his note immediately became C.'s money, and no trust arose in favor of complainant out of C.'s use of the money for his corporation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 114; Dec. Dig. § 80.*]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

William H. Clopton, for appellant.

George D. Reynolds (George V. Reynolds, on the brief), for appellees.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before SANBORN and VAN DEVANTER, Circuit Judges, and AMIDON, District Judge.

SANBORN, Circuit Judge. In July, 1902, the defendant below, the New York & St. Louis Mining & Manufacturing Company, was a corporation, and the defendant, M. B. Coburn, was its treasurer and general manager. The corporation bought 8,187 acres of land in the state of Tennessee, for which it agreed to pay \$87,000. The land was conveved to it by a deed dated July 10, 1902, and recorded July 28, 1902. After this deed was recorded the mining company issued bonds to the amount of \$500,000, and secured them by a mortgage upon this land and other property. In December, 1907, the complainant below, John E. Martin, exhibited his bill against the mining company and Coburn to recover four-fifteenths of this land and of the profits of the corporation, upon the ground that without his consent Coburn had used on July 28, 1902, \$4,000 of his money to pay some of the necessary expenses of the corporation in acquiring the land and to pay a part of its purchase price. The defendants denied that any of the complainant's money had been used for these purposes, and Coburn alleged that on July 28, 1902, he borrowed \$4,000 of the complainant, that this \$4,000 was thereafter his money and not that of the complainant, and that he had subsequently paid back to him and he had received \$4,000 and interest on account of this loan. The court below found the issues for the defendants and dismissed the bill, and the complainant has appealed.

The theory of the bill is that Coburn used \$4,000 of the complainant's money without his consent to obtain the land which was deeded to the corporation, that this \$4,000 was four-fifteenths of the entire amount used to obtain this land, and that four-fifteenths of the land and of the profits made by the mining company by the use of it were charged by these facts with a resulting trust in favor of Martin. Conceding that if these facts were established by the proof the complainant would have been entitled to relief, it was indispensable to the maintenance of the bill that the complainant should prove that the \$4,000 was his money and not Coburn's at the time when Coburn used it, and that he should establish this fact by clear and convincing evidence, for a resulting trust in the title to land vested by writings and record in another may be established only by strong and persuasive proof. Shaw v. Shaw, 86 Mo. 594, 598; Laughlin v. Mitchell (C. C.) 14 Fed. 382, 388; Id., 121 U. S. 411, 7 Sup. Ct. 923, 30 L. Ed. 987. Did the evidence in this case thus establish the averment that Martin was the owner of the \$4,000 when it was used by Coburn? The complainant testified that on July 28, 1902, Coburn told him that he had control of some property in Tennessee upon which the mining company had to make a payment in order to hold it, and that he would like to have \$4,000 or \$5,000 for a few days; that Martin replied that he would let him have it, but that he wanted it back within 10 days; that Coburn then said that the payment had to be made, that a loan on the property had been arranged, and that Martin could be absolutely sure of the money in 10 days; that Martin then said to Coburn: "Now I will let you have this money with this understanding, Mr. Coburn, that this money is placed in escrow with those people. Then if your deal goes through the people to whom this payment was to be made to hold this property can be satisfied that the money was there for them, and the trust company could either deduct the \$4,000 and the loan they were making you, if it was more than that amount, or else it could be taken out of the loan that they were making," and Coburn answered, "I will take no chances with this money at all and see that you take no chances. You shall have the money back within ten days"—and thereupon Martin paid over the \$4,000 to Coburn. Martin further testified that shortly before August 25, 1902, he received a telegram from Coburn in these words, "Wire me whether I can use the money," and that on August 23, 1902, he wrote to Coburn in this way:

"Your message and letter were received the same day. Was away for some time. Regarding the money: Be sure to have it here (Mpls) Sept. 20. Did not write when I got back thinking that if you had a dead sure thing with big money in sight you would use it anyway."

On the other hand Coburn testified that he told Martin about July 28, 1902, that he wanted \$4,000 or \$5,000, that the mining company was issuing bonds, that he was to have \$65,000 of them, that a party had agreed to loan him \$27,000 on \$30,000 of them as soon as they were printed and signed, that he could get the money in that way to pay \$4,000 back in 10 days, that Martin then loaned him the \$4,000 and took his promissory note for it and an agreement from him to give Martin 40 shares of the stock of the mining company. He testified that nothing was ever said about placing the money with a trust company in escrow, that if it had been so placed he could not have used it, and that he never heard that Martin claimed any interest in the property of the company on account of the \$4,000 until after the bill in this suit was filed.

The evidence was uncontradicted that Coburn used the money between July 29, 1902, and August 13, 1902. If the testimony of Martin was true, the money was then his, and Coburn converted it to the use of his mining company; if Coburn told the truth, Martin then had no title to the money, and the relation between them was that of debtor and creditor. The court below found this issue in favor of Coburn. Its finding may not be reversed unless it clearly appears that it fell into some error of law or made some mistake of fact in reaching its conclusion. There is no substantial evidence in the record except the testimony of Martin, which is inconsistent with its finding. Its conclusion is supported by the facts that on July 28, 1902, when Martin gave Coburn the \$4,000, the latter executed and delivered to him his promissory note for that amount and for interest at 10 per cent. per annum after maturity, payable to the order of Martin on August 10, 1902, and a written agreement "to give J. E. Martin forty shares New York and St Louis Mining and Manufacturing Company stock in consideration of loan and other promotion benefits"; that Martin repeatedly asked Coburn, by letters in evidence, to pay the \$4,000 and interest to him, and Coburn did pay it before this suit was commenced: and that Martin never claimed or demanded any interest in the prop-

erty or profits of the mining company until he commenced this suit in December, 1907, after he had received from Coburn the \$4,000 and interest. No analysis or discussion of this evidence can make the legal conclusion it compels much clearer. The promissory note was the usual evidence of a loan. The parties themselves called the transaction a loan in the simultaneous written agreement about the 40 shares of stock. The writings evidence a loan, and nothing more. There was no agreement in writing from which a bailment or any other relation than that of debtor and creditor could be inferred, and the complainant affirmed and took the benefit of that relation until he persuaded Coburn to pay the debt. These acts of the parties demonstrate more plainly than words or oaths the true nature of the transaction of July 28, 1902. They bear into the mind a firm conviction that when Coburn used this money it was his, and not Martin's, so that no resulting trust could have arisen in favor of the complainant from that use. This conclusion is fatal to the complainant's case, and it renders the consideration of other questions which have been presented and learnedly discussed by counsel unnecessary.

The decree below must be affirmed, and it is so ordered.

NOTE.—The following is the opinion of Dyer, District Judge, filed in the court below:

DYER, District Judge. This is a proceeding in equity in which the complainant (a citizen of Minnesota) seeks to recover an interest in property now owned by the defendant company in the state of Alabama. The defendant company is a corporation created prior to the 28th of July, 1902, and organized for the purpose of buying and selling mineral lands, mines, and quarries in the states of Tennessee and Arkansas, and for the purpose, also, of building, equipping, and operating mills and reduction works, and for manu-

facturing and selling fertilizers, and for other purposes.

The bill sets forth: That in 1902 Arthur R. Jones was president, Evans R. Darlington vice president, Harry R. Danner secretary, and the defendant Melville B. Coburn treasurer, of the corporation. That Coburn was appointed manager of the company, and while so acting procured to be made to said company a deed for 8,187 acres of land in Hickman county, Tenn., dated July 10, 1902. That the consideration for said lands was \$87,000, to be paid as follows: \$5,000 cash; \$10,000 on or before the 25th of July, 1902; \$50,000 on or before the 5th day of October, 1902; \$15,000 on or before the 6th of October, 1902; and \$7,000 on or before the 5th of January, 1903. That the deferred payments were evidenced by notes bearing 6 per cent, interest and secured by lien on the property conveyed. It was further provided that the note for \$50,-000, given as aforesaid, might be satisfied by first mortgage bonds of the company, thereafter to be issued, and \$50,000 of its common stock, also to be thereafter issued. It is alleged in the bill that the note for \$50,000 was, in the manner provided, discharged. It is further alleged in the bill that the corporation did not have means sufficient to meet its said obligations as they respectively became due and to carry on the business for which it was organized, and that on the 28th of July, 1902, the defendant Coburn had in his possession the sum of \$4,000 belonging to complainant, and that afterwards at the request of the defendant corporation this sum of money was used in part for the purpose of meeting said notes, and partly for purchasing material for the prosecution of the business of the corporation, etc., and that it was so used without the knowledge or consent of complainant. It is further alleged that the defendant company in August, 1902, issued bonds in the sum of \$500,000, due in 20 years, and that these bonds were secured by a deed of trust on all of the property of the defendant corporation. It is further alleged that the said \$4,-000, paid as aforesaid, amounts to four-fifteenths of the cash paid for said lands, and that therefore he is entitled to that proportion of said lands and the

profits made out of the working of the same, etc.

The answer of the defendant corporation is in effect a specific denial of all of the material allegations made in the bill. The defendant Coburn makes answer in substance the same as his codefendant, but further says that the \$4,000 alleged to have been the money of complainant was in fact money that he had borrowed from complainant, and for which he had executed his note on the 28th of July, 1902; that from time to time he made payments on the note, so that the whole amount thereof, with 10 per cent. interest thereon, was fully paid before the commencement of the present action.

The complainant claims that under the allegations contained in the bill, and the evidence taken in support thereof, a "resulting trust" has been accrued in his favor, and that in equity he is entitled to an interest in the property of the defendant corporation equal to four-fifteenths of its property. The defendant corporation disputes this contention. The defendant Coburn not only disputes the contention of the complainant, but claims that the \$4,000 was loaned to him by the complainant, and that the sum was paid back, with interest, be-

fore the suit was brought.

The evidence in the case is quite voluminous, and counsel in the case have been diligent and painstaking in the preparation of briefs and in the oral presentation of the case. The evidence shows that the defendant Coburn was a moving spirit in the organization of the defendant company, and that he had much to do with procuring the conveyance of the property from Meeks and others to the company. The evidence further shows that the "cash" payment of \$5,000 was made by Jones on the 10th day of July, 1902, and the payment of \$10,000 due July 25, 1902, was also made by Evans. The evidence, seemingly undisputed, shows that the cash payment made by Jones was in the form of a New York draft, drawn by the National Bank of the Republic of Chicago, to his order. This was indorsed by Jones and delivered to Hamilton Parks, attorney for the company, who turned the same over to the grantors in the deed. The \$10,000 payment due July 25, 1902, was paid by one Evans, who took up a draft for that amount at the Corn Exchange National Bank; the note being attached to the draft.

The evidence shows that Coburn was greatly interested in carrying successfully through what he calls "the deal," He had but little ready money at the time, and was anxious to raise \$4,000 or \$5,000 for the purpose of furthering the consummation of the project, to acquire the property for the company, and to enable the company to issue and float its bonds and issue its stock. This done would, as Coburn claimed, give him many of the bonds and much of the stock of the company, from which he claimed he could realize a large sum of money. Finding himself short of money, he went in July, 1902, to Minneapolis, the residence of complainant, for the purpose of raising the sum needed, through the assistance of complainant. It appears that the complainant and Coburn were well acquainted with each other, and had been engaged together in business ventures in Wisconsin and in Joplin, Mo. After reaching Minneapolis it appears that Coburn explained quite fully to complainant his condition and wishes, and sought to get complainant to become interested in the business of defendant company. This complainant declined on the ground that he had interests in Canada that required all of his capital. It was suggested by complainant to Coburn that he (Coburn) might be able to make a loan for a short time at a bank in Minneapolis. The two went together to the bank, where negotiations for the proposed loan were unsuccessful. Complainant then said to Coburn, in effect, that if he (Coburn) would return the money (\$4,000) in ten days he would let him have the amount. Coburn assured him that this would be done. Thereupon Coburn executed and delivered to complainant a note, a copy of which is as follows:

"\$4,000. July 28, 1902.

"August 10th, after date, without grace, for value received, promise to pay to the order of J. E. Martin, four thousand (4,000) dollars in United States gold coin, or its equivalent, with interest at the rate of ten per cent. per annum from date until paid, payable at the Northwestern National Bank. Interest on this note to maturity has been paid in advance.

"[Signed] Melville B. Coburn."

The money was furnished in the shape of drafts to Coburn. The proceeds of these drafts, or the greater portion thereof, were used by Coburn in the purchase of materials, etc., for the company. The note became due, but was not paid. The evidence shows that repeated demands were made by complainant on Coburn for the money. Continuous and persistent demands for payment were made. These payments were all made before the beginning of the present suit.

The complainant claims that the \$4,000 was not a loan, but was to be deposited with the Colonial Trust Company in St. Louis, to the end that the trust company might register the bonds of the company and agree to act as its financial agent, etc. If the \$4,000 was a loan (and so understood by the parties at the time the same was made), to be paid back, with interest, then the complainant's contention that there is in him a "resulting trust," which entitles him to an interest in the property equal to four-fifteenths cannot be maintained.

I have examined as carefully as I could the evidence in the case, and have reached the conclusion that it does not sustain complainant's contention. In my judgment the transaction on the 28th of July, 1902 (when the note was given for the \$4,000), was simply and purely a loan. Martin let Coburn have the money on the assurance that it would be paid back in a certain number of days. This was not done. The letters of Martin to Coburn (covering a long period after the note was matured) convince me that Martin always regarded the money he let Coburn have as a loan, and the fact, if it be a fact, that Coburn at various times promised to compensate Martin for the losses he claims to have sustained in Canada by the failure of Coburn to return the money at the time promised, does not in my judgment militate in the least against the contention of Coburn that the transaction on the 28th of July, 1902, was "simply and purely a loan." It is unnecessary, in my view of the evidence, to enter into a discussion of what is and what is not a "resulting trust"; for it is practically conceded by counsel for complainant, as I understand him, that, if the \$4,000 transaction was a loan, then no trust resulted to complainant.

It follows, therefore, that the complainant's bill must be dismissed; and it is so ordered. The same order will be made in regard to the defendant Coburn's

cross-bill.

TOWN OF FLETCHER v. HICKMAN.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1908.)

No. 2,703.

1. JUDGMENT (§ 900*)—JUDGMENT AS CAUSE OF ACTION.

A judgment creditor may maintain an action against the debtor on his judgment, the right to collect it by execution or other process being merely cumulative.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1719; Dec. Dig. § 900.*]

2. EVIDENCE (§ 5*)—JUDICIAL COGNIZANCE—NOTORIOUS FACTS.

Courts take judicial cognizance of notorious facts, familiar to common experience and observation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. EVIDENCE (§ 586*)—NEGATIVE TESTIMONY.

Negative testimony is valueless, unless it appears that the witness was so circumstanced as to be reasonably likely to have some knowledge on the subject.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2433, 2434; Dec. Dig. § 586.*]

^{*}For other cases see same todic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

 MUNICIPAL CORPORATIONS (§ 122*) — ORDINANCES—PUBLICATION—NEGATIVE TESTIMONY.

Under Mills' Ann. St. Colo. 1891, § 4443, providing that municipal ordinances shall be recorded in a "Book of Ordinances," which record shall be prima facie evidence that the ordinances were duly published as provided by law, which requires their publication in some newspaper published within the corporate limits of the municipality or, if none, in one of general circulation therein, the burden resting on a town having no newspaper to prove that an ordinance authorizing an issue of bonds and so recorded was not duly published is not sustained by a general statement of a witness that he moved into the town some years after the issuance of the bonds and that there had been no newspaper of general circulation therein "at any time since its incorporation."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 289; Dec. Dig. § 122.*]

5. MUNICIPAL CORPORATIONS (§ 947*)—BONDS—BONA FIDE HOLDERS.

A purchaser of municipal bonds from a prior bona fide purchaser for value before maturity takes the rights and standing of his vendor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1982; Dec. Dig. § 947.*

Bona fide purchaser of municipal bonds, see note to Pickens Tp. v. Post, 41 C. C. A. 6.]

In Error to the Circuit Court of the United States for the District of Colorado.

William A. Bryans (Guy Le R. Stevick and L. Ward Bannister, on the brief), for plaintiff in error.

William P. Malburn (C. S. Thomas and W. H. Bryant, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge. This was a suit in two counts: One to recover the amount of a former judgment rendered by the court below in favor of the plaintiff, Hickman, against the town of Fletcher, the defendant below, and the other to recover the amount due on coupons detached from 69 certain bonds issued by the town of Fletcher and belonging to plaintiff, Hickman. The Circuit Court directed a verdict and rendered a judgment for the plaintiff on both counts, and this writ of error is to secure a review of that action.

It is first objected that a suit does not lie on a judgment as long as the holder can enforce it by execution issued thereon in due and usual course. It is said that to permit a second judgment at the pleasure of the judgment creditor is unnecessarily harassing and vexatious to the judgment debtor. This view finds support in a few cases, but the general and almost universal rule is otherwise. 2 Freeman on Judgments, § 432; 2 Black on Judgments, § 958, and cases cited; Gaines v. Miller, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466; Hickman v. Macon County (C. C.) 42 Fed. 759. The right to enforce payment of a judgment by process of execution is merely cumulative. The obligation of the judgment debtor is to pay the judgment when rendered. If he fails to perform the obligation, no reason is

^{&#}x27;For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

perceived why the judgment creditor may not resort to the courts of the land to enforce it. If the judgment debtor desired to escape the vexation and annoyances of successive suits, it is pertinent to suggest that he had it in his power to do so, and at the same time save his creditor from greater vexation and annoyance, by discharging his obligation and paying his debt when due. There was no error in directing a verdict on the first count.

It is next contended that the ordinance of the town of Fletcher which purported to authorize the issue of bonds from which the coupons in controversy came is invalid because not published as required by law, and that the plaintiff Hickman was not an innocent holder for value of the bonds. The validity of this issue of bonds has been passed upon by this court in a former suit between these parties to recover on other tunpaid coupons taken from them. Town of Fletcher v. Hickman, 136 Fed. 568, 69 C. C. A. 350. In that case this court considered the present contention of the town relating to the invalidity of the ordinance. One of the vital contentions then considered and upon which the town now chiefly relies was that the ordinance authorizing the issue of the bonds was not published as required by law. The act of the General Assembly of Colorado approved April 4, 1877 (Laws 1877, p. 874), as amended by the act approved March 2, 1887 (Laws 1887, p. 443), found in Mills' Ann. St. Colo. 1891, vol. 2, § 4364 et seq., authorized towns and cities by ordinance to contract an indebtedness and issue bonds for the purpose of acquiring a system of waterworks. Section 4443 of the Statutes provided that all such ordinances-

"* * shall be published in some newspaper published within the limits of the corporation, or if there be none such, then in some newspaper of general circulation in the municipal corporation, * * * provided, however, that if there is no newspaper published within or which has a general circulation within the limits of the corporation, then and in that case, upon a resolution being passed by such council or board of trustees to that effect, such by-laws and ordinances may be published by posting copies thereof in three public places, to be designated by the board of trustees, within the limits of the corporation; and such by-laws and ordinances shall not take effect and be in force until the expiration of five days after they have been so published or posted. But the Book of Ordinances herein provided for shall be taken and considered in all courts of this state as prima facie evidence that such ordinances have been published as provided by law."

This court has held (National Bank of Commerce v. Town of Granada, 54 Fed. 100, 4 C. C. A. 212), construing the Colorado Statutes, that the publication of an ordinance authorizing the creation of an indebtedness and issue of bonds for the purposes contemplated in this case was an essential prerequisite to the validity of the issue, and such is assumed by counsel to be the law applicable to this case. The contention on the part of the town is that, conceding an ordinance to have been duly passed, there was no lawful publication of it, and, as a result, the bonds issued by authority of the ordinance are void.

The bonds in question bore date July 1, 1891, and, to prove in the former case that there was no designation of three public places by the board of trustees for the posting of the ordinance, defendant introduced in evidence copies of the town records covering the period from

the incorporation of the town until and inclusive of July 1, 1891. These records disclosed that the board took no action designating places for posting the ordinance prior to the date of the bonds, but this court on the former appeal held that, inasmuch as the date of bonds is not necessarily or usually the accurate date of their issue, lawful posting of the ordinance might have occurred after July 1, 1891, and inasmuch as the burden of showing the failure to publish was on defendant, it had not borne the burden. To supply the proof thus shown to be lacking the contest is renewed in this second suit on coupons of the same issue of bonds, and defendants have proved that the bonds in question were actually issued and emitted on July 1, 1891, and that there was no order of the board of trustees authorizing the posting of the ordinance prior to that time. Upon making this proof defendant now contends that the gap is closed, and that it appears that

the ordinance was never published and is therefore void.

We are unable to agree with this contention. Publication of the ordinance by posting was a resort permissible only when no newspaper was published or in general circulation within the limits of the corporation. Whatever may be the proof with respect to the publication of a newspaper within the town of Fletcher, there is none which fairly tends to show that there was no newspaper which generally circulated in that town. We must take judicial cognizance of the fact that the four sections of land constituting the territorial area of the town of Fletcher lie contiguous to the city of Denver, and that the city in 1890. according to the census report of that year, had a population of 106,-000. We may also take judicial cognizance of the notorious facts familiar to common experience and observation that there was within the city the usual provision for urban life, comfort and enjoyment like market houses, water and light supply companies, railroads and other means of locomotion affording communication with the outside and surrounding country; and also that the city had a daily press consisting of newspapers of a general circulation, at least throughout its limits. Baker v. Duncombe Mfg. Co., 146 Fed. 744, 77 C. C. A. 234, and cases cited. In such circumstances it is incredible that no newspaper ever got into general circulation in the neighboring town of Fletcher. Such, however, might have been the case, and to prove it a Mr. Harris was produced as a witness for defendants. He swore that he had resided in the town of Fletcher for 12 or 14 years; that he moved into the town in 1894, 3 years after the events now being considered; and, without having disclosed any facts showing that he had any information or was so circumstanced that he could have any information on the subject, the following broad and all-embracing question was asked: "Q. Was there any newspaper of general circulation in the town of Fletcher at any time since its incorporation?" This guestion was propounded to him at the time of the trial below, in 1907. His answer was equally broad and all-embracing: "No, sir." affirmed that at no time since 1891 up to 1907, when he testified, was there a newspaper circulating generally in the town. This was all the testimony produced to establish the required negative. Testimony like this has been repeatedly pronounced by this court of no value. Chicago & N. W. Ry. Co. v. Andrews, 130 Fed. 65, 64 C. C. A. 399; Rich v. Chicago, M. & St. P. Ry. Co., 149 Fed. 79, 78 C. C. A. 663. Notwithstanding the evidence of this witness, which is all that the town relied upon, the ordinance authorizing the issue of the bonds may well have been published in some newspaper of general circulation in the town, and the burden was on the town to prove that it was not.

The ordinance was duly recorded in the "Book of Ordinances" provided for by section 4443. That fact constituted prima facie evidence of its lawful publication. The statute conferring that prima facie effect was dictated by a wise public policy. New towns and cities of Colorado required for their proper development the construction of public buildings, sewers, waterworks, gas plants, bridges, and other like public utilities; and necessity frequently dictated that the cost of such improvements should be made a burden upon the future as well as the present. Proof of the publication or posting of ordinances required for their lawful authorization might after the lapse of years be difficult. The successful accomplishment of public enterprises, dependent largely upon the ability to borrow money for the purpose, required some readily available and reliable method of proving compliance with conditions precedent to the validity of bonds to be issued as evidence of the loan. For reasons like these, the statutes of the state made the record of an ordinance in the "Book of Ordinances" to be kept for that purpose prima facie evidence of its lawful publication. In view of these facts, courts ought not to permit this salutary presumption of regularity to be overcome by anything less than substantial proof of irregularity. There was no proof of it in this case, and the trial court rightly directed a verdict for plaintiff on the second count.

But it is said that defendant offered to make proof of failure to publish the ordinance, and that the court rejected such offer, and in so doing erred. After witness Harris had been examined, cross-examined, and re-examined, with no other result than as indicated, the court intimated that that evidence was not sufficient to authorize a submission of the issue to the jury. Thereupon defendant's counsel, without offering any other witness, made the following offer:

"The defendant offers to prove from the records in the former case, and under the stipulation filed in this case, that at all times between the day of the formation of the town of Fletcher and the date of the actual emission and issue of the bonds in controversy in this case, that there was no newspaper published within or which had a general circulation within the limits of the corporation, * * * " etc.

Assuming, for the present purpose only, that this wholesale offer to prove was proper practice, and one upon which error could be predicated, attention is called to the fact that the offer was to prove "from the records in the former case" under the stipulation filed in this case permitting use of that record. That record has been exhaustively examined, and is found to contain no further evidence on the subject concerning which the offer of proof was made than that already considered. Nothing appears in this record justifying any different result than that reached when the case was here before.

In view of the conclusion just stated, it is unnecessary to consider whether Hickman was an innocent holder for value of the bonds in

controversy; but as that question was argued and may arise at some other time, we may properly dispose of it now. The undisputed proof is that Hickman acquired his bonds from the Denver Savings Bank, which was an innocent purchaser and bona fide holder thereof before maturity. In such circumstances the bank passed its title to its vendee, and the latter is not affected by proof that he was acquainted with facts constituting a defense to the bonds at the time he purchased them. He is entitled to stand in the shoes of his vendor. Whatever rights the bank had he may assert in this action. Gamble v. Rural Independent School District, 146 Fed. 113, 76 C. C. A. 539, and cases cited.

The judgment must be affirmed, and it is so ordered.

CLARK v. COLORADO & N. W. R. CO.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1908.) No. 2,695.

CARRIERS (§ 244*) — Who are Passengers — Invitation of Carrier's Employés.

Neither the master mechanic of a railroad nor a conductor, nor an engineer of a train, has any implied authority to agree on behalf of the company to carry a person on such train without payment of fare.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1115; Dec. Dig. § 244.*]

2. RAILROADS (§ 276*)—INJURIES TO PERSONS ON TRAINS—PERSONS RIDING AT INVITATION OF EMPLOYÉS—RIDING ON ENGINE.

One who accepted an invitation from the master mechanic of a railroad and a conductor and an engineer of a train to ride in the cab of an engine without payment of fare is presumed to have known that such invitation was without authority, and not only did not become a passenger, to whom the carrier owed the duty of care as such, but assumed all of the known hazards incident to such exposed position; and there can be no recovery from the company for his injury or death, due to such dangerous position, unless caused by the wanton or reckless act of its servants

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 884; Dec. Dig. § 276.*]

In Error to the Circuit Court of the United States for the District of Colorado.

Sterling B. Toney (Henry V. Johnson and R. Burge Toney, on the brief), for plaintiff in error.

O. L. Dines (E. E. Whitted, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an action instituted by the widow of J. F. Clark against the defendant railroad company to recover damages for personal injury resulting in his death. The court sustained a demurrer to the petition, which presented two objections thereto: (1) That the petition does not state facts sufficient to con-

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stitute a cause of action; and (2) because it discloses that the deceased was guilty of negligence directly contributing to his injury. The plaintiff below declining to plead further, final judgment was entered on the demurrer.

The substantive facts disclosed by the petition are as follows: The defendant railroad was operated between the city of Boulder and the town of Eldora, in Boulder county, Colo. On the 15th day of July, 1906, the said J. F. Clark was invited by the conductor, engineer, and master mechanic of the defendant company to ride in the cab of an engine drawing a train of cars on said road. While so traveling in said cab the engine collided with the end of a freight car which defendant's employés had run out on a siding of the railroad track, but left the end or corner of said car protruding onto the main track, so that the said engine in passing collided therewith, breaking in the side of the cab on which the said J. F. Clark was sitting or standing, whereby he was killed. The petition alleges "that deceased was not an employé of the defendant company and was not a passenger for hire; that is, was not required to pay for traveling on said car." The prayer of the petition is for \$25,000 damages.

It will be observed that, while the petition discloses that the engine in question was drawing a train of cars, it does not allege that it was a train of passenger cars, adaptable to and used for the carriage of passengers. Non constat, it may have been a freight train, which did not carry passengers at all. Therefore the case presented by the petition is that the deceased, without paying or agreeing to pay any fare, establishing a contractual relation between him and the carrier for his safe carriage, voluntarily entered into the cab of a locomotive engine to take a free ride for his own accommodation.

To avoid the obvious nonliability of the defendant railroad company for said Clark's death, the petition alleges that he was so much in their personal favor that he received simultaneously an invitation from the conductor, the engineer, and the master mechanic to ride in the engine cab. As the petition does not aver that either of said employés had authority to extend such invitation, the authority must arise, if at all, from mere implication. Most certainly no such authority can be assumed to have resided with the master mechanic, who had no connection whatever with the operation of the railroad train while running. Judge Caldwell, in Condran v. Chicago, M. & St. P. Railway Company, 67 Fed., loc. cit. 523, 14 C. C. A. 508, 28 L. R. A. 749, said:

"It is a matter of common knowledge, of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. They are not electrosynary agencies. It is equally well settled that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare."

So Judge Sanborn, in Purple v. Union Pacific Railroad Company, 114 Fed., loc. cit. 126, 51 C. C. A. 567, 57 L. R. A. 700, said:

"A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the agreement that the carrier will transport and the passenger will pay for the transportation, in the absence of a specific agreement or permission by the proper officer of the transporta-

tion company that the latter will carry the passenger without compensation. This contract of carriage may, it is true, be express or implied; but, if it does not exist in either form, the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards his destination. But it is equally true that if one enters and rides under an express or implied agreement with a conductor, whom he knows or has reasonable cause to believe has no authority to make such a contract, that he shall not pay his fare, but shall cheat the company out of the transportation, no contract of carriage is created; but the existence of such an agreement is conclusively negatived by the actual fraudulent contract, so that it cannot exist."

As the petition alleges that the deceased was not a passenger for hire, he knew, what every man is presumed to know, that the rail-road was being operated for hire. If so, he knew that he was cheating the railroad out of its rightful due, as he certainly understood that the men whose guest it is claimed he was were not to pay it for him. Every sensible man comprehends that, while a railroad conductor is in charge of the train, he is placed there by the company to collect fares from passengers, and if he neglects this duty he is wronging his employer. His very position and office as conductor advise every person who enters upon the train to be carried that, presumptively, he is without authority to carry him free of charge. He also knows that the engineer in his cab has nothing to do with the admission of a passenger to the train for carriage. Much less had either the engineer or the conductor authority to invite the deceased to take passage in the engine cab. The law imputed to him, when he entered the cab, knowledge of the fact that the railroad company had not constructed or designed such a place for the carrying of passengers. It is a place fashioned and intended alone for the engineer and fireman. It is equipped with a narrow seat on the right-hand side for the engineer, and a corresponding seat on the left-hand side for the fireman, with a small space between for the engineer when standing at the throttle of the engine and for the fireman when shoveling coal. It is necessarily exclusive of outsiders, who by their presence and talk are liable to divert the attention of the engineer and fireman from their required constant watchfulness. Public policy itself demands this rule, and forbids any deviation from its observance.

The authorities are in harmony in holding that in a place like an engine cab, drawing a train of cars, the person who voluntarily enters therein to ride is presumed to know that it is not designed for such use, and no presumption arises in favor of such person that the engineer and conductor have either express or implied authority to grant him such permission. Robertson v. N. Y. & E. R. R. Co., 22 Barb. (N. Y.) 91; Powers v. Boston & M. R. Co., 153 Mass. 188, 26 N. E. 446; Eaton v. Delaware, L. & W. R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Files v. Boston & A. R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411; Whitehead v. St. Louis, I. M. & S. Ry. Co., 22 Mo. App. 60. While some courts have gone to considerable length in holding railroad companies responsible for the acts and assumptions of their employés while in positions of apparent authority, yet, when requested to hold that there is any presumption

in favor of the authority of the employés to permit third persons to use places and instrumentalities obviously not designed therefor by the master, they come to a halt. If a conductor or engineer should invite a person to ride on the cowcatcher, a cross-beam is front of the engine, or on a brake-beam of a moving car, the foolhardy acceptor receiving an injury thereby, would not be heard to say that he as sumed the conductor or engineer had authority from the railroad com-

pany to invite him to ride there.

By voluntarily entering the engine cab to ride, the deceased assumed all the known hazards incident to such exposed position, because it is not a place designed by the railroad company for carrying passengers, and because it is a known place of increased danger. If a bridge be down, or any obstruction be on the track, the engine first encounters the danger and incurs the disaster. Danger lurks in such position. It was the side of the cab on which Clark stood or sat that first encountered the projecting end or corner of the car on the side track. The side of the cab was crushed in, which occasioned his injury. No derailment of, or other injury to, the train is alleged. So the fact is confronting that, had the deceased not chosen to ride where he did, no harm would have come to him. In voluntarily assuming such extrahazardous position he was guilty of contributory negligence. This proposition of law has recently been announced by this court in Chicago G. W. Ry. Co. v. Mohaupt (C. C. A.) 162 Fed. 665. It is reinforced by the following pertinent decisions: Doggett v. Illinois C. R. Co., 34 Iowa, 284; Radley v. Columbia Southern R. Co., 44 Or. 332, 75 Pac. 212; Texas & P. R. Co. v. Boyd, 6 Tex. Civ. App. 205, 21 S. W. 1086; Files v. Boston & A. R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411, and citations; St. Louis, K. C. & C. R. Co. v. Conway (C. C. A.) 156 Fed. 234, 235.

Counsel for plaintiff in error placed great stress in argument upon the contention that, notwithstanding the deceased may have been in an improper place on the engine, he was not a trespasser, but a licensee, and therefore the company owed him the duty not to wantonly or recklessly injure him. This may be conceded. The contention of counsel is that the petition charges gross negligence in the switching crew of the defendant company leaving the end of the freight car on the siding so as to conflict with the main track. In the first place, there is no allegation in the petition of wanton and reckless conduct by the defendant's employés. "The term 'gross,' in this connection, is nothing but an epithet. It means no more than the failure to exercise ordinary diligence in the circumstances of the particular case. It distinguishes no legal degree of negligence, and it is not error to refuse to apply it to the negligence for which a defendant may be liable, because its use merely tends to create doubt and to increase confusion." Purple v. Union Pacific R. Co., 114 Fed., loc. cit. 130, 51 C. C. A. 571 (57 L. R. A. 700).

Even had the petition charged wantonness or recklessness in the switching crew, as applied to the instance at bar it would not have helped the case. The following excerpt from the well-considered opinion in Eaton v. Delaware, L. & W. R. Co., 57 N. Y., loc. cit. 394, 15 Am. Rep. 513, presents the correct rule:

"But it is said that by the act of the conductor the plaintiff was lawfully on the train, and that for this reason the defendant was liable to him for the negligence of its servants. With due submission, this is simply begging the question. The plaintiff could only be lawfully on the train by an authorized act of the conductor. The question still recurs: Had the conductor the authority to take plaintiff on the train? If not, he could not lawfully be there. It is not necessary to consider whether he was a trespasser. It is enough to hold that a duty to be careful toward him would only spring up on the part of the defendant by an act on the conductor's part coming within the scope of his authority."

The switching crew did not know that the deceased was on the engine, and had no reason to anticipate that any passenger would be in such exposed position. Nor did the engineer or conductor know or have reason to anticipate that the freight car extended onto the main track. While it is to be conceded that it was a culpable, negligent act on the part of the switching crew in not taking pains to see that the freight car cleared the main track, the deceased, in voluntarily riding in the engine cab—a place not designed for the carriage of passengers, and in which he would obviously be exposed to first encounter any obstruction that might be on the track—was none

the less guilty of contributory negligence.

Counsel for plaintiff in error rely chiefly upon the case of Philadelphia & Reading Railroad Company v. Derby, 14 How. 468, 14 L. Ed. 502. It is deemed sufficient to say of that case that the pronouncements therein are predicated of a state of facts distinctively distinguishable from the case at bar: (1) The cab there spoken of, in which the injured party was riding, was evidently not such an engine cab as the one here in question. It was a carrying car, constructed and designed for the president and officials of the railroad on inspection tours, and the like, and was, therefore, a place for carrying passengers. (2) The injured party was a stockholder in the company, and was invited by the president thereof, who had apparent authority therefor, to ride with him in the place designed for the carriage of persons. (3) The employes of the company in charge of the track had special instructions to keep it clear of obstructions because of the coming, on this specially equipped car, of the officials of the road, who could be expected to be where they were riding when the car came.

Other decisions cited in the brief of counsel for plaintiff in error are not in point in their facts, and are not of controlling authority.

It results that the judgment of the Circuit Court must be affirmed.

WOLF BROS. & CO. v. HAMILTON-BROWN SHOE CO.

(Circuit Court of Appeals, Eighth Circuit. November 17, 1908.)

No. 2,811.

1. Trade-Marks and Trade-Names (§ 3*)—Marks Subjects of Ownership— Descriptive Names.

The term "The American Girl," used to designate women's shoes, is a geographical and descriptive, rather than an arbitrary and fanciful, name, and is not the subject of a valid trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

2. Trade-Marks and Trade-Names (§ 5*)--Marks Subjects of Ownership-Numerals.

Numerals, used to designate particular styles of shoes, rather than the manufacturer, cannot be made the subject of a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 9; Dec. Dig. § 5.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 67*)—UNFAIR COMPETITION.

A manufacturer, which has adopted a name or device not subject to appropriation as a trade-mark to designate its goods, is still protected in its use from unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.*]

4. Trade-Marks and Trade-Names (§ 70*) — Unfair Competition—Simulation of Names and Devices.

Complainant, a manufacturer of shoes, and its predecessors in business, used the name "The American Girl" to designate a woman's shoe, and extensively advertised the same, with the phrase "As good as its name" and the picture of a young woman. It also used numerals "403," "404," etc., to designate different styles. Defendant, a large manufacturer, subsequently commenced the use of the name "The American Lady" for shoes of its make, with the words "with the character of the woman," using also the picture of a young woman, and designating different styles by the same numbers used by complainant. *Held*, that the simulation of complainant's names and devices in so many respects evidenced an intention to deceive purchasers, and constituted unfair competition, against which complainant was entitled to an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

Sanborn, Circuit Judge, dissenting,

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

James L. Hopkins and Simeon N. Johnson (Wallace Burch, Alfred A. Eicks, and John E. Jones, on the brief), for appellant.

Paul Bakewell (Bakewell & Cornwall, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

W. H. MUNGER, District Judge. The record in this case discloses that complainant is a corporation, manufacturing women's shoes, at Cincinnati, Ohio; that in 1896, George F. Dana & Co. were manufacturers of shoes in said city, and adopted as a trade-mark

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for women's shoes manufactured by them the words "The American Girl." In May, 1898, a copartnership under the name of Wolf Bros. & Co. acquired said business and trade-mark, and in 1899 said Wolf Bros. & Co. adopted and used in advertising and selling its American Girl shoes the catch phrase, "A shoe as good as its name," and used, in advertising, upon the top facing of the shoes, the picture of the head of a lady. In 1901 said Wolf Bros. & Co., for the purpose of designating certain styles of its American Girl shoes, adopted and advertised in its catalogues the numerals 403, 404, 407, and 408, and in its catalogue in 1904, for the same purpose, adopted an additional numeral, 397; and in their fall catalogue for 1904 Wolf Bros. & Co. adopted and had printed on its face cover a picture of Uncle Sam and a lady dancing a minuet. In June, 1905, the partnership of Wolf Bros. & Co. incorporated under the name of "The Wolf Bros. & Company," under the laws of the state of Ohio, and complainant then acquired all the assets of the partnership, including the good will and trade-marks.

The defendant is a corporation organized under the laws of the state of Missouri, and a large manufacturer of shoes at St. Louis, in said state. In August, 1900, defendant adopted as a trade-mark for women's shoes the words "The American Lady," with the picture of a lady. In October, 1903, it advertised with its American Lady shoes the catch phrase, "The shoe deserves its name." The defendant claims that this catch phrase was used by it in advertising upon one occasion only, and we dismiss it from further consideration. Thereafter it changed the phrase to the words, "With the character of the woman." In its fall catalogue of 1904 the defendant designated certain styles of its American Lady shoes by the same numerals used by complainant, to wit, 403, 404, 407, and 408, and in its fall catalogue of 1904 defendant placed upon the face cover the picture of George and Martha Washington dancing a minuet.

This action was brought by complainant, in which it charges the defendant with infringing its trade-mark "The American Girl" by the use of the name "The American Lady" and the portrait of a young woman. It further charges the defendant with infringing the catch phrase "A shoe as good as its name" by using the catch phrases "The shoe deserves its name" and "With the character of the woman." It also charges the defendant with infringement by adopting its numeral numbers before mentioned for similar styles of shoes. It also charges defendant with unfair trade. Proofs were taken, and upon the hearing the Circuit Court dismissed complainant's bill, and

the case is brought here on appeal.

The first question for consideration is whether the term "The American Girl" constitutes a valid trade-mark. We think it settled doctrine that geographical names cannot be appropriated to the exclusive use of one as a trade-name. Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581; Genessee Salt Co. v. Bur-

nap, 73 Fed. 818, 20 C. C. A. 27; Ill. Watch Co. v. Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 237; Elgin Nat. Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Allen B. Wrisley Co. v. Iowa Soap Co., 59 C. C. A. 54, 122 Fed. 796. We also think that the name, as applied to women's shoes is descriptive merely, viz., shoes manufactured in America and to be worn by women, and not an arbitrary or fanciful name to indicate maker; hence the name "The American Girl," applied to shoes, is not the subject of a valid trade-mark. Nor can numeral numbers, when used to indicate styles rather than origin and manufacture, be the subject of a valid trade-mark. Shaw Stocking Co. v. Mack (C. C.) 12 Fed. 707; Dennison Mfg. Co. v. Thomas Mfg. Co. (C. C.) 94 Fed. 651. In this case we think that the numerals used by the complainant were for the purpose of indicating and designating the different styles of shoes, rather than the maker.

While it is true that a geographical name may not be exclusively appropriated as a trade-mark, yet a party, having adopted a geographical name as a designation of its goods, may be protected as against unfair trade. Pillsbury Washburn Flour Mills Co. v. Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; The French Republic v. Saratoga Springs Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247. This is clearly illustrated in the case of Pillsbury Washburn Flour Mills Co. v. Eagle, supra, wherein it was held that complainants, who were manufacturers of flour at Minneapolis, Minn., and had designated their flour as "Minnesota," "Minneapolis." etc., were entitled to enjoin a party who sold flour manufactured at Milwaukee. Wis., from designating such flour as "Minnesota," "Minneapolis," This was done because defendant, in using the names "Minnesota," "Minneapolis," etc., was expressing a falsehood, and endeavoring to palm off upon the public flour manufactured in Wisconsin as and for flour manufactured at Minneapolis. In this case, while complainant is not entitled to relief upon the ground that the words "The American Girl," or the numerals applied to its several styles of shoes, are valid trade-marks, yet it is entitled to protection from their use by the defendant in a manner and under circumstances constituting unfair trade; the essence of the rule being that one person shall not, in the sale of his goods, so act as to lead the public to believe that they are the goods of another.

The record discloses that complainant and its predecessors extensively advertised its shoes under the name "The American Girl," with the catch phrase before referred to, in various trade journals and in newspapers throughout the United States, but largely throughout the Southern states, and established an extensive trade therefor. Defendant is a much larger manufacturer of shoes than complainant, and has advertised much more extensively, expending something over \$100,000 in advertising American Lady shoes after the bringing of this suit. It is plainly obvious, we think, that the words "The American Girl" and "The American Lady" are so similar as to cause confusion, and the evidence fully discloses such to have been

the result.

The testimony of the vice president and superintendent of defendant, with reference to adopting the name "The American Lady," is that in the latter part of August, or the first of September, 1900, they assembled their traveling salesmen, for the purpose of making a selection of samples for the following season, and it was suggested at such meeting that some name be adopted for that line of women's shoes, and the name "The American Lady" was selected. He testifies that at that time he had never known or heard of shoes being made by Wolf Bros. & Co. of Cincinnati, or made and sold by any one, under the name of "The American Girl." It is further claimed on the part of the defendant that, when it used the catch phrases "The shoe deserves its name" and "With the character of the woman," it did not know, and had not heard, of complainant's catch phrase, "A shoe as good as its name;" that at the time they adopted the various numerals which had been theretofore adopted by complainant it did not know that complainant used such numerals to

designate similar styles of its shoe "The American Girl." To the adoption of the picture of George and Martha Washington dancing a minuet we do not attach much importance, as the evidence discloses that defendant had ordered engravings of the picture some months prior to the issuance to the public by complainant of its catalogue having engraved thereon the picture of Uncle Sam and a lady dancing a minuet. But we cannot believe that, at the time of the adoption by defendant of the name "The American Lady" for its shoes, it did not know that complainant used the words "The American Girl" for its shoes, as it appears that the salesmen who were assembled by defendant and adopted the name "The American Lady" had been traveling through the territory in which complainant's American Girl shoe had been sold and extensively advertised as such. The adoption by defendant of the catch phrases simulating that of complainant, adopting the same numerals that complainant had adopted, and, when complainant went back and adopted the additional numeral 397, then likewise immediately adopting the same, we cannot think took place without knowledge that it was following complainant in this regard. Had it only imitated complainant in one respect, it might well be said that it was innocently done and without knowledge of the previous adoption by the complainant; but the several acts of complainant being followed so closely in imitation by defendant is persuasive, if not conclusive, evidence that it was done with knowledge that it was imitating complainant. tions of a similar character were held to overcome protestations of innocence and good faith in Fairbanks Co. v. Bell Co., 77 Fed. 869, 23 C. C. A. 554, National Biscuit Co. v. Baker (C. C.) 95 Fed. 135, and Hansen v. Siegel-Cooper Co. (C. C.) 106 Fed. 690.

That defendant's action in the several respects above enumerated was not taken without knowledge of complainant's rights we think is shown by the following circumstances: In January, 1901, Wolf Bros. & Co., on seeing one of defendant's advertisements of its shoes under the designation "The American Lady," immediately wrote defendant, calling its attention to the fact that they regarded it as an

infringement upon their trade-name "The American Girl." To this letter defendant answered, in substance, that it did not regard its use of the words "The American Lady," with the picture of a lady, as an infringement. To this Wolf Bros. & Co. replied, suggesting that, if defendant would further consider the matter, they thought it would come to the conclusion that it did constitute an infringement, and expressing a desire that the matter be adjusted between themselves without legal proceedings. To this letter defendant made no reply. Defendant's treasurer, upon cross-examination, in answer to the inquiry as to whether the first of the above letters was answered by him merely as a matter of courtesy between one house and another, or because there was merit in the contention set up by complainant in the letters, said:

"My answer was prompted solely by a feeling of courtesy and politeness, as I never seriously regarded their claim. In fact, coming from a house relatively obscure, it seemed to me more a joke than a matter of any serious importance."

In a question relative to the second of said letters written by complainant to defendant he was asked if the same was answered; if not, why not? To which he answered:

"If I did not answer the letter, it was because I did not think it of sufficient importance to waste the time necessary to do so. I do not remember that I did not reply to it, but my impression is that I did not."

It may be that some parties regard a complaint coming from one relatively more obscure as a joke, not a matter to receive serious consideration, and not of sufficient importance to waste the time necessary to answer; but in the courts the most obscure and lowly person is entitled to be received upon the same level as his opponent, and the claim that his opponent has trampled upon his rights is entitled to such time of the court as may be necessary to give it full and careful consideration, however small to others his claim may appear to be.

In some respects the markings upon the bottom of defendant's shoes and upon the cartons and boxes in which the shoes were placed were in simulation of those of complainant; but, as the simulation in these respects was discontinued by defendant upon the bringing of this suit, we will not extend this opinion by pointing out the sim-

ilarity.

Legitimate competition in trade is not only the right of every person, but to be commended, when of public benefit. It is only when competition is deceptive that it is condemned by the law. While the term "The American Girl," as applied by complainant and its predecessors, was not subject to exclusive appropriation by them, it had, nevertheless, by their long-continued use of it, come to have a secondary meaning, indicative of the origin and manufacture of the shoes to which it was applied, and had come to be recognized in the trade as meaning that such shoes were those of the complainant and its predecessors. Whatever of good will and advantage resulted from this was the property of the complainant, and, while others were entitled to use the same or any similar term, because of

its being common property, they could do so only on condition that they accompanied it with such distinguishing marks or matter as would plainly indicate that it was not being used with its secondary signification; that is, as pointing to the complainant as the manufacturer of the goods to which it was applied. Howe Scale Co. v. Wycoff, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481.

Complainant is not guilty of such laches as to deprive it of an injunction; but we think an accounting should be limited to the time since the commencement of this suit.

Complainant is entitled to a decree enjoining the defendant from using the name "The American Lady," as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's, and from using, in connection with such name, as applied to its shoes for women, the numerals mentioned, or the catch phrase "With the character of the woman," or any other phrase in simulation of the phrase "A shoe as good as its name," and also to an accounting as before stated.

The decree of the Circuit Court is reversed, with directions to

enter a decree in accordance herewith.

SANBORN, Circuit Judge (dissenting). If the alleged trademark were the "American Shoe," it would be invalid, because that term would constitute a geographical name of the shoe; but the title "The American Girl," when applied to a shoe, is, in my opinion, an arbitrary and fanciful name, and hence constitutes a valid trademark, when it comes to designate the origin or manufacture of the shoe. It was not a geographical description of the shoe, because it does not state or indicate that it was made, or sold, or used, in America. It was not, when first applied by the complainant to the shoe, and before he had taught the trade its meaning, descriptive of the shoe, or of its materials or characteristics (and that is the true test -Wellcome v. Thompson & Capper, 1 L. R. Ch. Div. 1904, 736, 742, 749, 750, 754; Keasbey v. Chemical Works, 142 N. Y. 467, 471, 474, 475, 476, 37 N. E. 476, 40 Am. St. Rep. 623), because it described nothing but a girl, and the term "American Girl" was just as descriptive of a coat, or a hat, or a glove, or a car, or an engine, or any other manufactured article, as it was of a shoe; that is to say, it was not descriptive of a shoe in any way whatever. It was nothing but an arbitrary, fanciful term, which the complainant, by means of its advertisements and its use, caused to indicate to the trade that the shoe to which it was applied originated in the complainant's shops and was made by it. For these reasons I am of the opinion that the term "American Girl," when applied to a shoe, constitutes a valid trade-mark; that the defendant infringed upon the right of the complainant thereto by the use of the term the "American Lady" to designate a class of shoes which it sold; and that on account of that infringement it should be enjoined from the use of that term, and should account to the complainant from the date of the filing of the bill.

CHAMBLISS et al. v. SIMMONS.†

(Circuit Court of Appeals, Fifth Circuit. December 8, 1908.)

No. 1.725.

1. Adverse Possession (§ 71*)—Initiation of Right Under Texas Statute
—Deed Duly Recorded—Corporate Deed—"Deed Duly Registered."

Under Rev. St. Tex. 1895, art. 676, which provides that a corporate deed may be signed by the president or presiding member or trustee, and that when so signed and acknowledged it may be recorded, a deed by a foreign corporation doing business in Texas, executed over its corporate seal and signed and acknowledged by two of its directors under authority of a resolution of its board of directors, is effective, and, when recorded, is "a deed duly registered," and sufficient foundation for proof under the five-year statute of limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 415; Dec. Dig. § 71.*]

2. Limitation of Actions (§ 199*)—Absence of Defendant—Foreign Corporations.

The question whether a foreign corporation was absent from the state of Texas so as to suspend the running of the statute of limitations in its favor under Rev. St. Tex. 1895, art. 3367, where it depends upon whether agents acting for it in certain classes of matters, but not in all, were "local agents" upon whom service could have been made under Rev. St. Tex. 1895, art. 1223, is to some extent at least one of fact, and its determination by the court as one of law was error.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 727; Dec. Dig. § 199.*]

In Error to the Circuit Court of the United States for the Western District of Texas.

Geo. R. Gillette, for plaintiffs in error.

Robt. L. Ball and L. G. Denman, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This was the Texas statutory action of trespass to try title to land. The plaintiffs' petition is in the usual form. The defendant pleaded the general issue (not guilty), and limitation under the three, five, and ten years' statutes, respectively, and made a claim of improvements in good faith. The plaintiffs replied disability of coverture, and that defendants had absented themselves from the state during long periods of time, etc. The cause came on for hearing, and, after both parties had closed their evidence, the court announced that he was of opinion that the law and the facts were with the defendant, and instructed the jury that they should return a verdict for the defendant, which was done, and judgment entered thereon. This action of the court is the substance of the errors assigned in 17 specifications, which the plaintiffs make the grounds to support their complaint that the court erred in instructing a verdict

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes † Rehearing denied February 2, 1909.

for the defendant. There is but one bill of exceptions shown in the record. The first paragraph of the bill is:

"Be it remembered, that the above entitled and numbered cause came on to be heard on the 3d day of January, A. D., 1907; whereupon all parties appeared by counsel and announced ready for trial, and a jury having been impaneled, composed of A. J. Event and eleven others, the following proceedings were had:

"Plaintiffs introduced the following documentary evidence (embracing chain of title, will of their ancestor, William J. Hardee, tax receipts, depositions of Mrs. Anna Hardee Chambliss as to the plaintiffs' relation to William J. Hardee), and rested. In the bill of exceptions this evidence covers $3\frac{1}{2}$ pages of the printed record. Upon the plaintiffs' resting, the defendants offered proof embracing documentary evidence, evidence by deposition and oral testimony, in the aggregate covering more than 70 pages, and the concluding paragraph of the bill appears in the printed record thus:

"'And thereupon ——— the court ——— ordered judgment entered, which

judgment is as follows:

"'Final judgment hertofore printed at page 18.

"To which ruling, instruction, verdict, and judgment plaintiffs then and there in open court excepted, upon the ground, in addition to other exceptions herein contained, that said ruling, instruction, verdict, and judgment were against the law and the evidence of this cause, and that defendant was not entitled to said ruling, instruction, verdict, and judgment as against the plaintiffs; and said plaintiffs do here now present the foregoing their bill of exceptions, and respectfully pray the court that the same may be approved and allowed and ordered filed as a part of the record of this cause and proceedings had therein, all of which is accordingly done.

"'Signed March 29, A. D. 1907. [Signed] T. S. Maxey, "'Judge of Said Court.'"

Indorsed: "O. K. R. L. Ball," who was attorney for the defendant. The exception is here urged that this bill of exceptions does not bring up all the evidence heard and considered on the trial. An inspection of the bill and the method of its settlement, showing that it was prepared by the counsel for the plaintiff, and approved and marked "O. K." by the counsel for the defendant, satisfies us that the bill is not subject to the exception made to it here. It therein appears from the plaintiffs' evidence that their muniments of title and the deposition establishing the relation of the plaintiffs to William J. Hardee, their ancestor, showed title in them with a right of recovery in this action, subject to be defeated only by the pleas of limitations interposed by the defendant if supported by the proof. The plea of the limitation of three years is not supported by proof of title or color of title. The necessary foundation for proof under the five years' limitation is a deed duly registered. It is claimed by the defendants in this case that the deed from the British & American Mortgage Company to Simmons was a "deed duly registered" within the meaning of the five-years statute of limitation. The mortgage company referred to was a foreign corporation doing business in Texas under permit. The Texas Revised Statutes of 1895 (article 676) provides that corporate deeds be signed by the president or presiding member or trustee, and that when acknowledged by such officers such deed may be recorded. It has been decided that by the terms "a deed duly registered" the statute intends an instrument which is really and in fact a deed, possessing all the legal essentials to constitute it such in law, an instrument by its own terms, or with such aid as the law requires, assuming and purporting to operate as a conveyance; not that it shall proceed from a party having title, or must actually convey title to land, but it must have all the constituent parts, tested by itself, of a good and perfect deed, and that this requirement is more rigid under the statute of five years than under the statute of three years, because under the five years the chain of title is dispensed with. Schleicher v. Gatlin, 85 Tex. 270, 20 S. W. 120, and cases there cited. The authentication clause of the deed here in question is in these words:

"In testimony whereof, the British and American Mortgage Company, Limited, has caused these presents to be signed by two of its directors and its corporate seal to be hereto affixed this 10th day of January, 1900; the said directors having executed this deed in behalf of said British and American Mortgage Company, Limited, by virtue of authorization duly given them by resolution of its American board of directors."

—attested by the seal, and signed. "The British and American Mortgage Company, Limited, A. R. Shattuck, Lionel H. Graham, Directors." Also bearing the names of Charles H. Wilson and Charles P. Rowland.

If it be conceded that this deed is duly executed, there is no question as to its having been duly registered. The majority of the court are of opinion that the deed was duly registered within the meaning of the five-years statute of limitation. The deed under which the British & American Mortgage Company came into possession of and held the land was recorded in the proper county April 1, 1895. The deed from the mortgage company to the defendant Simmons, just above referred to, was dated January 10, 1900. The statute of Texas whereby limitation was permitted to run against married women went into effect July 30, 1896. This action was begun May 13, 1902. There is no dispute that from the time the British & American Mortgage Company, Limited, had its deed to the land in question recorded, it, either by its officers and agents, or by one using the land as a renter, was in actual exclusive control of the premises from the date of West's deed to it (April 1, 1895) to the date of its deed to the defendant Simmons (January 10, 1900), and that he has been in possession and control of the premises continuously since that time. If, then, the defendants were not absent from the state within the meaning of article 3216, Rev. St. 1879, and article 3367, Rev. St. 1895, the bar of the statute of five years was complete, and the court did not err in directing the verdict for the defendant. We do not deem it necessary to notice the contention of the plaintiffs that the defendant Simmons was absent from the state within the meaning of the statute. As to the British & American Mortgage Company, under whom the defendant Simmons holds, the plaintiffs concede that it was present in the state of Texas and on the land, the title to which is here in controversy, at the time of the record of its deed from West (the 1st of April, 1895) and up to May 1, 1896, and that it has been in Texas from September 1, 1899, until the present time. But it insists that between these dates it was absent from the state, having left on or about May 1, 1896, and not having returned until about, September 1, 1899. The liability to suit where process can at all

times be served must, in the nature of things, be the test of the running of the statute. (Articles 3216, 3367.) Thompson v. Tex. Land & Cattle Co., Ltd. (Tex. Civ. App.) 24 S. W. 857. During the period of time indicated, from May 1, 1896, to September 1, 1899, the firms of Francis Smith & Co. and H. P. Drought & Co., one successive to the other, and, in relation to the question we are here discussing, substantially the same firm, were located in San Antonio, Tex., and in certain capacities represented the British & American Mortgage Company in that locality. H. P. Drought, the active member at San Antonio of each of the firms, called by the defendant as a witness, testified on cross-examination as follows:

"I was employed as the representative of the British & American Mortgage Company by Mr. Graham, Mr. Parker, and Mr. Shattuck. Mr. Parker was a member of the English board. I was employed by Shattuck and Graham. I was not employed by any written or formal document. I never attended to the collection of any of the business of the British & American Mortgage Company until it got into default. A part of my business is loaning money. I bought some land from the state of Texas for the British & American Mortgage Company because the company asked me to do it. It was not my business to collect money for that company. I did not do any kind of business for them except when they got in bad shape, and then we were employed to do that. Their notes were made payable in New York, and never came here. If a man never paid his note in New York and defaulted, then it was sent to us. I would attend to the business when it was not especially committed to my charge. My letters were sometimes addressed to the British & American Mortgage Company, Ltd., sometimes to A. R. Shat-tuck, and sometimes to Mr. Graham. The original Mr. Shattuck is the father of the present Mr. Shattuck, who is now the head of the American board. If the British American Mortgage Company had anything to do out here, we did it. If they wanted a representative here tomorrow, we would represent them. I cannot say whether or not I was an agent upon whom service could be had. I can only give the facts and let you consider it as you please. I am not claiming to be an agent. I am just answering the questions, telling you what I did, and what I did not do. We represented them in this locality in all southwest Texas, and we made some leases for them up near Ft. Worth. You will have to determine from the whole facts whether I was the agent of the company for the whole state prior to the time Mr. Graham established an office in Dallas. I did not represent them in all their business in the state, for they had some land in the extreme northern part of the state that we had nothing to do with, and the reason for that was because it was attended to in New York. We made some loans for them in southwest Texas, and some around Ft. Worth. The territorial limits of our agency were not confined to any county at all or any series of counties. They had no district representative. They had no other representative in any other portion of the state. To my knowledge we were the only representatives they had in the state from 1890 up to 1900, the time when Mr. Graham went to Dallas. I have never accepted service for them in any suit: they have never been sued. I attended to such business as the company intrusted to me, but if any business arose here that required attention without consulting the company I attended to it, and expected to be paid for it. It is not a matter of instruction, but I should say a matter of custom."

We have only given what we deem the most material parts of Mr. Drought's testimony.

Article 1223, Rev. St. Tex. 1895, provides:

"In any suit against a foreign * * * corporation, * * * citation or other process may be served on the president, vice president, secretary or

treasurer, or general manager, or upon any local agent within this state, of such corporation. * * * "

There was testimony of other witnesses bearing somewhat on this question and which plaintiffs insisted conflicts with parts of Mr. Drought's testimony, but, having in view alone the testimony of Mr. Drought and the language of the statute, it seems to us that there is apparent force in the question of the plaintiffs' counsel when he asks:

"Is it not certain that if asked to accept service, Smith & Co. or Drought & Co. would have said that they represented the British & American Mortgage Company occasionally in various ways, but are not local agents, and have no authority to accept service?"

Upon the consideration of the proof we have recited, could the learned trial judge have applied his own estimate of the weight of testimony, and found, as a matter of law, that the employment or agency or representative capacity of Smith & Co. or Drought & Co. for the British & American Mortgage Company was of such a character as if service had been made upon them, and the British & American Mortgage Company had failed to appear and judgment been taken by default, would the service so made and the judgment taken by default thereon have concluded the British & American Mortgage Company? It seems to us that the question whether Smith & Co. or Drought & Co. were such local agents within the meaning of the statute was not wholly a question of law, but, to some extent at least, a question of fact to be determined by the jury under proper instructions. In the condition of the case before us we do not deem it our office to propound such instructions as should have been given to the jury on this question. We conclude that the learned trial judge erred in withdrawing the case from the jury.

And the judgment of the Circuit Court is reversed, and the cause

remanded.

PARDEE, Circuit Judge, concurs in the judgment.

CHICAGO, M. & ST. P. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 27, 1908.)

No. 2,640.

1. COMMERCE (§ 27*) — SAFETY APPLIANCE ACTS—EQUIPMENT OF CARS—INTERSTATE COMMERCE.

The hauling by a railroad company from one state to another of a car not equipped with the required safety appliances, upon its own trucks, as a part of a train of other cars moving in interstate commerce, is a use of the defective car in violation of the safety appliance act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by acts of April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), though it is empty and is being transported to a repair shop in the state of its destination.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COMMERCE (§ 27*) — SAFETY APPLIANCE ACT — EQUIPMENT OF CARS — INTERSTATE COMMERCE.

Where a freight car loaded with lumber brought from another state was delivered to defendant railroad company on an exchange track a few blocks from its final destination, and after being moved from such track by defendant without inspection was found to have a broken coupler, so that it could not be coupled without going between the cars, it was being used by defendant in interstate commerce in violation of Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by acts of April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885).

[Ed. Note,—For other cases, see Commerce, Dec. Dig. § 27.*]

In Error to the District Court of the United States for the Southern District of Iowa.

J. C. Cook (H. Loomis, on the brief), for plaintiff in error. Luther M. Walter (Marcellus L. Temple, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. This was an action by the United States against the Chicago, Milwaukee & St. Paul Railway Company, a railroad corporation engaged in interstate and local commerce, to recover penalties for four separate violations of the safety appliance statute. Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), amended by the acts of April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). Judgment was rendered against the company upon each of the four counts of the petition, but the only complaint here is of the recovery upon the first and fourth.

The evidence under the first count showed these facts without dispute: A west-bound freight train of the company was wrecked near Elmira, in the state of Missouri, and some of the cars were ditched. Among them was an empty, foreign refrigerator car. In replacing this car on the track the coupler at one end was pulled out and the draft timbers and sills so broken as to be useless. It was then taken to the town of Elmira, the damaged end was chained to another car which was also injured in the wreck, and in that condition the two cars were incorporated in an east-bound freight train of the company and sent to its general repair shops at Dubuque, in the state of Iowa, about 350 miles from Elmira. During this interstate journey the refrigerator car moved upon its own trucks, was empty, and was not equipped at its damaged end with the safety appliances prescribed by the statute.

Our conclusion is that the hauling by a railroad company from one state to another of a car not equipped with the required safety appliances, upon its own trucks, as a part of a train of other cars moving in interestate commerce, is a use of the defective car in violation of the act of Congress, though it is empty and is being transported to a repair shop in the state of its destination. Had the car in question been put upon a flat car and so transported from Missouri to Iowa,

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1807 to date, & Rep'r Indexes

that would have been a movement in interstate commerce, for traffic may as well consist of the property of carriers as of the property of merchants. In such a case the law would have required that the flat car be equipped with safety appliances. But instead of adopting that course the company used the injured car as the vehicle of its own movement, and it would seem as though the duty to comply with the requirements of the statute still remained. Even if the car did not itself carry traffic, it was engaged in intercourse between the states. The particular purpose of the movement or the character of the vehicle running on the rails between points in different states is not important. The statute applies to an engine which hauls but does not carry freight, to a dining car for the refreshment of passengers (Johnson v. Southern Pacific, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363), to an empty freight car (Voelker v. Railway [C. C.] 116 Fed. 867), and even to a steam shovel car consisting of machinery bolted to a platform supported on trucks (Schlemmer v. Railway, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681). In the last case the court said the phrase "used in moving interstate traffic" occurring in the act of March 2, 1893, should not be taken in a narrow sense. The car in question was one of the connecting links between the engine and the caboose, and was a constituent part of a train moving on an interstate mission. Moreover, the case is wholly within the spirit of the act of Congress, for the presence in such a train of an empty, crippled car having no appliances as prescribed by section 2 of the act, or no grab irons or hand holds required by section 4, or with drawbars higher or lower than as fixed under section 5, albeit the car is being forwarded for repairs, threatens the very dangers to life and limb against which Congress has commanded the maintenance of safeguards. It is said it was not intended that the two cars chained together should be separated before they reached the repair shops, but no one could foretell that an emergency would not arise requiring it, and the probability or improbability of it being necessary for an employé to go between the cars cannot qualify the duty of the carrier to observe the requirements of the statute. We pass by the evidence of the parties as to the existence or nonexistence of facilities for repairing the car in Missouri. Whether the duty of the carrier should be made to depend upon its course in maintaining suitable repair shops in the state where cars may need repairs is a question for Congress. The present statute makes no provision upon that subject, and a court cannot interpolate one. These conclusions follow from the act of 1893, and we forbear discussing the larger questions arising under the amendment of 1903.

These were the facts under the fourth count: Another railroad company delivered to the defendant upon an exchange track in its yards at Ottumwa, in the state of Iowa, a string of six freight cars among which was a foreign car loaded with lumber that had come from a point in the state of Arkansas and was consigned to an industry located a few blocks distant from the exchange track. A switching crew of the defendant company with a switch engine pulled the cars out of the track where they had been placed, and were engaged in distributing them when it was discovered that the coupling appliance on the foreign

car would not work so it could be uncoupled from the car next to it. A switchman then went between the ends of the cars and with his hands manipulated the coupler of the opposite car and so detached them. The car with the defective coupler was then put back on the exchange track from whence it was taken. The defect consisted of a broken finger or lifting key that worked within the coupling block. The break would not appear to an external view, but there was substantial evidence that a mere manipulation of the lever without moving the car would disclose it. At the conclusion of the evidence each party requested a directed verdict in its favor; the trial court granted the request of the government. There had been no delivery of the car in question at its ultimate destination, and the switching of it from the time it was taken by defendant's employés on the exchange track to the time of the discovery of the defect was in the course of such delivery and constituted a use in interstate commerce. There was no proof of such an inspection of the car while it was at rest on the exchange track as would have disclosed the condition of the coupling appliance, and there was no proof indicating the defect was caused while the switching crew were performing their duties. It cannot, therefore, be inferred that the finger or lifting key might have been broken at the time it was discovered to be out of order. The duty of defendant under the statute is an absolute one, and is not discharged by the exercise of reasonable care. The case is controlled by the principles announced in St. Louis, Iron Mountain & Southern Railway Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, and by this court in United States v. Atchison, Topeka & Sante Fé Railway Co. (C. C. A.) 163 Fed. 517, and United States v. Denver & Rio Grande Railroad Co. (C. C. A.) 163 Fed. 519.

The judgment is affirmed.

AMERICAN LITHOGRAPHIC CO. v. WERCKMEISTER.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 47.

COURTS (§ 349*)—FEDERAL COURTS—SUBPŒNA DUCES TECUM.

The power of a federal court to require the production of documentary evidence is not limited to an order made on motion, as provided by Rev. St. § 724 (U. S. Comp. St. 1901, p. 583); but it has inherent power, as well as express authority under section 716 (page 580), to issue a subpœna duces tecum and to enforce obedience thereto by proceedings for contempt.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 349.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment in favor of the defendant in error, who was plaintiff below, entered on the verdict of a jury for \$10,000 in a qui tam action brought to recover the money penalties for violation of section 4965, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3414), relating to copyrights.

[•]For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William A. Jenner, for plaintiff in error. Antonio Knauth, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. This cause was here before on a writ of error to review a judgment in favor of plaintiff. After overruling the other exceptions then presented, we reversed and remanded the cause for a new trial on the ground that there was not in the record competent legal evidence to support the verdict; much of the testimony offered by plaintiff having been excluded by the trial court on the mistaken theory that it was privileged. 146 Fed. 377, 76 C. C. A. 649. Upon

the second trial the excluded testimony was admitted.

Upon the present appeal we see no reason to modify in any way our former ruling that the various books and papers of the defendant corporation are not privileged, following the decision of the Supreme Court in Hale v. Henkel. 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. The books and papers were produced in court by officers or employés of defendant who had them in custody, after the trial judge had notified them that, unless they obeyed the process of the court which called for such production, he would commit them for contempt. A perusal of the record satisfies us that nothing short of a threat of immediate commitment would have secured obedience to the process of the court. Defendant contends that such compulsory production was error, and his principal argument is directed to the construction of section 724, Rev. St. U. S. (U. S. Comp. St. 1901, p. 583). But it is not at all necessary to refer to that section. The plaintiff had duly served a subpœna duces tecum for their production. Defendant is wholly in error in assuming that section 724 is the only means provided for bringing a party's books and papers into court on the trial of an action at law. The inferior federal courts are expressly given power to issue all writs not specifically provided by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law. Section 716 (page 580). Indeed, it would be immaterial if there were no such express provision. The power to issue a writ of subpoena to compel the production of written as well as oral testimony is essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. Amey v. Long, 9 East, 473, per Ellenborough, L. C. J.

The power of courts to issue subpænas duces tecum is so elementary that it will be sufficient to refer to an admirable discussion of the history and development of that power in Wigmore on Evidence, vol. 3, §§ 2190 to 2194. The Code of Civil Procedure has restricted the powers of the state court by requiring that a subpæna duces tecum must be served at least five days before the day when the witness is required to attend; but no such restriction has been imposed on the federal courts, although the trial judge would, of course, secure to the witness a reasonable time to comply with the requirements of the subpæna. Inasmuch as the witnesses in this case actually brought the documents into court before the taking of testimony was closed, there

is no force in the suggestion that they did not have a reasonable time

to comply.

Defendant argues again the various propositions presented by him on his former appeal, viz., that the action is penal, that defendant was privileged, and that no offending sheets were "found in defendant's possession." These have already been decided adversely to his contention, and his reargument has not induced a reconsideration of our former opinion.

Exceptions were reserved to the admission of certain items of evidence, including the judgment roll and minutes of testimony in a replevin action against the American Tobacco Company. While these were not competent, being res inter alios acta, we are satisfied that the error was not harmful, since abundant proof of the "sale" of the necessary number of copies was made by the entries in defendant's own books.

Finally, it is suggested that there was no evidence that any of the alleged infringing sheets were made within two years of the date of the action. Section 4968 (page 3416). We do not think it necessary to discuss the evidence at length, but are convinced that there was quite sufficient to warrant the jury in concluding that defendant had offended against the terms of section 4965 within two years before the beginning of the action.

The judgment is affirmed.

CARPENTER V. SOUTHWORTH.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 63.

1. Payment (§ 84*) — Recovery of Payments—Mistake of Law—Payment to Trustee in Bankruptcy.

The rule that payments made under mistake of law are not recoverable does not apply to a payment made to a trustee in bankruptcy or other officer of a court holding the funds in his hands upon trust for equitable distribution.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 267; Dec. Dig. § 84.*]

2. PAYMENT (§ 84*)—RECOVERY OF PAYMENTS—NATURE AND GROUNDS OF RIGHT.

An action to recover money paid by mistake is equitable in its nature, and when a payment is made which the payee in good conscience is entitled to retain it cannot be recovered.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 267; Dec. Dig. § 84.*]

3. PAYMENT (§ 89*) — ACTION TO RECOVER PAYMENT — SUFFICIENCY OF COMPLAINT.

A complaint in an action against a trustee in bankruptcy to recover a payment alleged to have been made to him by plaintiff in the mistaken belief that under a prior decision of the court he was liable therefor does not state a cause of action, where it does not show that he would not otherwise have made the payment, nor that he was not in fact liable.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 294; Dec. Dig. § 89.*]

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Northern District of New York.

Matteson, Fuller, Miller & Matteson, for plaintiff in error. Grant & Wager, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The complaint in this action alleges, in substance, that the Remington Automobile & Motor Company, a corporation, went into bankruptcy; that a call was made by order of the District Court upon certain unpaid stock subscriptions; that an appeal was taken from such order to this court, where it was affirmed, but without prejudice to any defenses stockholders might have in plenary actions to recover their respective assessments (see In re Remington Automobile, etc., Co., 153 Fed. 347, 82 C. C. A. 421); that the plaintiff, who was a stockholder and subject to the call, learned from a newspaper of the decision of this court and believed that it held him liable, although he was not advised as to its terms; that he thereupon called upon the defendant, who was trustee of the bankrupt corporation; that the defendant did not show or tell him the contents of the decision, "but informed him that the Ilion stockholders would have to pay, and that his payment would release him"; and that, relying upon this statement and in the belief that he had no further opportunity to defend himself, he paid the amount of his assessment, \$1,250. The plaintiff seeks in this action to recover the money so paid upon the ground of payment by mistake. The defendant filed a general demurrer, which was sustained by the District Court, and, the plaintiff, not availing himself of the privilege of amending, the complaint was dismissed.

Whether the mistake which the plaintiff sets up was a mistake of law, or of mixed law and fact, is not material. While payments made under a mistake of law are, as a general rule, not recoverable, an exception is made in the case of such payments made to trustees in bankruptcy or other officers of courts. As stated by Lord Justice James in Ex parte James, L. R. 9 Chancery Appeals, 609, 614:

"With regard to the other point, that the money was voluntarily paid to the trustee under a mistake of law, and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

See, also, Ex parte Simmonds, L. R. 16 Q. B. 308; Gillig v. Grant.

23 App. Div. 596, 49 N. Y. Supp. 78.

These cases are based upon the proposition that, while an individual litigant may retain moneys paid through a mistake of law, a court will not permit its officers to take advantage of any such mistake and

keep moneys belonging to another. The difficulty with the plaintiff's cause of action as stated in his complaint is, however, that it is not sufficiently alleged that the money in the hands of the defendant belongs to another. It is not alleged that the mistake under which the payment was made was material. It does not appear that, if the plaintiff had known the precise terms of the decision, he would not have made the payment. It is not alleged that the plaintiff had any defense to a plenary action for the recovery of the assessment, or that he intended to make any defense if afforded opportunity. The plaintiff in his brief says that "under the decision of this court complainant was not liable." This is a mistake. He was liable, unless he had a valid defense and chose to interpose it.

An action for the recovery of money paid by mistake is equitable in its nature, and when a payment is made which the payee in good conscience is entitled to retain it cannot be recovered. The principle is stated by Lord Mansfield in the early case of Bize v. Dickason, 1 T. R. 285:

"The rule has always been that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back as a debt barred by the statute of limitations or contracted during infancy; but where the money was paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."

The general allegation in the complaint that the money sought to be recovered rightfully belongs to the plaintiff merely states an inference or conclusion from the other facts, which are in themselves insufficient. It does not help them out and show the materiality of the mistake. Upon the complaint as it stood the demurrer was properly sustained, and, as the plaintiff did not amend, the judgment dismissing the complaint was correct, and must be affirmed.

In affirming the judgment, however, we deem it proper to say that it would seem to us appropriate for the District Court to enter another order, upon the application of the present plaintiff, directing the trustee to retain the said money paid to him until the determination of a new action for the recovery of the same, should said plaintiff institute it in said court within a specified time.

HAIGHT & FREESE CO. v. WEISS et al.

(Circuit Court of Appeals, First Circuit. November 17, 1908.)

No. 778.

1. APPEAL AND ERROR (§ 150*)—PARTIES—SUBSTANTIAL INTEREST.

In proceedings for winding up the affairs of a corporation under receivership, where the receiver has been made practically a trustee, and has been made a party in reference to an allowance of counsel fees from the fund in the registry of the court, and where it appears that the corporation is so deeply insolvent that it has no possible interest in the ques-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion involved, it will not be heard on an appeal with reference to the subject-matter of the allowance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 938; Dec. Dig. § 150.*]

2. Equity (§ 400*)—Reference—Discretion of Court.

A court is not bound to refer to a special master the question of the allowance of counsel fees from a fund in court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. 866 ; Dec. Dig. 400.*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Franklin Bien, for appellant.

William D. Turner, for appellee receiver.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is an appeal against certain allowances from the fund made to counsel in the same case to which our opinion in Weiss v. Haight & Freese Company (No. 785, passed down this day) 165 Fed. 432, relates. The appellant was the Haight & Freese Company, but there were brought into the appeal as respondents certain of the creditors who intervened, and also the receiver. By force of the facts which appear in our opinion in Haight & Freese Company v. Weiss (No. 695, passed down October 1, 1907) 156 Fed. 328, 84 C. C. A. 224, the appellee, styled the "receiver," was in fact a trustee, as he had been by a final decree directed to take possession of all the assets of the corporation, the Haight & Freese Company, and to sell and dispose of them, and distribute the proceeds among the creditors. All this he has accomplished to a very considerable extent.

The result has been to make it evident that the corporation is absolutely insolvent, and this to such an extent that it has no possible interest in the questions now before us. No parties having any real interest in the assets object to the allowances; and, so far as we can understand the objections made by the appellant corporation now insisted on, they result in the single proposition that the court should have referred the matter to a special master, which it did not do. We are not aware of any rule or practice which prohibits the court from determining itself a question of this nature, or any other question of a like character, without the delay and expense of a reference. A reference is merely for the convenience of the court to enable it to facilitate its business, and not an incumbrance which it must bear the burden of when it appears to be unnecessary. The observations in Railway v. Tompkins, 176 U. S. 169, 179, 20 Sup. Ct. 336, 44 L. Ed. 417, cited by us in Haight & Freese Co. v. Weiss, 156 Fed. 328, 332, 84 C. C. A. 224, apply only to an appellate tribunal, and are not inconsistent herewith. Therefore, inasmuch as the appellant has no substantial interest, and inasmuch, also, as the alleged error on which

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it relies is not in fact error, we cannot interfere with the conclusions brought to us by this appeal.

The decree of the Circuit Court is affirmed, and the receiver re-

covers his costs of appeal.

WEISS et al. v. HAIGHT & FREESE CO. et al.

(Circuit Court of Appeals, First Circuit. November 17, 1908.)

No. 785.

APPEAL AND ERROR (§ 984*)—REVIEW—ALLOWANCE OF COUNSEL FEES.

The rule applied that an allowance of counsel fees by a court of equity from a fund in court is largely discretionary, and will not ordinarily be disturbed by an appellate court, where the judge who made the same presided throughout all of the proceedings, and therefore had personal knowledge of the services rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3886; Dec. Dig. § 984.*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

William P. Maloney, for appellants.

Franklin Bien, for appellee Haight & Freese Co.

William D. Turner (Stephen S. Fitzgerald, on the brief), for appellee receiver.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This appeal arose out of the proceedings which are explained in our opinion in Haight & Freese Company v. Weiss (No. 695, passed down October 1, 1907) 156 Fed. 328, 84 C. C. A. 224, and in Haight & Freese Company v. Weiss (No. 778) 165 Fed. 430, in which our opinion is passed down simultaneously with this. It was taken by Mr. William P. Maloney, who was the solicitor and counsel who initiated the bill in equity out of which all the proceedings referred to resulted, and it relates to an allowance from the fund made by the Circuit Court in his behalf for his professional services in reference thereto. That such allowances may ordinarily be made was affirmed in Central Railroad v. Pettus, 113 U. S. 116, 122, 5 Sup. Ct. 387, 28 L. Ed. 915 et seq.

The appellant made the corporation and the receiver and certain of its creditors appellees. The receiver objects to an increase of the

allowance.

In Trustees v. Greenough, 105 U. S. 525, at pages 536 and 537, 26 L. Ed. 1157, the opinion discussed the general topic of this class of allowances, and declined to interfere with those made by the Circuit Court, because it did not find in them anything "seriously objectionable." It added that the court of the first instance should have considerable latitude of discretion on the subject, since "it has far better means of knowing what is just and reasonable than an appellate court

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

can have." On the same general topic, though not under the same circumstances, Stuart v. Boulware, 133 U. S. 78, 81, 82, 10 Sup. Ct. 242, 244, 33 L. Ed. 568, observed:

"Like all questions of costs in courts of equity, allowances of this kind are largely discretionary, and the action of the court below is treated as presumptively correct."

It then repeated the language of Trustees v. Greenough as to the means of knowledge of the court of primary jurisdiction. In Central Railroad Company v. Pettus, 113 U. S. at page 128, 5 Sup. Ct. at page 393, 28 L. Ed. 915, the Supreme Court reduced the allowance made by the Circuit Court; but it appeared that the parties who initiated the proceedings had a specific contract with the counsel for a specific sum less than that allowed, and the court held that all other parties in interest were entitled to the benefit of the contract, and reduced the allowance accordingly.

In the case at bar the record shows that the learned judge who made the allowance in behalf of the appellant initiated the proceedings to which it related and had sole control of them throughout. Therefore, in determining the amount which the appellant should receive, it must be assumed, in the language of the Supreme Court, that he acted somewhat on his personal knowledge of the value of the services to which the case relates; and it is impossible for us to put ourselves in the advantageous position which he had with reference to the determination which he was required to make. Clearly, also, the record is not of such a character as to enable us to find in it anything which would make good what the learned judge possessed in this respect which we do not possess. Indeed, as is the fact, it must also be understood that it is impossible on this record, which is comparatively brief, and which presents only a small portion of the proceedings below, for us to estimate correctly the value of the appellant's services; while, also, the record contains no positive features suggesting error in the determination of the amount of the allowance. In other words, the condition of the case before us is such that we could not properly determine what amount we should award if we had primary jurisdiction in reference thereto; and it fails to suggest anything which indicates that the discretion which the learned judge of the Circuit Court was led to exercise was in any respect abused. The only clear element which we have before us is that the services of the appellant were exceedingly efficient and productive of favorable results; but even these are comparative expressions, and in no way indicate specifically whether the amount allowed was excessive on the one hand or insufficient on the other.

Notwithstanding what we have observed, the appellant maintains that there are certain errors of law in the method in which the learned judge of the Circuit Court approached the question, which ought to be revised by us. With reference to this claim we have nothing to go to except the opinion filed below. If in the absence of formal findings of fact we may go to this, which is doubtful, we discover nothing therein of the character claimed by the appellant. The only matter upon which we may comment is that the learned judge quotes a para-

graph from the judge of the Circuit Court in the Second Circuit, having concurrent jurisdiction over certain questions involved in this litigation, in which he apparently states that any allowance must necessarily cease with reference to services after the receiver was appointed. The learned judge against whose allowance this appeal is taken does not indicate that he accepted that view. If he had accepted it, it might be erroneous, according to the suggestions made by the Circuit Court of Appeals for the Fifth Circuit in Burden Co. v. Ferris Co., 87 Fed. 810, 31 C. C. A. 233.

On the whole, we are unable to revise the determination of the Cir-

cuit Court.

The decree of the Circuit Court is affirmed, and the receiver recovers his costs of appeal.

In re BEVINS et al.

(Circuit Court of Appeals, Second Circuit. November, 16, 1908.)

No. 34.

1. BANKRUPTCY (§ 77*)—INVOLUNTARY PROCEEDINGS—PETITIONING CREDITORS—PURCHASE OF CLAIM.

Claims against a bankrupt may be purchased in order to make up the requisite number of petitioning creditors to sustain an involuntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 103; Dec. Dig. § 77.*]

2. BANKRUPTCY (§ 77*)-INVOLUNTARY PROCEEDINGS-AMOUNT OF INDEBTEDNESS

Where the claim of a petitioning creditor was provable when the petition was filed for an amount exceeding \$500, it was immaterial that thereafter the creditor became liable to the bankrupt's assignee for the benefit of creditors because of a wrongful attachment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 101; Dec. Dig. § 77.*]

3. BANKRUPTCY (§ 77*)—INVOLUNTARY PROCEEDINGS—CLAIMS IN DIFFERENT RIGHTS.

A claim by a bankrupt's assignee against a creditor for damages for wrongful attachment was a claim in a different right, and therefore could not be set off against the creditor's claim against the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 77.*]

Appeal from the District Court of the United States for the Western District of New York.

Bartlett, Putnam & Chamberlain, for appellants.

Lewis & Lewis, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. December 22, 1906, at about noon, the firm of R. S. Bevins & Co., of Niagara Falls, delivered an assignment for the benefit of creditors to one Chamberlain, at Buffalo. The assignee told R. S. Bevins to go back to Niagara Falls and take possession of the business until he could get down and close it up. On the same

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

day Philip Becker & Co., of Buffalo, creditors of Bevins & Co. to the amount of \$468.02, obtained an attachment against their property on the ground that the indebtedness was fraudulently contracted, and that the assignment to Chamberlain was in fraud of creditors. At about 7 p. m. the sheriff served the attachment papers on R. S. Bevins at the store, said he attached all the stock and fixtures, and appointed Prime, a clerk in the employ of Bevins & Co., to keep charge for him until the matter was settled. December 27th, the attachment was vacated for irregularity, with \$10 costs. December 29th, Becker & Co., Joseph H. Fisher, and Samuel Goetz filed a petition in involuntary bankruptcy against Bevins & Co. December 31st, Bevins & Co. brought suit against Becker & Co. on the undertaking given by them in the sum of \$250 conditioned that "if the warrant is vacated the plaintiffs will pay all costs which may be awarded to the said defendants, and all damages which they may sustain by reason of the attachment, not exceeding the sum of \$250," and the assignee brought suit against Becker & Co. to recover \$10,000 damages for conversion of the assigned property. Bevins & Co. admitted insolvency in their answer, but denied that there was more than one petitioning creditor, alleging that Goetz and Fisher bought claims against them for \$40 and \$16.14, respectively, for and with the funds of Becker & Co. They further denied that the claim of Becker & Co. amounted to \$468.02 because of the liability of Becker & Co. to them on the bond given in the attachment action. The district judge referred the issues to a special master to ascertain and report the facts with his conclusions thereon.

We follow the finding of the master and of the district judge that Fisher and Goetz were the real owners of the claims purchased by them against the alleged bankrupts, and that therefore the requirement of section 59b of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3445), that there should be three petitioning creditors is satisfied. The right to purchase claims in order to make up the necessary number of petitioning creditors was upheld under the act of 1867 in Re Woodford, Fed. Cas. No. 17,972, 13 N. B. R. 575. The claim of Becker & Co. was provable when the petition was filed, and, as the petitioning creditors then represented an indebtedness over \$500, the requirements of section 59b were satisfied in this respect also. In re Hornstein (D. C.) 122 Fed. 266; In re

Mertens, 147 Fed. 177, 77 C. C. A. 473.

The damages caused by the attachment belong to the assignee, Chamberlain, as owner of the goods attached, and, being in another's right, could not be set off by the respondents against Becker & Co.'s claim, and the respondents have not tried to do so in their answer. In respect to the costs, only \$10 have been awarded to the respondents, which is not sufficient to reduce the indebtedness represented by the petitioning creditors below \$500, even if a claim accruing to the respondents after the filing of the petition could be set off.

The order adjudicating the respondents bankrupts is affirmed. Sub-

mitted without argument.

INTERNATIONAL PAPER CO. v. CHALOUX.

(Circuit Court of Appeals, First Circuit. December 11, 1908.)

No. 798.

1. CONTEMPT (§ 66*)—DECISIONS REVIEWABLE—JUDGMENT FOR CONTEMPT.

A judgment adjudging a party in contempt for disobedience of an order made in an action at law, which is not criminal in character, but for the protection of private rights, is not a final judgment, reviewable on writ of error.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 224; Dec. Dig. § 66.*]

2. Contempt (§ 66*)—Decisions Reviewable.

Where a judgment made to enforce an order by punishment of disobedience as a contempt would not be reviewable by a writ of error, the order itself is not.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 224; Dec. Dig. § 66.*]

Appeal from the Circuit Court of the United States for the District of New Hampshire.

Herbert I. Goss (Daniel J. Daley and Sullivan & Daley, on the brief), for appellant.

Henry F. Hollis, for appellee.

Before COLT and LOWELL, Circuit Judges, and DODGE, District Judge.

PER CURIAM. The order of the Circuit Court complained of was made in an action at law, not in a suit in equity or admiralty, and no appeal lies to this court under such circumstances. That this is true seems to be now conceded by counsel on both sides, who have suggested that they agree in desiring us to pass upon the validity of the order, and are ready to file such stipulation as may enable us to deal with it as if brought here by writ of error, instead of by appeal.

We think it equally clear, however, that this is not an order reviewable here upon writ of error. It was not made in a matter distinct from the general subject of litigation between the parties, nor did it affect any one not a party, and therefore without opportunity to be heard at final hearing in the case. Had the defendant's officers been adjudged in contempt for disobeying the order and a punishment imposed by the court, the judgment in contempt could not have been brought to this court by writ of error, because not a final judgment or decree. Such a judgment, not criminal in its nature, or imposed for public purposes, but a judgment having for its object the protection of the rights in the pending litigation of that party to the suit for whose benefit it is made, is not regarded as final. In re Debs, 158 U. S. 564, 573, 15 Sup. Ct. 900, 39 L. Ed. 1092; Bessette v. W. B. Conkey Co., 194 U. S. 324, 328, 24 Sup. Ct. 665, 48 L. Ed. 997; Doyle v. London Guarantee Co., 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641; Webster Coal Co. v. Cassatt, 207 U. S. 181, 28 Sup. Ct. 108, 52 L. Ed. 160. See, also, in this court, Wilson v. Calculagraph Co., 153 Fed. 961, 83 C. C. A. 77.

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

If a judgment made to enforce the order after it had been disobeyed would not have been final for the purposes of a writ of error, the order itself cannot be treated as final for those purposes.

The appeal is dismissed for want of jurisdiction, and without costs.

EQUI VALLEY MARBLE CO., Limited, v. BECKER. (Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 43.

SHIPPING (§ 108*)—CARRIAGE OF GOODS—CONTRACTS OF AFFREIGHTMENT—DAMAGES FOR BREACH.

Where, after a vessel had sailed with part only of the cargo she had contracted to carry for a shipper, the latter signed, under a verbal protest, a bill of lading covering the entire quantity, as the only means of obtaining any bill of lading, such bill did not supersede the original contract, and the shipper is entitled to recover back the freight paid on the cargo not taken, as well as damages resulting from the failure to take it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 407; Dec. Dig.

§ 108.*]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 153 Fed. 378.

J. Parker Kirlin, for appellant.

Clarence B. Smith and Wheeler, Cortis & Haight, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. We must decide this case on the record before us, although, because of the libelant's delay in filing its libel and the respondent's failure to take proofs on any material point, it is most unsatisfactory. The libelant has established that it made a contract at Spezia, Italy, with one Giacopini, as respondent's agent, for carriage to New York on one of his steamers of 500 tons of marble, to be shipped in the month of September, 1904, at Spezia, for a freight of 161/2 shillings per ton of 16 cubic feet measurement, including the expense of loading and discharging. The marble was on lighters ready to be loaded September 12th. The respondent's steamship Citta de Palermo called at Spezia September 23d and loaded 295½ tons, and sailed on the 29th, leaving 204½ tons on the lighters. October 9th the respondent's agent presented his bill of lading, which was printed to be signed by the shippers as well as by the master, requiring the shipper to pay net freight 9 shillings 6d. per ton on the 2041/2 tons of marble short-shipped. The libelant refused to accept this bill of lading because of this charge, but ultimately did sign and accept it; respondent refusing to deliver it in any other form. Upon arrival at New York the libelant paid the freight called for by the bill of lading under protest and filed this libel some eight months afterwards.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

We think the whole case turns upon the question whether the libelant has proved that it signed and accepted the bill of lading at Spezia, October 9th, under protest. A bill of lading is a commercial document of title, which represents the goods, and which the master by the general maritime law and expressly by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), in the case of vessels in the foreign trade, is bound to give to the shipper. The libelant has made out, perhaps a little lamely, that it did sign and accept this bill of lading under verbal protest for the purpose of getting this usual document of title. Under these circumstances the bill of lading cannot be said to have taken the place of the original contract of affreightment. The correspondence offered in evidence by the respondent was properly excluded by the court, and we have not considered it at all.

Decree affirmed, with interest and costs.

GILL v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. December 12, 1908.)

No. 1,819.

MASTER AND SERVANT (§ 112*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—RAILROAD TRACKS—DUTY TO FENCE.

Neither at common law nor under Acts Tenn. 1891, p. 220, c. 101, §§ 2, 3, which provide that railroad companies shall be liable for all stock killed on their tracks if unfenced, but exempts them from such liability if their tracks are inclosed by a lawful fence, is any duty to employés imposed on a railroad company to fence its track; and it is not chargeable with liability for the death of an engineer in its employ, resulting from a collision with live stock on the track because its road was unfenced.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 222; Dec. Dig. § 112.*]

In Error to the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

J. W. Green, for plaintiff in error.

J. G. Johnson and J. B. Wright, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This suit was brought by the plaintiff's intestate, an employé of the defendant railroad company, who was killed through the derailment of an engine by a collision with a cow which had strayed upon the unfenced track of the defendant. It was averred in the petition that the intestate's "death was due wholly to the carelessness and negligence of the defendant in failing to erect and maintain a fence along its said track, so as to prevent live stock from going thereon," and that the defendant "wholly failed to fence its track in Blount county [wherein the accident occurred], or to protect and guard its tracks, rails, and right of way in said county by a fence or in-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

closure of any sort, in direct violation of law, and especially the fencing act passed by the Legislature of Tennessee for the protection

of life and property, both on the trains and upon the tracks."

After careful consideration, the court below delivered a written opinion, reported in Gill v. L. & N. R. R. Co. (C. C.) 160 Fed. 260, in which the demurrer was sustained and time allowed to amend. It was not possible, however, to amend, and the action was dismissed. The sole question before us is whether there could be an amendment which would save the cause of action. We do not think there can be, and we fail to see the necessity for another opinion.

The judgment is therefore affirmed, upon opinion of the Circuit

Court.

THE J. S. T. STRANAHAN.

THE McCALDIN BROS. CO.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 62.

Towage (§ 11*)-Injury to Tow-Collision with Pier.

Two tugs, which undertook to tow a steamer from the Erie Basin without her having steam up and without assistance, although they lacked sufficient power to handle her safely under the conditions of wind and tide existing, especially outside the basin, *held* liable for injury by striking against the piers at the entrance.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 151 Fed. 364.

On appeal from a decree entered on the 8th day of November, 1907, awarding damages to the libelant for injuries sustained to its steamship Maria by striking the pier at the entrance of the Erie Basin while in tow of the steam tugs belonging to the claimant.

R. J. M. Bullowa, for appellant.

Wing, Putnam & Burlingham (James Forrester, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. But a word need be added to the opinion of the District Judge. The Maria was solely in charge of the tugs. She had no motive power of her own. It was for the tugs to determine whether they could tow her safely to her destination, and they should have ascertained positively whether she had steam up before they undertook the maneuver. Whether they knew this fact when they first made fast is debateable; but they certainly knew that she had no steam before they got into a position of danger, and we are convinced that they could have brought her to a position of safety and held her

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

there until she got steam up, or until the services of another tug were obtained. One of the witnesses testifies that, if the tugs had not proceeded to tow the Maria through the entrance to the Erie Basin, she would have drifted back into the dry dock from which she was taken. Indeed, this is apparent, as the wind was from the southwest. With full knowledge of all the conditions, the tugs should not have undertaken the service unless they were able to complete it with safety. The fault of the tugs is clearly established, and we fail to find any negligence on the part of the steamer.

The decree is affirmed, with interest and costs.

MAIMEN v. UNION SPECIAL MACH. CO.

(Circuit Court of Appeals, Third Circuit. November 20, 1908.)

No. 23.

1. PATENTS (§ 328*)—INVENTION AND INFRINGEMENT—THREAD-CONTROLLING DEVICE FOR SEWING MACHINES.

The Woodward patent, No. 493,461, for a thread-controlling device for sewing machines, was not anticipated, covers a true combination, and discloses patentable invention; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 318*)—SUIT FOR INFRINGEMENT—ACCOUNTING—EFFECT OF FAIL-URE TO MARK PATENTED ARTICLE.

In a suit in equity for infringement of a patent by a party who failed to mark the articles made thereunder as required by Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), he may nevertheless be decreed an accounting on account of infringement committed by defendant after notice given by the filing of the bill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 567; Dec. Dig.

Accounting by infringer for profits, see note to Brickill v. City of New York, 50 C. C. A. 8.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 161 Fed. 748.

H. T. Fenton, for appellant.

Charles L. Sturtevant and Joseph C. Fraley, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The opinion of the learned judge below, reported in 161 Fed. 748, so fully and clearly resolves the points in controversy that it seems unnecessary to paraphrase at length the reasoning by which his conclusions were severally attained. After careful consideration of all the points raised on appeal in behalf of the appellant, our conclusion is that the issues were rightly decided in the court below. In this court, as in that, the appellant rested his claim to anticipation mainly upon the Muther patent. That the pat-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ent in suit, however, shows inventive advance upon that, as well as upon the prior art in general, has been clearly demonstrated. It must be admitted that the placing of an intermediate eyelet upon the top of the movable arm of the sewing machine was of itself a simple matter. Nevertheless results were thereby obtained which were previously obtained or attempted only by complicated devices. The simplicity of the invention is perhaps its chief merit, and certainly ought not to, and does not, preclude its validity.

As to the point made on behalf of the appellant that the claims in question do not set forth a true combination, but rather a mere aggregation of parts, we think the contrary is manifest. The eyelet, c, which comprises the invention, manifestly co-operates with the other elements of the combination, and without them could not perform its function. It is true that the elements of the combination do not act simultaneously; but that is immaterial, since they are nevertheless so arranged that the action of each is necessary and contributes to the general result. Upon this point the court below well said:

"Nor is the invention here to be characterized as merely putting on another eyelet, but consists in attaching it at such a place that it shall operate to a certain end in a certain way. Not only by producing a crook or bend in the thread, between the tension device and the needle arm, does the relative arrangement of the several eyelets pull off just so much more thread, thus supplying a needed slack in case of encountering an extra thickness of material, such as the ridge of a seam, but this slackness is in turn taken up by the action of the forward eyelet as the needle arm descends, keeping the thread taut and securing a tight stitch; and all this is so timed as to co-operate with the action of the looper, or under-thread carrier, as it is shot back and forth, into and out of the looper, at incredible speed, below the bed plate."

Infringement has been clearly established, and nothing need be added to what was said upon that point in the court below. The authorities there cited amply support a charge of infringement, when facts similar to those here presented appear.

Of the assignments of error one attacks the form of the decree, which required an accounting of profits and damages subsequent to November 14, 1904, the date of the filing of the bill of complaint. One of the issues raised by the pleadings was that, although the complainant had made and sold the patented article, it had failed to mark said devices as required by section 4900 of the Revised Statutes (U. S. Comp. St. 1901, p. 3388). There is no evidence in the record which shows or tends to show any actual or constructive notice to the defendant of the patent in suit prior to the filing of the bill of complaint. Under circumstances like these, however, an accounting of profits and damages subsequent to the date of the filing of the bill was allowed by this court in American Caramel Co. v. Thomas Mills & Bro. (C. C. A.) 162 Fed. 147. The mandate in that case, by implication at least, clearly permitted such an accounting, and we have not been referred to any controlling authority to the contrary. Turning to the statute upon this point, we find it enacts that:

"In any suit for infringement by the party failing so to mark [as previously prescribed in the same section] no damages shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement and continued after such notice to make, use and vend the article so patented."

This goes no farther than to prohibit the recovery of damages without proof of notice. It prescribes no particular form of notice or any particular time for the accounting. To permit an accounting, therefore, after notice given by the filing of the bill, if the complainant shall establish its right thereto, does not contravene the statute, since, notwithstanding such notice, the complainant can recover no damages unless it affirmatively shows infringement after notice.

As the proofs now stand, the complainant can recover no damages; but, if he shall be able to show infringement after the bill was filed, we see no reason why it should not be permitted to do so, and to recover the amount so shown, and in this suit. By this procedure the statute is neither violated nor strained; but an opportunity is afforded the complainant to do at a later stage of the case what probably it should have done at an earlier. The question is one of procedure, rather than of jurisdiction, and therefore well within the control of the court, and an accounting may properly be allowed in order to avoid a multiplicity of suits. If the complainant's proofs, when taken, shall not affirmatively disclose infringement subsequent to the filing of the bill, it will be mulcted in costs, and the defendant will not have been injured.

We find no error, therefore, in the decree below, which is affirmed,

with costs.

FOX et al. v. KNICKERBOCKER ENGRAVING CO.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 73.

1. Patents (§ 310*)—Suit for Infringement—Admission in Pleading.

Where the answer to a bill charging infringement of a patent admitted that defendant had during the time alleged made and used articles conforming to the claims of the patent, no further proof is required from complainant on the issue of infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. \S 526; Dec. Dig. \S 310.*]

2. Patents (§ 324*)—Suit for Infringement—Increase of Damages by Court.

The awarding of treble damages for infringement of a patent under Rev. St. § 4921 (U. S. Comp. St. 1901, p. 3395), being discretionary with the court, will not be interfered with by the appellate court unless it appears that there has been an abuse of discretion.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 324.*]

3. PATENTS (§ 328*)-VALIDITY-PHOTOGRAPHIC NEGATIVE.

The Fox patent No. 675,272, for a photographic negative, is valid on its face.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from final decree entered January 16, 1908, in the Circuit Court for the Southern District of New York, in an infringement suit based upon letters patent No. 675.272, granted May 28, 1901, to Thomas S. Fox for a new and Improved half-tone negative. This decree made final the interlocutory decree,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

confirmed the report of the master, after modifying it by reducing the damages assessed by him, found the amount of damages to be \$591, and adjudged that this sum should be trebled.

For opinion below, see 158 Fed. 422.

Wm. Lester Wemple, for appellant. Philip C. Peck, for appellees.

Before LACOMBE, COXE and NOYES, Circuit Judges.

COXE, Circuit Judge. On the issue joined by the bill, answer and replication no one appeared before the examiner on behalf of the defendant. The complainants offered in evidence the patent, various documents proving title, an admission by the defendant of infringement and rested, after having called a practical photo-engraver to describe the process of the Fox patent. After the interlocutory decree was entered a petition for a rehearing was presented, and denied.

The first proposition argued is that the patent is void on its face for want of invention. Assuming that this question may be presented for the first time on appeal, it is manifest that the defendant's contention cannot be maintained. The patent deals with an abstruse and complicated art and there is nothing, existing prior to the date of its application, of which the court can take judicial notice, which throws any light upon the question of invention. Obviously the patent is valid on its face and it was the duty of the defendant to prove the contrary.

The defendant's second contention is that there is no evidence of infringement to sustain the interlocutory decree. We think, on the contrary, that the proof was of the highest class attainable, viz.: the written admission of the defendant itself sworn to by its president. The portion of the answer introduced is as follows:

"And the defendant further says that since the 5th day of August, 1902, it has made or caused to be made and used, or caused to be used a number of photographic negatives which conformed to claims 1, 2, 3 and 4, respectively, of the said letters patent No. 675,272; and which were respectively made by processes which included the methods specified in claims 5, 6 and 7, respectively, of the said letters patent No. 675,272."

This admission is in direct response to an allegation of the bill charging that "since the issue of said letters patent No. 675,272, and since the 5th day of August, 1902, the defendant herein named" has infringed, etc. The bill also required the defendant to make answer to certain interrogatories stating whether or not it had made the new articles of manufacture covered by the first four claims of the patent and whether or not it had used the method described in the last three claims. The admission is distinct and positive; it is contained in a paragraph by itself, wholly disconnected from any other averment of the answer.

It is argued that the admission is not available because other paragraphs of the answer preceding and following the paragraph in question, allege, on information and belief, that the invention was known and used by other designated individuals prior to the patent. In other words, it is said that the admission is qualified by the other

averments of the answer and cannot be separated from the affirmative

allegation of anticipation. We are aware of no such rule.

The effect of the admission was to remove the issue of infringement from the controversy leaving it to proceed upon the question of prior use. As there was no proof of prior use the court had no alternative but to grant the interlocutory decree.

If the cause had been heard in open court, and the complainants had attempted to make proof of infringement the judge would undoubtedly have declined to listen to such proof in view of the express admission of the answer.

As was said by Mr. Justice Miller in Jones v. Morehead, 1 Wall. 155, 165, 17 L. Ed. 662:

"It would be subversive of all sound practice, and tend largely to defeat the ends of justice, if the court should refuse to accept a fact as settled, which is distinctly alleged in the bill, and admitted in the answer."

If anything further be needed to demonstrate the fallacy of the defendant's contention it is found in the fact that this is an appeal from a final decree founded upon a record containing abundant proof of infringement. It may also be noted that the master reports that at the hearing before him the defendant's counsel stated that "the defendant's infringement in this case was not willful and was small and was frankly admitted in the defendant's answer."

We have examined the report of the master and the opinion of the judge of the Circuit Court confirming the report, as modified, and

deem it unnecessary to add to what is there stated.

The concluding contention of the defendant is that "the learned court below abused the discretion in it vested by granting the com-

plainants' application for increased damages."

In increasing the damages the court below was influenced by the fact that defendant had reason to believe that it was infringing, "as it was called upon to indemnify at least one party with whom it was dealing and from whom it secured business by a reduction of price, thus knowingly taking business from a licensee of the complainants." It also appeared that the defendant destroyed all file proofs of the use by it of the infringing process prior to the commencement of the accounting, although this was not done maliciously or for the purposes of concealment. The account presented to the master was not a frank and full statement and defendant's infringement was continued after the commencement of the suit.

The defendant presented no evidence showing the invalidity of the patent and admitted infringement. Its conduct has subjected the complainants to a long and expensive litigation which might easily have been avoided if a license had been taken. In these circumstances the Circuit Court may well have thought that the damages which it was

possible to prove were inadequate.

If the question had been presented to this court in the first instance it is not improbable that we would have declined to treble the damages. It was, however, in the discretion of the Circuit Court to do so and we hesitate to say that the discretion has been abused. The following authorities sustain this view: Topliff v. Topliff, 145

U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; Day v. Woodworth, 13 How. 363, 372, 14 L. Ed. 181; Weston v. Empire Co. (C. C.) 155 Fed. 301; Folding Box Co. v. Elsas (C. C.) 81 Fed. 197, affirmed 86 Fed. 917, 30 C. C. A. 487; Lyon v. Donaldson (C. C.) 34 Fed. 789, 793.

The decree is affirmed with costs.

KUHN et al. v. LOCK-STUB CHECK CO.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 24.

1. Patents (§ 328*)—Invention—Printing Die.

The Force patent, No. 705,228, for a printing die, consisting of a metallic handle and a type-block, the handle having flanges with gripping edges to hold the rubber block instead of fastening it with glue or cement, is void on its face for lack of invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—ADJUDICATION OF INVALIDITY ON DEMUREER.

A court may properly declare a patent void on a demurrer to a bill for its infringement, when convinced from an inspection that it cannot be sustained.

[Ed. Note.—For other cases, see Patents, Cent. Dig. $\$ 536; Dec. Dig $\$ 310.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 157 Fed. 235.

On appeal from a decree of the Circuit Court for the Southern District of New York sustaining a demurrer to the bill on the ground that the patent in suit is void for lack of invention.

Henry Schreiter, for appellants.

George D. Beattys (George B. B. Lamb, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The patent in controversy, No. 705,228, was granted to William A. Force for a printing die. The object of the alleged invention is to fasten the rubber type-block securely to the handle of the die and is sufficiently illustrated by the claims, which are as follows:

"(1) A metallic handle for type-blocks provided with flanges, set in position to embrace a type-block, and adapted to be brought into rigid, unyielding engagement with the block when pressed together.

"(2) A metallic handle for type-blocks, provided with flanges, having gripping edges on their ends, the flanges being set in position to embrace a type-block and adapted to be brought into rigid, unyielding engagement with the block when pressed together.

"(3) The combination with a metallic handle, having flanges set in position to embrace a type-block and adapted to be brought into rigid, unyielding engagement with the type-block, when pressed together, of a type-block set

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

between the flanges and secured to the handle by pressing the flanges together upon the type-block."

It appears from the specification that nothing is new in the patented device except the method of fastening the type-block to the handle. Both of these elements were old, whether considered singly or in combination, but, instead of fastening them together by glue or cement, the patentee provides his metallic handle with flanges, and clamps the rubber between them—a method of fastening which is as old as mechanics. Assuming that the patented die discloses an improvement over the dies of the prior art, it is one of degree only. The die operates in the old way, no new function is produced, no new result is accomplished. The rubber is fastened to the metal more securely than before, but that is all. If this be invention, it must follow that one who substitutes some other material for metal—glass or porcelain, for instance—and fastens the rubber block to this handle by some well-known mechanical device which he substitutes for the gripping flanges of Force, will be entitled to a patent, and so on until all available fastening devices are exhausted. We are clearly of the opinion that the patent discloses nothing which does not belong to the skill of the calling. To paraphrase the language of the court in Rubber-Tip Pencil Co. v. Howard, 20 Wall. 498, 507, 22 L. Ed. 410:

"Everybody knew, when the patent was applied for, that if a yielding substance (like rubber) was inserted into a cavity having metal flanges, that the rubber would be embraced and held in position when the flanges were pressed together."

See, also, Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719, where a claim for "a pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article, as shown and set forth,"

was held invalid for lack of patentability.

That the question here presented may properly be decided on demurrer was decided by the Supreme Court in Richards v. Chase Elevator Company, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991. This court has frequently approved this practice, believing it for the interests of both parties that the court, when convinced that the complainant cannot succeed, should say so in limine and thus save them from the expense and annoyance of a protracted litigation. Fowler v. City of New York (C. C.) 110 Fed. 749, affirmed 121 Fed. 747, 58 C. C. A. 113; Lappin Brake-Shoe Co. v. Corning Co. (C. C.) 94 Fed. 162, affirmed 99 Fed. 1004, 40 C. C. A. 215; Conley v. Marum (C. C.) 83 Fed. 309, affirmed 85 Fed. 990, 29 C. C. A. 680.

The decree of the Circuit Court is affirmed with costs.

BRADLEY v. ECCLES.

(Circuit Court, N. D. New York. December 10, 1908.)

PATENTS (§ 235*)—INFRINGEMENT—THILL COUPLING.

The Bradley patent, No. 609,928, for a thill coupling, the essential feature of which is a spherical packing of leather or other similar material interposed between the knuckle and draft-eye, is limited by the prior art to a packing made in a single piece, and is not infringed by one made in separate halves, although pressed into shape and inserted in the coupling before sale.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370–381; Dec. Dig. § 235.*]

On order to show cause why defendant should not be punished for contempt in disobeying and violating injunction order or decree of this court made on final hearing, and issued on or about December 29, 1903, and served January 2, 1904, enjoining infringement of United States letters patent No. 609,928, dated August 30, 1898, on application filed September 28, 1897.

Howard P. Denison, for the motion. Wm. A. Megrath, opposed.

RAY, District Judge. On final hearing this court sustained the validity of the patent in question and wrote an opinion, reported in 122 Fed. 867, and affirmed by the Circuit Court of Appeals, 126 Fed. 945, 61 C. C. A. 669. The claim of the patent reads as follows:

"The combination with a draft-eye having spherical recesses in its jaws and a draft-iron having a spherical knuckle, of an interposed spherical packing provided with an open longitudinal joint along its side and with truncated ends at the ends of said joint, said packing enveloping the knuckle entirely and separating the same from the spherical bearing-surfaces of the surrounding draft-eye, substantially as set forth."

By reference to the specifications it is seen that the spherical packing surrounds the wrist and is seated in corresponding cavities of the jaws of the draft-eye. This packing is made of leather or other suitable material, bent and molded by pressure to the required form. It is constructed with truncated ends arranged at right angles to the open joint at the ends thereof, and entirely envelops the spherical knuckle. The construction shown and described is such that rattling is prevented by either perpendicular or horizontal movement of the iron parts.

The specifications explicitly state:

"While I prefer to make the packing of leather, it may also be made of other suitable material, and, if desired, the packing may be composed of separate halves, as shown in Fig. 4, instead of being made in one piece."

This is very material to the question now presented to the court, as the packing now made and sold by the defendant is composed of separate halves, and one half is placed and fastened in the upper half of the spherical socket, and the other half is placed and fastened in the lower half of the spherical socket. This spherical socket holds and envelops the spherical knuckle or wrist, the packing being interposed

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

between the inner surface of the socket and the surface of the knuckle. It must be conceded, I think, that, aside from convenience of construction and convenience in making a change of the packing when it becomes damaged or worn, the packing now made and sold by the defendant is the exact equivalent of that described in the complainant's patent, the claim quoted, and, if the claim, as construed by the Circuit Court of Appeals in the case mentioned and the one to be mentioned. is broad enough to cover and does cover this packing when composed of separate halves, pressed into shape and inserted in the coupling before sale, then defendant is violating the injunction, and the motion to punish for contempt must prevail. The Circuit Court of Appeals in the first instance, affirming the Circuit Court, held that the claim of the patent disclosed invention although of a narrow character, and that it must be limited in view of the prior art. There was no question that defendant's packing infringed, as he substantially duplicated that of complainant, which consisted of a single piece of leather suitably shaped and formed and placed in the sockets. After the decree was entered and the injunction was issued, the defendant sought to avoid infringement and a violation of the injunction by making the packing in two pieces, pressing them into shape to fit the socket and attaching them together at one edge by a small wire. This left an interposed spherical packing provided with one entirely open longitudinal joint along its side with truncated ends, etc., and another open longitudinal joint along its other side but closed, so far as it would be, by the wire or metal thread bringing the edges of the leather together. This court held that construction an infringement and a violation of the injunction, and no appeal was taken. Thereupon the defendant made and sold with his coupling a packing consisting of a single flat piece of leather cut of suitable size and shape to be inserted in the sockets and cover the wrist or knuckle when the coupling was closed. This was attached by a string to the coupling and sold with it. The purchaser and user was left to place this leather in the socket and press it into shape by closing the coupling upon it. Judge Wallace at circuit held this to be an infringement, and granted a preliminary injunction, but he was reversed by the Circuit Court of Appeals. Bradley v. Eccles. 139 Fed. 447, 71 C. C. A. 291. This packing was neither shaped nor inserted in the socket of the coupling. It was a mere flat piece of leather of suitable size and shape, sold with the coupling as stated. The defendant next made and sold with his couplings this same leather pressed into shape to fit the socket, and either actually inserted in the socket of the coupling and riveted there, or attached to the coupling after being so shaped and made ready to be inserted. The flat piece of leather was not pressed into shape by a separate device or presser. but by the coupling itself in closing it after the leather was inserted. This court held such a packing to be an infringement, and its manufacture and sale by the defendant a violation of the injunction, and the defendant was fined. On appeal that order was affirmed. Eccles v. Bradley, 158 Fed. 98, 85 C. C. A. 566.

The defendant, Eccles, now cuts out two pieces of leather, one for each socket, or each side of the socket, of such size and shape that

when inserted and riveted to the coupling by a small nail or otherwise they will be pressed into the required shape by the closing of the coupling, envelop the knuckle entirely, and separate the same from the spherical bearing-surfaces of the surrounding draft-eye. This packing thus formed is spherical, is provided with two (in place of one) open longitudinal joints, one along each of its two sides (front and back), with truncated ends at the ends of said joints. (See opinion of C. C. A., 158 Fed. 98-99, 85 C. C. A. 566). The two open longitudinal joints, instead of one, neither add to nor detract from the utility of the packing after insertion. With them there is no new or different mode of operation when in actual use. The mode of operation and the end sought and attained is the same. The defendant's mode of construction and of joining the packing to the coupling is a little different and probably more expensive, and it would be more difficult to substitute new packing of defendant's construction after long use. However, if the defendant makes and sells a coupling with packing which contains complainant's invention, he infringes and violates the injunction.

The latest decision of the Supreme Court of the United States is that infringement of a patent not primary—not a pioneer—is not averted merely because defendant's machine may be differentiated; that the range of equivalents depends upon the degree of invention. Continental Paper Bag Company v. Eastern Paper Bag Company, 210 U. S. 405, 414, 415, 28 Sup. Ct. 748, 52 L. Ed. 1122. This case clearly limits and explains Cimiotti U. Co. v. American Fur R. Co., 198 U. S. 399, 25 Sup. Ct. 697, 49 L. R. A. 1100, and Kokomo F. M. Case, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689. I understand it to be the law that a defendant may not avoid infringement by making an inferior device in changing parts or construction, provided he retains and uses the invention of the patentee—has the same elements in substantially the same combination operating in substantially the same way and producing the same result. The claim of the patent in question has in combination, 1, a draft-eye having spherical recesses in its jaws and a draft-iron having a spherical knuckle, 2, an interposed spherical packing provided with an open longitudinal joint along its side and with truncated ends at the end of said joint, and 3, "said packing enveloping the knuckle entirely and separating the same from the spherical bearing-surfaces of the surrounding draft-eye." In defendant's present combination, complained of, we have "1" and "3" exactly and without variation. We have "2," that is, "an interposed spherical packing," but it is provided with two open longitudinal joints. one along each side, and this spherical packing has truncated ends at the end of the joints. It is also riveted in the socket. The operation and office or function of the packing is precisely the same in both When not in use—that is, when the draft-eye is not closed, when the coupling is exposed for sale or is being attached for use one piece of the defendant's packing would drop out if not fastened in some way. The other would be liable to be displaced. For this reason, evidently, defendant attached the two pieces in the recesses by means of small nails or rivets which must be removed when the

packing is changed and new ones substituted. This makes an inferior packing, so far as insertion and keeping in place is concerned, when the entire combination is not in actual use, but when in actual use the one is the full equivalent of the other. As stated, this inferiority of construction merely would not avoid infringement. But, in view of the prior art, the Circuit Court of Appeals in Bradley v. Eccles, 126 Fed. 945, 947, 948, 61 C. C. A. 673, expressly limited the claim, and held:

"The patent must be confined closely to the precise device of the claim. The specification states that 'the packing may be composed of separate halves,' but no such form is included in the claim, nor would the prior art allow the patentee so to include it."

In Bradley v. Eccles et al., 139 Fed. 447, 71 C. C. A. 292, the Circuit Court of Appeals again had this patent before it, and the correctness of the interpretation and construction formerly given by the court in this regard was challenged. The whole subject was reconsidered, and Judge Lacombe, giving the opinion of the court, after quoting from the former opinion, said:

"The complainant in this suit realizes that the charge of infringement cannot be sustained unless our prior opinion is in some respects modified. His brief contains this statement:

"'When this case was before the Court of Appeals the patent was sustained, but the claim was erroneously and unjustly limited by the opinion to a spherical packing, integral, molded before application; and complainant therefore requests the court at this time to take cognizance of this fact,

and correct the limitations imposed by that opinion.'

"In support of this contention it is suggested that there is nothing whatever in the claim which says that the device must be integral, or that it may not be made of two separate halves, or that it must be molded into a spherical form before application. This suggestion is correct—there is no such restricting language in the claim—and the phrase used in our former opinion, 'The patent must be confined * * * to the precise device of the claim,' would have been more accurately expressed, had it used the words 'precise device shown.' But it is manifest from the opinion that the claim was limited, not because of its language, but because the prior art left no room for invention unless it was restricted in the manner indicated. The opinion expressly stated that, although the specification stated that the packing might be composed of separate halves, such modification could not be sustained, in view of the Murray (Canadian) patent, showing a thill iron with ball coupling between inverted cup-shaped packings. In his brief now filed, complainant asserts that the Murray (Canadian) patent shows two flat disks. That patent is not printed with the papers on this appeal, but the excerpts from it, which were laid before this court on the former appeal, contained the following:

"'Between the ball, d' and * * * I locate the inverted, cup-shaped packing, f, preferably made of leather or rawhide, or similar elastic material. * * * In the bottom of the semispherical recess, a4, * * * is

laid a cup-shaped packing, f', similar to the one marked f.'

"With a device of the prior art so close to the one patented, we were satisfied that the claim could not be sustained unless it were restricted in the manner indicated, and we are still of the same opinion."

It thus appears that the Circuit Court of Appeals has twice held that, in view of the prior art, the claim of the patent in suit is not broad enough to cover a packing made in two parts, one for the recess of the upper jaw and one for the recess of the lower jaw, and fastened therein by nails or rivets, and then pressed into shape, as naturally they would be, by closing the jaws upon the packing and spherical

knuckle. In this conclusion I concur, as I am bound to do, but am also free to say that I would so hold as an original proposition. The prior art clearly disclosed the use of a two-piece packing in such recesses, which, when placed therein and the jaws closed, were made to conform to the shape of the recesses and knuckle and surround it.

In view of the full consideration given to the question by the Circuit Court of Appeals its declaration, "The specification states that the packing may be composed of separate halves, but no such form is included in the claim, nor would the prior art allow the patentee to so include it," and its subsequent holding, "With a device of the prior art so close to the one patented, we were satisfied that the claim could not be sustained unless it were restricted in the manner indicated, and we are still of the same opinion," I do not see how it can be held that the defendant violates the injunction by using the packing composed of separate halves, each half inserted in and riveted to its appropriate jaw and recess. If complainant is correct in his contention, a new suit for infringement will settle the whole question.

The motion is denied.

UNDERWOOD TYPEWRITER CO. V. MANNING.

(Circuit Court, E. D. New York. December 11, 1908.)

1. EQUITY (§ 167*)—PLEADING—PLEA—MULTIFARIOUSNESS.

A plea which states but one ground of exemption from liability is not multifarious, although it may set out a number of facts or details of evidence in explanation and support of that ground.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 404; Dec. Dig. § 167.*]

2. Patents (§ 310*)—Suit for Infringement—Defenses.

In a suit for infringement of patents, against the patentee, who has assigned the patents and is charged with having infringed as superintendent of another corporation, a plea setting up that defendant as such superintendent has made no change in the conduct of the corporation's business, but which in effect admits infringement by the corporation, is insufficient.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 523; Dec. Dig. § 310.*]

In Equity. On plea.

Briesen & Knauth (Arthur von Briesen and Eugene Eble, of counsel), for complainant.

Edward C. Davidson (J. J. Kennedy, of counsel), for defendant.

CHATFIELD, District Judge. The defendant has interposed a plea, which has not been traversed by the complainant, but has been brought on for argument under equity rule 33. The complainant has attacked the form of the plea as multifarious, and also on the merits, as being no excuse or answer to the matters charged in the complaint.

The plea states that the defendant, "for plea to the whole of said bill," shows certain allegations as to his business relationship with

^{*}For other cases see same topic & SNUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Royal Typewriter Company, by which he is employed as superintendent, of which he is a director, qualified by holding one share of stock, and for which he is superintendent of its typewriter factory. The plea also states that the Royal Typewriter Company has been employing the same methods of manufacture since the defendant has been its superintendent as it did at the time he went there, and that no change has been made by him in respect to any of the matters covered by the complaint. Upon a mere examination of this plea it would seem that the defendant was setting up his lack of individual responsibility and also a denial of any infringing use by the Royal Typewriter Company. Such a joinder would make the plea multifarious, and therefore bad, under the authority of Giant Powder Co. v. Safety Nitro Powder Co. (C. C.) 19 Fed. 509, McCloskey v. Barr (C. C.) 38 Fed. 165, and Société Fabriques v. Lueders (C. C.) 105 Fed. 632.

But a further examination of the bill of complaint, and of the plea as well, shows that the complainant has charged the defendant with agreeing to undertake the duties of superintendent of the defendant's factory, and of so conducting himself as superintendent thereof as to make himself personally liable as an infringer of patents previously obtained by him, and which he had assigned to the complainant company. The defendant in his plea has referred to this accusation, and has stated that he had made no changes in the conduct of the Royal Company's factory. His apparent purpose is to disclaim any individual interest in the infringements, if they exist, rather than to plead lack of infringement on the part of the Royal Company. So that from this aspect the plea substantially amounts to a statement of but one ground of excuse or freedom from liability, although a number of specific facts, or a number of details of evidence, are set forth in explanation of that ground. On this aspect the plea is not multifarious, and must be considered on the merits. Story's Equity Pleadings (3d Ed.) § 652.

The plea, therefore, if it be taken to admit all things not denied, and, as has been said, be considered as an attempt to state an excuse or ground for freedom from liability, is equivalent to a concession that the Royal Company may be, or in fact is, for the purposes of argument upon the plea, an infringer. Some of the points previously decided upon the motion for a preliminary injunction must be referred to, although the statement thereof will be left as in the former

opinion.

It is apparent that the suit here is not for an injunction against the corporation, with an attempt to enjoin also an officer, as was the case in Continental Wire Fence Co. v. Prendergast (C. C.) 126 Fed. 381. Nor can the defendant attack (as was indicated in the former opinion) the validity of the complainant's patent, nor justify any infringement by himself, if he be found to be an individual infringer. Nor, again, if the Royal Company were admittedly or by adjudication held to be an infringer, would the fact that he was an employé relieve him from the consequences of his act. Maltby v. Bobo, 14 Blatch. 55, Fed. Cas. No. 8,998.

Under the last point mentioned the plea interposed by the defendant raises immediately the question as to whether the infringement is admitted, and, if so, what are the consequences thereof. As was indicated in the former opinion, this court does not consider that the defendant would suffer any hardship if he were restrained from any connection with or participation in a plain infringement of patents taken out and assigned by him. In the same way, no matter what opinion one may have of the ethical responsibility of an individual going over to a competitor, and there profiting through the experience gained with the original employer, no abstract equities are here involved, but the plea must be determined upon the legal status of the parties. In so far, therefore, as the plea would seem to admit infringement, and to seek to evade the consequences thereof on the part of the defendant, the plea should be overruled as insufficient.

If no other question could be raised, the complainant would seem to be entitled to judgment absolute; but by the provisions of equity rule 34 the defendant must be assigned to answer the bill, and to set up such defenses as he may have not covered by his plea. Wooster v. Blake (C. C.) 7 Fed. 816. Further, the issue in the present case, as shown by the complaint and by the plea, is substantially whether infringement did exist. If the Royal Company were a party to the action, this question could be determined; but as the action now stands the defendant, if he has no other defense, can only justify his conduct and relieve himself from the responsibility of the admissions of his plea by defending his action to the extent of proving that the Royal Company is not committing acts which are infringements of the patents claimed, if he is able so to do.

The defendant, therefore, may answer the complaint within such period as may be fixed by the order, or, in the event of his failure so to do, judgment absolute for the complainant will be entered, because of the insufficiency of his plea in the respects indicated.

QUEEN & CO. v. ROENTGEN MFG. CO. et al. (GREEN, Intervener).

(Circuit Court, E. D. Pennsylvania, December 28, 1908.)

No. 73.

PATENTS (§ 328*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction granted against infringement of the Sayen patent, No. 594.036, for a Roentgen ray tube, previously adjudged valid, as against the defense of anticipation by one of the defendants.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*

Grounds for preliminary injunction in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

In Equity. On motion for preliminary injunction.

Wm. S. Jackson and E. Hayward Fairbanks, for complainant. Ward & Joy, for defendants.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. B. McPHERSON, District Judge. The patent in suit, No. 594,-036, was granted in November, 1897, to Henry Lyman Sayen for an improvement in Roentgen ray tubes. Claims 2 and 3, which are especially involved in this controversy, were decided to be valid by Judge Kohlsaat of the Seventh Circuit, in the case of Queen & Co. v. Friedlander (C. C.) 149 Fed. 771, after a prolonged and strenuously contested litigation. His full and careful opinion was apparently convincing, for the result was accepted by the defendant without appeal. There is nothing whatever in the record, either of that case or of this, to support the faint suggestion that the decree in Judge Kohlsaat's court was entered by consent. Prima facie, therefore, these two claims are valid, and the first element of the complainant's right to the relief now prayed for is thus made plain. A second element, namely, infringement by the defendant intervener, is admitted, and, indeed, could not be successfully denied. A third element also sufficiently appears; the defendant is of slender financial ability and would probably be un-

able to respond to a final decree for damages.

The chief defense to the present motion rests upon an alleged anticipation. It is said that the defendant Green is the original inventor of the improvement in question, and that he reduced the invention to practice and put it into public use in 1896, several months or perhaps a full year before Sayen conceived the idea which is the subject of the patent in suit. No application for a patent, however, has at any time been made by the defendant, and the ex parte affidavits that are submitted on his behalf concerning the alleged public use of his device in 1896 are most unsatisfactory. He avers that apparatus showing various stages of his invention are still in existence, and he produced several photographs in support of this averment. There is no evidence. however, when these photographs were taken, and they were not even proved to be correct representations of the apparatus referred to. Moreover, there is no explanation why the apparatus itself was not offered in place of the secondary evidence presented by the photographs. A similar unfavorable criticism must be made of all the affidavits concerning the public use in 1896. Although they refer to events that are said to have taken place 12 years ago, in every instance they rest simply on the uncorroborated testimony of the witnesses. Part of their contents is also secondary in its character; part is mere hearsay, and, as their total result, they produce the decided impression that loose and general averments have been offered because no better evidence could be obtained. In my opinion the defendant's proof does not meet the high standard that must be applied when evidence is offered to make out the defense of anticipation by prior use, after a patent has once been adjudged to be valid.

These considerations are amply sufficient to justify a preliminary injunction, and I need say nothing, therefore, concerning the complainant's additional position, that in the most favorable aspect the defendant has nothing to rely upon except certain abandoned experiments, and that these can be of no value in the face of the subsequent patent to Sayen. I refer to this position only to add that I have not given it any weight, and that I intimate no opinion concerning its soundness.

The injunction asked for is well supported upon other grounds, without seeking the aid of the doctrine of abandonment. At the present stage of the case, therefore, the propriety of applying this doctrine need not be passed upon.

The decree prayed for may be entered upon the giving of security

by the complainant in the sum of \$2,000.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO.

(Circuit Court, S. D. New York. October 19, 1907.)

STREET RAILROADS (§ 58*)—INSOLVENCY—EXPENDITURES BY RECEIVER.

On appointment of a receiver for a street railway, he will be authorized to make such expenditures as are necessary to render the road efficient and to perfect the service in return for which its franchises were given.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

Byrne & Cutcheon, for complainants. Masten & Nichols, for respondent's receivers.

LACOMBE, Circuit Judge. The petition of the receivers, filed this morning, has been carefully considered. It is unfortunate that at the outset of their receivership such large expenditures should be required toward putting the roads and their equipments in proper condition. Evidently some of the work referred to should have been done long ago by the defendant; but that does not change the situation. Whatever is required to make the roads efficient and to perfect the service in return for which their franchises were given must be done, and done promptly.

The expenditures recommended by the receivers are approved.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. et al.

GUARANTY TRUST CO. v. SAME.

(Circuit Court, S. D. New York. April 14, 1908.)

RECEIVERS (§ 128*)—RECEIVER'S CERTIFICATES—PRIORITY.

Receiver's certificates authorized to be issued by the receivers for a street railway system for the purpose of making betterments necessary to enable the receivers to give an efficient service to the public because of the failure of a lessee to keep the property in repair and properly equipped will not, at the instance of the lessor and its bondholders, be made primarily a first lien on the property of the lessee on the ground that it was liable for waste, to the displacement of claims for material and supplies furnished the lessee which are entitled to priority over the claim for waste.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 219, 220; Dec. Dig. § 128.* Nature of certificates, see note to Postal Telegraph Cable Co. v. Vane, 26 C. C. A. 350.]

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. On settlement of order for receiver's certificates.

Byrne & Cutcheon, for complainant Pennsylvania Steel Co.

Masten & Nicolls, for defendant New York City Ry. Co. et al.

LACOMBE, Circuit Judge. Since it has been stated by the representatives of the bondholders that they expect to appeal from the order authorizing the issue of receivers' certificates to provide funds to put the roads and equipment of the system in efficient condition, it may be well to file a brief memorandum stating why the suggestions presented at the settlement of the order were not approved.

As has been noted many times, the property was in a deplorable condition when receivers took possession, and it became at once manifest that in order to secure a proper and efficient service, such as the public was entitled to, it would be necessary to expend a large amount of money on improvements and equipments of such sort as to amount to reconstruction and new acquisition. See opinions of October 8th (157 Fed. 440) and October 19th (165 Fed. 455). It was foreseen then, as the event has shown, that the cost of such work would have to be borne by the property; its income is wholly insufficient. This is unfortunate for the owners and bondholders, but there seems no help for it; the property must be put in fit condition, and, by restricting the expenditures of the proceeds of certificates to the betterment of such property only as is covered by both mortgages, it is thought that the court has done all it can to protect the interests of the bondholders under those mortgages. The court is now operating the road with full appreciation of the obligations due to the public in consideration of the franchises granted; it is far better able to determine as to the details of these expenditures than are the bondholders, who are not and cannot well be familiar with the practical operation of the road, however competent they may be to deal with the legal aspects of the situation. From past experience it may reasonably be assumed that the discharge of those obligations will be more satisfactorily effected by receivers under instructions of the court.

It is undoubtedly true that the property got into this deplorable condition because of the failure of the lessee company (New York City Railway) to spend sufficient money upon repairs and re-equipment during the running of the lease. It would seem that the lessor company might have a good cause of action against the lessee for waste in allowing the leased property to go to wreck. Whether some defense to this claim might be sustained on the theory that the lease itself was only a cover to allow the owners of an unproductive property to declare dividends out of the paid-up rent, while an impecunious company incurred the indebtedness for operation need not be considered. It may be assumed that, even to the full extent of the \$3,500,000 now authorized for certificates, the Metropolitan Street Railway Company has a valid claim against the lessee road for waste. What the Metropolitan interests now ask is to make the lien of the certificates fall in the first instance on all property of the New York City Railway, and on all the earnings and income realized from the operation of the property by receivers since their appointment in the original creditors' bill against the lessee road. The natural result would be to give to this claim for waste a priority over all other claims, even those of creditors for material and supplies furnished within four months of receivers' appointment, a class of claim which is accorded priority in every federal jurisdiction, and might quite possibly leave the court without means even to pay the expenses of liquidating claims already advertised for and filed with its special master.

This seems inequitable, and the clauses submitted have been exclud-

ed from the order.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York, May 25, 1908.)

RECEIVERS (§ 158*)—INSOLVENCY AND RECEIVERS—PRIORITY OF LIENS.

In insolvency proceedings against street railroad companies, claims for torts committed prior to the appointment of receivers have no equity which entitles them to priority over mortgage liens, but rank with general unsecured claims.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 158.*]

In Equity.

Byrne & Cutcheon, for complainants. Masten & Nicolls, for defendants.

LACOMBE, Circuit Judge. These are two separate applications. The first is by Charles Benner and others that as "a tort creditors' committee" they be admitted as a party defendant in this cause, with liberty to plead and be heard and to receive notice of all proceedings. The other application is, by the same committee, for an order "adopting certain rules and classification, contained in some books relating to street railway accounting, as the basis for classification of claims; also requiring the special masters to report when each claim accrued, and whether or not it is an operating expense; also directing receivers to follow said classification." The real object of the application is to obtain a ruling by the court as to the status of claims for damages resulting from accidents which happened, before appointment of receivers, from negligent operation of the railways by the defendants, or either, or both of them. There is no objection to determining the question submitted at this time; indeed, an early determination of it will presumably be to the interest of all parties.

The proposition that claims for torts committed during the operation of the road prior to receivership should be given a preference over the claims of secured creditors has been often presented to the federal courts. It is unnecessary to add anything to the exhaustive discussion which is found in the opinion of the Circuit Court of Appeals of the Eighth Circuit. St. Louis Trust Co. v. Riley, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456. In the reasoning and conclusions expressed in that opinion I fully concur, and find nothing in any later reports, either of the Supreme Court, or of the Circuit Courts of Appeal, to mod-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ify such conclusions in any way. On the contrary, the following authorities are to the same effect: Veatch v. American Loan & T. Co., 79 Fed. 471, 25 C. C. A. 39; Id., 84 Fed. 274, 28 C. C. A. 384; Atlantic Trust Co. v. Dana, 128 Fed. 209, 62 C. C. A. 657; Atchison, T. & S. F. v. Osborn, 148 Fed. 606, 78 C. C. A. 378; Central Trust Co. v. Warren, 121 Fed. 323, 58 C. C. A. 289; Farmers' L. & T. Co. v. Northern Pac. R. R., 79 Fed. 227, 24 C. C. A. 511.

The application to give certain directions as to accounting, etc., is therefore denied; the tort claims accruing prior to receivership rank with the general unsecured claims, and will be so classified. The committee, however, are allowed to intervene on behalf of themselves and

of all others similarly situated, as a party defendant.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. May 26, 1908.)

RECEIVERS (§ 149*)-METHOD OF PROVING CLAIMS.

In insolvency proceedings against street railway companies, claims against the defendants for penalties for refusal of transfers should be separately presented, each duly verified by the claimant, to be separately considered and disposed of, and an omnibus claim filed by an attorney in behalf of a large number of individual claimants cannot be considered.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 149.*]

In Equity.

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Byrne & Cutcheon, for complainants. Masten & Nicoll, for defendants.

LACOMBE, Circuit Judge. The special master to whom have been referred claims for penalties for refusal of transfers has submitted a so-called "claim" filed by Harcourt Bull, with request for instructions, objection having been made to its consideration. Harcourt Bull appears to be the attorney for several hundred persons who seek to recover such penalties, and the paper he has filed states that fact, and gives a long list of names and amounts. Such a paper is not at all in conformity to the practice. The cause of action or causes of action of each individual constitute a separate claim, to be presented in his behalf in the usual form, duly verified by the claimant, so that each claim may be separately considered and disposed of. The objection to this particular omnibus notice—it is in no sense a claim—is sustained. In order that the records may be properly kept, it should be returned to Special Master Turner, who will notify the person who filed it to withdraw it as incorrect in form. The claimants represented by him should not suffer from such error. Upon submission to the court, at any time within three weeks, of a claim by any one of the persons enumerated on the list, with proof that such claim was one of those included therein, order will be made allowing claim to be filed nunc pro tunc.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. GUARANTY TRUST CO. v. SAME.

(Circuit Court, S. D. New York. June 29, 1908.)

STREET RAILROADS (§ 58*)—RECEIVERS—ADMINISTRATION OF PROPERTY—ASSUMPTION OF LEASES.

Receivers for insolvent street railroad companies operating a system composed of a number of constituent lines, some of them held under lease, are not required to continue to operate any such lines at a loss, and where it appears that the rental is excessive, or the lease is otherwise unprofitable to the estate, they will be directed to cancel the same.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. On petition of receivers for instructions. Byrne & Cutcheon, for Pennsylvania Steel Co. Masten & Nichols, for receivers of New York City Ry. Co. Bronson Winthrop, for Morton Trust Co. Masten & Nichols, for receivers of Metropolitan St. Ry. Co. Davies, Stone & Auerbach, for Guaranty Trust Co.

LACOMBE, Circuit Judge. The receivers, upon due notice to all parties, ask for instructions as to a lease of the Central Park, North & East River Railroad, commonly known as the "Belt Line," located in Fifty-Ninth street, and running through Tenth avenue, First avenue, and other streets and avenues to the South Ferry. It comprises 7.433 miles of single electric track and 12.3 miles of single horse track. The lease was originally made to the Metropolitan Cross-Town Company, and runs for the unexpired term of the charter, 100 years from June 5, 1860. The Metropolitan Cross-Town was subsequently consolidated, with other companies, into the Metropolitan Street Railway Company, and the leasehold is included with the other property leased from the latter company by the New York City Railway Company. The lessee of the Belt Line agreed to operate the roads, to keep the demised properties in good condition and repair, to pay all taxes, assessments, and charges which might be lawfully imposed thereon and to pay a rental (calculated as equivalent to 9 per cent. on the stock of the lessor company) which now amounts to \$162,000 per annum.

A careful examination of the books shows that for the year ending March 31, 1908, the total gross earnings (cash fares) amounted to \$729,846.05, which some other items of income, such as advertising, rental of electric track, etc., increased to \$749,624.64. The total operating expenses aggregated \$607,896.20; besides which there was paid for taxes, other than special franchise, \$26,302.90, and for rent of necessary equipment \$16,000—making the total disbursements \$650,199.10. The special franchise tax was not paid, its amount being in litigation; it was assessed for the year 1907 at \$47,090.68, and, in the event of a successful termination of the litigation, would be at best only somewhat reduced; the reduced amount would have to be includ-

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed in the disbursements. Opposing counsel criticise these figures, and argue that the operation of the road is profitable, submitting expert reports and estimates; but the court places greater reliance on the results of the observations of its receivers, who for nine months have been in actual operation of the road, making a careful study of all its conditions. Irrespective of the franchise tax, it appears that the net earnings of the leasehold amount to \$99,425.54 only, while the rent agreed to be paid is \$162,000, a net annual loss of over \$60,000. Moreover, it may be necessary in the near future to incur heavy expenses for construction, and, when the correct amount of unpaid franchise taxes is determined by the state courts, that also will have to be paid

as a prerequisite to the future enjoyment of the franchise.

Under these circumstances, by payment of the stipulated rental to the lessor company, the receiver would evidently be "serving the stockholders," as the chairman of the Public Service Commission aptly expresses it. Whether the rental was excessive when originally agreed to is of no moment. It was stipulated for 16 years ago, at a time when conditions were such that the Belt Line, operated entirely by horse power, issuing practically no transfers and assessed for no franchise tax, earned 10 per cent, on its capital stock over and above all operating expenses and fixed charges. But under the conditions of to-day the rental is surely excessive for the lessees to pay, and it is with existing conditions only that we are now concerned. Great changes like this, ghastly sometimes in their results to innocent individuals, are contingencies to which all investments in public service corporations are peculiarly exposed. Nor is it at all material to inquire whether the rental is high because of the presence of "water" in the capitalization of the lessor company. Neither its stock nor its bonds have been increased since the time, 16 years ago, when it was a very profitable property, and in the interim 7 miles of its roadway has been transformed from horse car tracks to conduit electric system, wholly at the expense of the lessee; not a dollar of the cost has been repaid by the Belt Line to the lessee by issue of additional stock or bonds, nor, so far as the receivers can discover, even by the giving of notes, as was done in the case of other lines. But even if there were "water" in the capitalization, certainly the receivers of the New York City Railway Company have no power to pump it out, nor indeed has this court; that is a matter which must be left for the consideration of state authorities and state courts.

Inasmuch as it is not "the first object of the receivers to pay excessive rentals to leased lines," the manifest thing to do is promptly to terminate the existing situation, and relieve the property which they are operating from the burden of this unprofitable contract. If the lessor should thereafter offer the property on more favorable terms as to rental, and also as to provision for such construction expenses as might be required to render the property more efficient for service, such proposition may be then considered. The important thing now is to relieve the whole system of the constant drain upon it, entailed by the continuance of the present lease; \$60,000 a year might be much better expended in improving the condition and service of the remaining lines.

It will be readily understood that there may be leases which it would be desirable to continue, even at some small loss, because part of the roads covered by them are essential to make connections between different parts of the system. But this is no such case. If the line known as "First and Sixth Avenues" between the shopping district and upper East Side should have to be discontinued, passengers can be carried for a single fare between those districts by the use of the Second avenue road and the Eighth street, Fourteenth street, Twenty-Third street, and Thirty-Fourth street cross-town lines. The two upper West Side lines, "Columbus Avenue and Broadway" and "Amsterdam and Sixth Avenue," can run their cars east and west through Fifty-Third street instead of Fifty-Ninth street. Nor is there any serious difficulty to be apprehended in the operation of the Prince and Houston street and other lines without the use of any part of the Belt Line tracks in excess of the statutory thousand feet.

The receivers are therefore instructed that the lease may be canceled, the leasehold (including not only the real estate, but also all personal property which can be identified) returned to the lessor, and its further operation by these receivers discontinued. It would be desirable if this could be done by June 30th, which ends the fiscal and railroad year; but a proper regard for the convenience of the traveling public precludes so speedy a disposition of the matter. There is an existing board of directors of the Belt Company to whom the property might be returned, but they were originally elected when the lessee was in entire control, and a stockholders' meeting has been called for July 10th to elect a new board which will represent solely the interests of the lessor. Common fairness requires that the company should not be called upon to act until its stockholders shall have the opportunity to select a board solicitous to protect their interests. If they choose not to avail of their opportunity or to elect a new board, there will then be no objection to the receivers dealing with the old board. Manifestly it will take some little time for the management of the road to equip it and to organize an operating force, and in order that there may be no falling off in the service during the interim the receivers are authorized to make contracts with the company for temporary operation, or for the rental of cars, or power, etc., provided that such contracts are upon such terms as not to expose receivers to loss; and provided further that liability for accidents of operation or for loss from fire or other catastrophe shall rest only upon the owner, and that the cost of necessary work of construction or reconstruction shall not be imposed upon receivers. Care should also be exercised to reserve the right to cancel any such contracts on reasonable notice should the requirements of public service on other parts of the City Railway System make it necessary to withdraw cars, power, etc., from the service of this independent line.

As to transfers. After the lease is canceled and the road returned to owners, the transfer act of 1885 (Laws 1885, p. 525, c. 305) will no longer apply. It is thought that mere temporary operation as agents of owners would not constitute the sort of agreement contemplated by that act. Nevertheless it seems unnecessary to invite controversy on a point which may be in doubt, and until the actual operation is taken over by the lessor, and one week's notice shall have been posted in the cars, the exchange of transfers will be continued.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. (Circuit Court, S. D. New York. July 23, 1908.)

See, also, 161 Fed. 784, 786, 787.

Byrne & Cutcheon, for Pennsylvania Steel Co. Masten & Nichols, for receivers of New York City Ry. Co.

LACOMBE, Circuit Judge. The receivers of defendant will forthwith communicate with the recently elected directorate of the Belt Line Road, inquiring upon what day the latter will be ready to take over the road and identified property. The court fully appreciates what a hardship it would be to the public to have the road cease running, and has authorized the receivers to assist in keeping it in commission, but it is not willing to continue indefinitely assuming responsibilities of operation which legitimately belong elsewhere.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. MOR-TON TRUST CO. v. METROPOLITAN ST. RY. CO. GUARANTY TRUST CO. v. SAME.

(Circuit Court, S. D. New York. June 29, 1908.)

STREET RAILROADS (§ 58*)—RECEIVERS—ADMINISTRATION OF PROPERTY—As-SUMPTION OF LEASE.

Receivers for a street railroad system directed to cancel a lease for a constituent line operated thereunder at a loss.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. On petition of receivers for instructions. See, also, 161 Fed. 784, 786, 787.

Byrne & Cutcheon, for Pennsylvania Steel Co. Masten & Nichols, for receivers of New York City Ry. Co. Bronson Winthrop, for Morton Trust Co. Masten & Nichols, for receivers of Metropolitan St. Ry. Davies, Stone & Auerbach, for Guaranty Trust Co.

LACOMBE, Circuit Judge. The receivers, upon due notice to all parties, ask for instructions as to a trackage agreement dated September 29, 1896, executed by the Twenty-Eighth & Twenty-Ninth Streets. Company of the first part and the Metropolitan Street Railway Company of the second part. By said agreement there was granted to the Metropolitan Company the right and privilege to use the railroad tracks of the Twenty-Eighth & Twenty-Ninth Streets Company, to operate cars in common, and to collect all fares of passengers riding in such cars. The Metropolitan Company agreed to run a sufficient number of cars daily to accommodate the traffic; to pay the principal

For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date. & Rep'r Indexe.

of certain first mortgage bonds (\$1,500,000), and to pay interest thereon (\$75,000 per annum); also to pay all taxes, and to maintain the railroad in good condition and repair. The agreement was to continue

during the corporate existence of the parties.

The situation presented is similar to that in the Case of the Belt Line, 165 Fed. 459, disposed of to-day. The gross earnings, including cash fares and advertising, for the year ending March 31, 1908, amounted to \$146,536.70, the operating expenses and taxes to \$143,-729.27; leaving a net income of \$2,807.48 only, with which to pay the stipulated rental of \$75,000. This involves an annual loss of over \$70,-000 a year, a sum which might be much more usefully employed in improving conditions on other lines of the system. The further payment of the amount stipulated for in the agreement should be discontinued, and the receivers are instructed that they may cancel the agreement. From what appeared upon the hearing it would seem that the bondholders only exhibit any interest in the property, the stockholders having notified the mortgage trustee that they intend to take no action. About one-third of the bondholders appeared by counsel, and, there being no registry of their names, difficulty may be experienced in getting together a sufficient number to act for the whole body and supply the trustee with necessary funds. No payment under the agreement will come due before October 1st, and the receivers may at their discretion continue to operate the lines until that date as an accommodation to the bondholders, thus giving them ample time to arrange for taking over the operation, but it must be distinctly understood that in so doing the receivers are not to account for any pro rata part of the stipulated rent, nor for damages from accidents of operation.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. et al. (two cases). GUARANTY TRUST CO. OF NEW YORK. v. SAME.

(Circuit Court, S. D. New York. July 16, 1908.)

1. Street Railroads (§ 58*)—Leases—Construction—Insolvency of Lessee.

A provision of a lease of street railroad property deferring entry for nonpayment of rent until one year after default does not continue binding where, by reason of the insolvency of the lessee and its failure to pay interest, mortgages on parts of the system have been foreclosed and the system has thereby been disrupted.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

Street Railroads (§ 58*)—Receivers—Necessity for Separate Receiverships.

Where, in a creditors' suit against an insolvent lessee of a street rail-road system, to which suit the lessor became a party, receivers were appointed who operated the property for all parties in interest until fore-closure suits were instituted against the property by bondolders of the lessor, who are entitled to possession by their own receivers, and the affairs of the lessee have been so far liquidated that they may soon be wound up and an accounting had between it and the lessor, separate receivers should be appointed to represent the adverse interests.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rer'r Indexes

8. STREET RAILROADS (§ 58*)—RECEIVERS—LIABILITIES INCURRED IN OPERATION.

Where an entire street railroad system as a going concern was placed in the hands of a court on application of a creditor of the lessee, but with the consent of the lessor and its bondholders, and operated by receivers until turned over to receivers representing the bondholders, all damage claims and other liabilities incurred during such operation will be made a charge upon the entire property in so far as they cannot be paid from the earnings or the property of the lessee.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

4. RECEIVERS (§ 201*)—Successive Receiverships—Accounting Between Receivers.

General rules stated to govern an accounting between receivers appointed for the lessee of a street railroad system, who had been operating the same and had purchased equipment and supplies, and receivers appointed at suit of mortgagees to whom the property was turned over.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 201.*]

In Equity. On application to appoint separate receivers for the lessor and lessee roads, and counter application to continue the leasehold till the expiration of a year from first default in payment of the rent.

Byrne & Cutcheon, for Pennsylvania Steel Co. Masten & Nichols, for receivers of New York City Ry. Co. Bronson & Winthrop, for Morton Trust Co. Masten & Nichols, for receivers of Metropolitan St. Ry. Co. Davies, Stone & Auerbach, for Guaranty Trust Co.

LACOMBE, Circuit Judge. At the time when former memoranda were filed October 1, 1907 (157 Fed. 440), and January 7, 1908 (160 Fed. 222), the situation was such that the operation of the system might be continued by receivers of the New York City Company under the lease, and the rights of all interested preserved easily and efficiently by a subsequent accounting. The lease was then in force, and no suit to foreclose mortgage had been instituted. Now the situation is changed. A regular foreclosure suit for unpaid interest under the refunding mortgage has been instituted, and it is fitting that the property covered by that mortgage should be taken over by receivers under that suit who will thereafter operate the whole Metropolitan System. The clause deferring re-entry for nonpayment of rent until one year after default presents no difficulties. There is not merely a simple default. By reason of the inability of the receivers to pay from the income the mortgage interest due January 1, 1908, on the Third avenue mortgages, that line has been foreclosed upon, and an independent receiver appointed who has taken it into possession, thus disrupting and destroying the unitary system covered by the lease. Surely the "deferred payment" clause cannot survive under such condi-

Considerable progress has been made in liquidating claims of outsiders against the New York City Company. It is reasonable to expect that by this coming fall the great bulk of contract and tort claims will be liquidated, and the time has now come (which was anticipated in the memorandum of October 1, 1907) when steps should be taken for an accounting between that company and its lessor, the

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Metropolitan Street Railway Company. However long it may be before a sale in foreclosure or some reorganization, approved by state authorities, will relieve this court and its receivers of the heavy burden of operating the property so as to maintain an efficient public service, there seems no reason why all claims against the New York City Company should not be liquidated, and its assets marshaled, and distributed without waiting for the disposition of the property now under foreclosure. To such an accounting, interests being diverse, it is essential that there should be separate receivers to represent the two roads.

Inasmuch as the present receivers, now holding all property of both roads, have by nine months' work familiarized themselves with the operation of the system, it seems wiser that they should be selected to continue such operation, and that a separate receiver should be appointed for the property of the New York City Company. Adrian H. Joline, Esq., and Douglas Robinson, Esq., are therefore appointed receivers of the Metropolitan Street Railway Cmpany under this new bill of foreclosure, and their bonds may, with assent of the surety company, be extended to cover their future operations. William W. Ladd, Esq., of the city of New York, is appointed receiver of the property of the New York City Railway Company, with the usual powers, and his bond is fixed at \$50,000. On July 31, 1908, at midnight, the present receivers will turn over to themselves all property of the Metropolitan Street Railway Company, and will turn over to the new receiver all property, including claims and choses in action, of the New York City Railway Company, from and after such transfer ceasing to be receivers of the New York City Railway Company. This date is selected for convenience of accounting, pay rolls, etc.

In order to relieve apprehensions on the part of receivers' creditors, it may be proper here to state some elementary propositions. The entire system as a going concern was placed in the hands of this court, on the application of a creditor of the lessee, but with the assent of both companies and the subsequent approval of the representatives under lessor's mortgages. Its possession of the property was confirmed by the United States Supreme Court. Since that date it has been absolutely necessary for the court to operate the road as an instrumentality of public service. In order to do so, it was necessary to make purchases of equipment, materials, supplies, etc., some of which were on credit. In the course of operation accidents have occurred through the negligence of employés, and those injured thereby in person or property have a cause of action against receivers. Future operation will produce like results. All indebtedness incurred and all damages sustained by reason of the operation of the property by the court will be paid or secured before the court parts with the property, and it need make no difference to the creditor or claimant which receiver was operating the road at the time. The receivers of the Metropolitan will adopt and affirm all contracts concerned with the operation of the system which were adopted or entered into by receivers of the New York City, and the court reserves the right to impose a lien upon the property itself for any obligations incurred by the court in its operation, and also for the expenses of court proceedings. An obligation incurred or damage inflicted by receivers when operating under the New York City lease must of course be paid from its income or property, but, in the event of these proving insufficient, then out of the income of Metropolitan receivers, and, failing that, out of the property itself. Presumably the income of each will be sufficient to pay its own expenses; but all creditors of and claimants against the court's officers may be satisfied that whatever may be found to be rightfully due them will be paid.

There is some property of the New York City which is not covered by the lease. That will, of course, be turned over to Receiver Ladd. It appears from the argument that as to one or more items there may be a dispute as to the ownership. The practical way to determine any such question will be for present receivers to turn over to the new receiver whatever they find to be the property of the New York City. Any party interested may then move the court to instruct such receiver to return the same and account for its use in the interval. There is also property which was bought with income of New York City receivers in order to keep the road in operation equipment, supplies, material for repairs, etc. That is of no further use to New York City receiver, and will be turned over to Metropolitan receivers, who need it for running the road. All respective rights may be adjusted on the accounting which will be had between them as soon as the new receiver shall have sufficiently familiarized himself with the situation. In order to secure a proper accounting, an inventory is essential. Fortunately the regular annual inventory is about completed, as of date of June 30th; it may be taken as the basis, and, with the records of property acquired, put to use, worn out, or disposed of during the month of July, will be easily extended to the date of transfer. Two illustrations will indicate in a general way the method to be followed on this accounting:

(1) Receivers of New York City bought, we will assume, 2,000 contact plows, in order to secure discount on large purchase and to provide an abundant supply for repair work. Of these, on July 31st, 1,000 are worn out or put to use. They paid for them out of their earnings from operation. Had they known in advance that they would cease operation on that date, and that but 1,000 plows would be required, they would have bought that number only, and so much of the earnings as went to purchase the additional 1,000 would be still in their treasury. As these additional plows are to be turned over as supplies for the future to receivers of Metropolitan, the latter should account for their value, since otherwise they would have to buy them from the maker and pay for them out of their earnings.

(2) Receivers of New York City, it may be assumed, paid \$10,000 out of their earnings on June 1st for premium on a 12 months' policy of insurance on cars. Having by August 1st parted with the possession of the cars and all further responsibility for them, the policy might be terminated and rebate for 10 months obtained from the insurance company. The more sensible procedure would be to transfer the policy to Metropolitan receivers; but the latter should ac-

count for so much of the premium as covers the period of their own

possession and responsibility.

These are quite simple illustrations; no doubt there will be many cases where the questions presented will be intricate and difficult, and of this accounting between receivers all parties to any of these suits should have notice and an opportunity to be heard. Relieved from all burden of operation, the new receiver can make a careful examination of all points in controversy before initiating this accounting, and under the principles enunciated in this opinion all obligations for his share of the expense of liquidating claims and other court expenses, for prosecution of suits, for settlement of claims for accidents between September and July 31st, for unpaid bills, etc., can be settled as they fall due.

A proposed decretal order to be entered on this opinion, which must be very brief, reciting only the papers filed and providing merely for the new appointments, and directing transfer and assumption of obligations, as above indicated, may be submitted with notice of settlement for July 23d and filed with the clerk, to be transmitted to me

on that date with any criticisms of other counsel.

The suggestions made in the petition of tort creditors' committee have been considered, but will be disposed of subsequently when that matter is finally submitted. Nothing is found in them which conflicts

with the granting of above relief.

For the information of all concerned, the receivers will on August 18th file an epitome of their receipts and expenditures down to July 1, 1908, and within a few weeks subsequent to August 1st file a supplement thereto covering the present month.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. GUARANTY TRUST CO. v. SAME.

(Circuit Court, S. D. New York. July 27, 1908.)

JUDGMENT (§ 243*)—PARTIES—DETERMINATION OF VALIDITY OF LEASE—MODE OF ATTACK.

The validity of a lease of street railway lines cannot be determined summarily on a motion by tort creditors of the lessee made in a creditors' suit, but can only be questioned by a plenary suit against all parties in interest.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 428; Dec. Dig. § 243.*]

In Equity. Petition by tort creditors' committee of the New York City Railway Company for various relief.

Byrne & Cutcheon, for Pennsylvania Steel Co.

Masten & Nichols, for receivers of New York City Ry. Co.

Bronson & Winthrop, for Morton Trust Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

Davies, Stone & Auerbach, for Guaranty Trust Co.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LACOMBE, Circuit Judge. The various prayers of the petition

may be conveniently disposed of separately.

(C) That it be determined and ordered that the lease made between the Metropolitan Stree. Railway Company and the Interurban Street Railway Company, now the New York City Railway Company, "be declared void and contrary to public policy, ultra vires and fraudulent," and (B) that certain references be ordered in connection with such finding. It is not competent for the court to grant such relief summarily on a motion. The questions are such as should be determined only in a plenary suit, to which all parties in interest should be made parties. Motion denied.

- (A) That the tort creditors' committee, who have been allowed to intervene in suit first above named, be allowed also to intervene in the suits brought by trustees under the mortgages made by the Metropolitan Street Railway Company. Logically this motion also should be denied, since they do not represent creditors of the principal defendant in these suits. Since, however, they are proposing to attack the validity of the lease by a bill to set it aside, to which suit the mortgage trustees would of course be made parties, it would be a saving of time and expense to all parties if they were allowed to apply for the same relief by cross-bill in the foreclosure suits. They will, therefore, be allowed to intervene solely for the purpose of filing such cross-bills and trying out any issues which may be raised thereon.
- (D, E) It was conceded on the argument that the appointment of separate receivers for lessor and lessee would practically eliminate these prayers for relief. The opportunity of being represented at the accounting between the respective receivers will secure all the moving party is entitled to. Motion denied.
- (F) That it be decreed that all claims for injuries and damages resulting from operation of the road from February, 1902, to September 25, 1907, be paid prior to any mortgage, rental, or fixed charges. A similar motion was heretofore made and denied (May 25, 1908). 165 Fed. 457. It is again denied, for the reasons stated in the former memorandum.
- (G, H) These prayers are too vague and general to call for any discussion. They are denied.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. July 27, 1908.)

STREET RAILROADS (§ 58*)—RECEIVERS—OPERATION OF SYSTEM—RIGHTS OF LESSORS OF CONSTITUENT LINES.

Where receivers for an insolvent lessee of a street railroad system, comprising lines leased from different owners, are operating the whole as a unitary system, they will not be required to keep the earnings of a particular line separate to meet the claims of its lessor.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. $135 \$ Dec. Dig. 58.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. On application of Eighth Avenue and Ninth Avenue Railroads.

Byrne & Cutcheon, for Pennsylvania Steel Co. Masten & Nichols, for receivers of New York City Ry. Co.

LACOMBE, Circuit Judge. The installments of rental overdue and unpaid when these applications were made have since been paid, and the only question now left in each case is as to the effect upon the lease of the nonpayment by the lessee of the franchise taxes, accruing in the past few years. Each of these taxes is in litigation with the state authorities under separate certiorari for each year. In the only similar case which has been adjudicated the company has so far prevailed, the referee finding that there should be a substantial reduction in the amount of the tax. Manifestly the litigation was undertaken in good faith and for the best interest of both lessor and lessee. Whether under these circumstances there has been a breach of the covenants of the lease need not be considered, because upon the argument petitioners expressly disclaimed any wish at the present time to re-enter for covenant broken. That would be the logical relief if their contention be sound. The two roads are parts of a unitary system, which can only be run as such by using the receipts on profitable fractions of the system to maintain a uniform service on nonprofitable fractions. The suggestion that whatever profit is made on petitioners' roads be not thus applied, but kept separate and distinct to meet whatever claims the petitioners may make under the leases, would probably leave the receivers without funds to provide an efficient public service elsewhere in the system, and is impracticable. If the lessor can show that the lease is broken, it should demand the property back and then present its claim for damages. But that question is not now presented nor passed upon. Petitioners will, in the course of this proceeding, receive notice of any application which would affect their rights under the leases, and intervention in the main suit is unnecessary. The request that the books be so kept as to show separately and distinctly the income from and expense of operating these two lines is one which the court is quite willing to grant, if it be practical. There are difficulties in distributing items of income and expenditure which can be relieved only by some agreement between all parties in interest as to some method of arbitrary apportionment. The books and present method of accounting will be open to petitioners, or to any experts they may send to devise some system calculated to show just what they want. When such system is devised and has been submitted to and considered by the experts for other interests, the court will then consider whether it shall be put in force.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. et al. (two cases). GUARANTY TRUST CO. OF NEW YORK v. SAME.

(Circuit Court, S. D. New York. August 12, 1908.)

CARRIERS (§ 18*)-REGULATIONS OF COMMISSION-ENFORCEMENT.

Receivers of a federal court operating street railroad lines will not be directed to obey an order of the State Public Service Commission requiring them to establish a joint rate and exchange transfers with an independent road where it can only be done at a serious loss, and the power of the commission to make such order is doubtful until the question of such power has been adjudicated by the state courts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 18; Dec. Dig. § 18.*]

In Equity. On application by receivers for instructions.

Byrne & Cutcheon, for Pennsylvania Steel Co.

Dexter, Osborn & Flemming, for receivers of New York City Ry. Co.

Bronson Winthrop, for Morton Trust Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

Davies, Stone & Auerbach, for Guaranty Trust Co.

LACOMBE, Circuit Judge. The receivers of the Metropolitan Street Railway Company have applied for further instructions as to transfers.

They have carefully conformed to the general instructions contained in opinion filed October 8, 1907 (157 Fed. 440) to operate the road in accordance with the requirements of law, state and local. When they took possession of the property the Metropolitan Company was operating the Fifty-Ninth Street Crosstown Line under a lease. The statutes of the state provide that in such case transfers should be exchanged, and this was done. On August 6, 1908, operation under the lease ceased, and the line was returned to its owner, an independent corporation. No statute, ordinance, or regulation, state or local, required the exchange of transfers in such a case, and such exchange was therefore terminated.

Thereafter the Public Service Commission issued an order to show cause why transfers were not continued, and why some joint tariff should not be established, with a resolution requiring separate accounts to be kept for 30 days. The receivers replied to the resolution offering to keep any accounts or records which the commission might wish. They did not appear to show cause for reasons set forth in an opinion of this court, filed June 10, 1908 (165 Fed. 494), as follows:

"It has been suggested that the Public Service Commission, under section 49 of the act which created it, might require the road to sell and honor these transfers (Laws 1907, p. 917, c. 429). Whether that section or any other one gives the Public Service Commission power to compel two independent roads to exchange transfers is a question of state law, the construction of a state statute, which may more appropriately be left to the state courts. In the event of the receiver being called upon by the commission to take and give such trans-

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fers, he will furnish all the information which he, as operator of the road, may be able to procure, and he will notify the owners and security holders of the several roads now in his hands, and will see that they are given the opportunity to present whatever arguments they may wish to make in opposition. In the ultimate analysis it is the owners of and lienors on the property whose interests would really be affected by such a construction of the statute; the court and its receiver are custodians merely, and are not concerned with its future."

The commission has now made an order requiring the receivers and the company operating the Fifty-Ninth Street line to establish through routes and put in force a joint rate of fare by the use of transfers over their respective lines.

In view of the information now on record in this court as to the financial condition of the two roads, and the report recently made to the commission showing that of 20,000,000 of passengers carried by the Fifty-Ninth Street line over 13,000,000 rode on transfers and paid it no fare, it is difficult to see how the operators of the two roads can succeed in agreeing upon a joint rate of the kind suggested.

The extent of the authority of the commission under section 49 is not exactly defined, since the new act has not yet been construed by the courts. In the event of any proceeding being brought by the commission in which such construction might be secured, the receivers will appear in any state court and co-operate in every way to secure a prompt determination of any questions presented.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. September 30, 1908.)

COURTS (§ 500*)-ACTIONS AGAINST RECEIVER-ENFORCEMENT OF JUDGMENT.

A federal court has the sole right to control the disposition of property and the distribution of funds in the hands of its receivers, and will not permit an execution from a state court to be levied thereon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. § 500.*

Suits by and against receivers of, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.]

In Equity. On petition for leave to issue execution against receivers. Byrne & Cutcheon, for complainant.

Masten & Nichols, for receivers of New York City Ry. Co.

LACOMBE, Circuit Judge. The petitioners obtained a judgment in the Municipal Court against receivers for damages resulting from an accident happening on the railway during their operation of it as officers of the court. Petitioners now apply to this court for leave to issue execution against the receivers. Meanwhile receivers, in entire good faith, have taken an appeal, feeling confident that upon a hearing in the state appellate court they will secure a reversal. Sufficient authority for the denial of the present application is found

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexe

in Judge Caldwell's opinion in Central Trust Co. v. St. Louis Railway Co., 41 Fed. 551, in the reasoning and conclusions of which this court fully concurs.

Motion denied.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. GUARANTY TRUST CO. v. SAME.

(Circuit Court, S. D. New York. October 19, 1908.)

1. Street Railroads (§ 58*)—Leases—Cancellation by Receivers of Lesses—Restoration of Property.

Petitioner leased its street railroad line for a long term, the lease providing that the lessee should maintain the property, and whenever the lease should cease to be operative should return all horses, cars, etc., leased to and used by it in good condition, and as to any which should have ceased to exist should return the substitutes provided therefor to an equal value. The lessee united the line with others owned and leased by it, operating the whole as a single system and using the equipment indiscriminately on all the lines. After the lapse of 16 years the property was returned to the lessor by receivers appointed in suits against the lessee. Held, that such property as could be identified as having been received under the lease or as having been substituted therefor should be returned, and that horses, cars, or other equipment of the same kind as that received under the lease, exclusively in use on the line at the time of the appointment of the receivers, might be assumed to be substitutes, and that as to any shortage petitioner had its claim for damages against the lessee.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

2. Street Railroads (§ 58*) — Leases—Cancellation by Receivers for Lessee—Restoration of Property.

A considerable part of such leased line was converted by the lessee at its own expense from a horse to an electric line at a large cost, and different cars were placed thereon. *Held*, that such electric cars could not be considered substitutes for the horse cars which they replaced and which were transferred to other parts of the lessee's system, and that petitioner was not entitled to the same.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

3. Street Railroads (§ 58*) — Leases—Cancellation by Receivers for Lessee—Accounting for Earning.

Where receivers appointed for a lessee of a street railroad system continued to operate one of the leased lines after the time for which rent was paid, but within a reasonable time elected not to continue the lease and returned the property to the lessor, they should account to it for the net receipts of such operation for the time during which no rent was paid.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

4. Street Railroads (§ 58*) — Leases—Cancellation by Receivers for Lessee—Restoration of Property.

At the time of the leasing of a street railroad line for a long term, the cash then in the treasury of the lessor was paid over to the lessee as owner and not as lessee; the lease providing, however, that, if the lessor should resume possession of the property by reason of default, the money should be deemed a loan, and returned with the other property. Subsequently receivers for the lessee elected to cancel the lease, and returned the property. Held, that they were not required to return the money which did not come into their possession, but that the lessor could prove

For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its claim for the amount against the property of the lessee being administered by the court.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. On petition of Central Park, North & East River Railroad Company, known also as the Belt Line.

See, also, 161 Fed. 784, 786, 787.

Byrne & Cutcheon, for Pennsylvania Steel Co.

Dexter Osborn & Flemming, for receiver of New York City Ry.

Bronson Winthrop, for Morton Trust Co.

Davies, Stone & Auerbach, for Guaranty Trust Co.

Masten & Nichols, for receivers of Metropolitan Street Ry. Co.

LACOMBE, Circuit Judge. Reference may be had to the opinion filed June 29, 1908 (165 Fed. 459), for a statement of the circumstances under which payment of rent to the petitioner road ceased and the road itself was returned to its owners. Such return was made August 7, 1908. The present application is for instructions (1) that the "personal property of petitioner heretofore used and operated by receivers of the New York City and Metropolitan under the lease of October 14, 1892, should be delivered to petitioner"; (2) "for the payment of accrued rental under said lease"; and (3) for the "return to petitioner of the cash turned over to the lessee company under said lease at the time of making thereof to the amount of \$108,618."

The former instructions directed receivers to return to petitioner not only the real estate, but also "all personal property which can be identified." It is understood that this has been done as to all personal property which can be identified as having come from the lessor to the lessee. If it be contended that there are any such items which have not been returned, petitioner can make proof of them before the special master, and the former instructions will thereupon be car-

ried out.

It should also be noted that what is now presented for consideration is not at all a claim against the lessee company (Metropolitan) or the sublessee (New York City) for property converted or allowed to go to waste and destruction contrary to the covenants of the lease. Any such claim against either or both companies may be filed with the master, and, when proved, will share with other claims of equal rank in whatever assets may be ultimately marshaled for distribution. What we have here is a demand that the receivers turn over certain specific things now in their custody, and it cannot be complied with if no such specific things have in fact come into their possession. The property specified is described generally as about 40 electric cars, with all the equipments and appurtenances thereof, 100 horse cars and 700 horses, with the necessary harnesses, tools, implements, equipments, stable equipments, furniture and fixtures.

The lease contains the following clauses:

"[The lessee covenants that it] at all times during the continuance of this lease will maintain, manage, use and operate and keep in good and working condition and repair, at its own expense, the entire line of the said demised railroads

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r In Jexes

or railroads and all extensions and branches thereof which are now or may hereafter be constructed, and all fixtures and appurtenances that now are, or hereafter may be constructed; and also keep the personalty hereby demised in good working order, condition and repair, so that the traffic and business of said railroad shall be encouraged and developed and reasonable accommodation given to the public * * * and will deliver up the said railroad or railroads and all the buildings, fixtures and appurtenances thereof at the expiration of this lease, or whenever the same shall become inoperative in good order and repair. * * * And * * * will replace any part of the demised property which may be destroyed by fire or other cause."

"The lessee also covenants that it] will at the termination of this lease or when for any cause it may cease to be operative, transfer, deliver and return to the party of the first part in good condition the horses, harnesses, cars, tools, implements, machinery, equipments, stable equipments, office furniture and fixtures and all property of every kind leased to and used by the party of the second part in the maintenance and operation of the railroad aforesaid, except that which is hereby absolutely transferred or which has passed from existence by death or destruction, and shall also deliver the substitutes, increments and additions provided or made by the party of the second part; and the substitutes for the property impossible to deliver by death or destruction shall be equal in value to that for which they are substituted."

This lease was for a very long term, as were many others under which the lessee, which itself owned several roads, built up what was known as the "Metropolitan Street Railway System," including all the lines on Manhattan Island. Such long terms gave an apparent asurance of permanence as a unitary structure, and it is not surprising to find that during its operation new cars and horses were bought for general use, being run now on one line, now on another, while cars of different roads were run indiscriminately throughout the system, and to a very large extent the identity of cars which had been acquired under lease from different roads and were from time to time repaired and repainted was destroyed. In the 16 years which have elapsed since the lease now under consideration was made, all the horses owned by the Belt Line have died, and although it is probable that some of its cars have not yet reached the scrap heap, no one can now identify them. To the extent that the lessee's failure to keep the original items of property, or substituted items, in proper condition to return, was a breach of covenant, petitioner has its claim for damages against the lessee or sublessee. The question here presented, however, is a different one, namely, whether under the facts which are conceded or can be proved there are now in the possession of receivers horse cars and horses which can be identified as the "substitutes" which the lease provided for. Manifestly if it were the fact that when original car No. 17, Belt Line, went to the scrap heap, a new car similarly numbered was put in its place, and when horse No. 312, Belt Line, died, a new one was bought and entered in the records as a substitute, these substitutes should be returned in place of the originals. It would seem that by placing on the line horse cars and horses which cannot be identified as belonging to some other lessor the same result was practically accomplished, and receivers may properly assume that the horse cars and horses (and harness) which they found in use by the New York City Railway on the Belt Line when they took possession are "substitutes" to be returned to the lessor when the road itself is returned. If the "substitutes" are less in number or of inferior character, or in an unfit condition of repair, that circumstance might support a claim against the lessee; all the receivers can be required to do is to return the specific thing. Unless some agreement can be arrived at, the special master will take proof as to what horse cars, horses, etc., were actually in use as "substitutes" on the Belt Line on September 25, 1907, and these the receivers will return. Should any new questions develop on this branch of the case when proofs are taken, they may be disposed of upon hearing on the master's report.

As to part of the petitioner's road, a different question is presented. Some years after the lease became operative the lessee decided to change the horse car tracks through Fifty-Ninth street, and for four blocks down Tenth avenue, to an electric conduit. This was a very expensive operation, costing considerably more than \$1,000,000. The case differs from that of the Second avenue road, which was argued at the same time, in this: that no part of the construction nor any part of the cost of equipment was paid for by the lessor. The lessee built the new track, put in the power cables and all equipments, and, when finished, used upon it electric cars which it had bought for general use on its system. It received from the lessor neither bonds, stock, nor even notes for any part of this improvement, which greatly enhanced the value of the property. Whether there was any charge made for it, or any assent to the propriety of such charge on the part of the lessor, does not appear. If there were, the facts can be shown before the master, and possibly further questions will arise for determination. Under these circumstances petitioner asks that the electric cars now operated on that part of the road be turned over. The application is denied. The improvements which have been made on the line itself are of course permanent; they cannot properly be removed; the road goes back to owners in its improved condition. If the effect of such improvements had been to destroy or impair its usefulness as a horse car line, the situation would be different; but it is understood that is not so. After the change the original cars of the Belt Line could be run over the new track; had they been kept in perfect condition by the lessee and returned on termination of the lease, the lessor would have had all it was entitled to. The fact that the lessee, instead of thus preserving them, used them on other lines, wore them out, and let them go to waste without providing others in their place, may justify a claim for damages against lessee and sublessee, but seems not to warrant a finding that on September 25, 1907, these electric cars were their designated substitutes.

As to tools and equipment generally, the case must go to the special master to determine the facts; these general propositions governing his investigation. Tools and equipments in use on the Belt Line were received by lessee, and presumably have been worn out and cannot be identified. If the lessee has failed to keep that line provided with substitute tools and equipments, a claim for consequent damage may be proved against it. If it can be shown that when receivers took possession there were any tools and equipments which, by exclusive use on the Belt Line, had been supplied to it as substitutes.

receivers should turn them over. If such were used indiscriminately on several lines, they cannot be held to have been designated as substitutes for original Belt Line tools and equipments. Thus the tools used by a repair gang for making repairs on a division of the whole system which includes parts of the Belt Line and parts of the Sixth, Seventh, and Eighth Avenue Lines will not be such "substitutes," while a switch bar, bought with many others for general use, which has been put and kept to use on some switch of the Belt Line, may fairly be considered such a "substitute."

All questions as to office furniture and fixtures will be disposed of

when the master's report is presented.

There has been no unreasonable delay on the part of receivers in examining into the question of the propriety of accepting or rejecting this lease. The whole system is most intricate, and the method of keeping accounts made it difficult to distribute receipts and expenses between the different routes. The case is within the principles enunciated in Quincy R. R. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632, but receivers (New York City and Metropolitan) should account for whatever receipts came into their hands from the operation of lessor's road during the period for which no rent has been paid, deducting whatever is properly chargeable against the same. This, of course, is a matter to be taken up in the first instance before the master. The petitioner may renew its application to be paid a sum equivalent to rent for the period, before the master, so that all the questions may be disposed of at the same time, and petitioner not required to review them piecemeal, should it wish to appeal.

As to the claim for the \$108,618 cash turned over to the lessee company at the time of making the lease, that instrument contains the

following clauses:

"It is further understood and agreed that the party of the second part receives the cash in the treasury of the party of the first part at the time of the taking effect of this lease as owner and not as lessee thereof, subject, how-

ever to this reservation and condition, viz.:

"That if the party of the first part shall resume possession of the demised property on account of any default of the party of the second part, then the said money shall be deemed to have been a loan instead of an absolute transfer, and shall be returned by the party of the second part to the party of the first part, with the remainder of the property of which the party of the first part takes possession."

It seems entirely clear that under this covenant the lessor has a claim against the lessee for money loaned, but neither the original \$108,618, nor any like sum earmarked as the lessor's property, has ever come into the possession of receivers, and the application to instruct them to pay such sum to petitioner is denied.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY, CO.

CENTRAL TRUST CO. v. THIRD AVE. RY. CO.

(Circuit Court, S. D. New York. October 28, 1908.)

Memorandum for Counsel. See, also, 161 Fed. 784, 786, 787.

Byrne & Cutcheon, for Pennsylvania Steel Co. Masten & Nichols, for receivers of New York City Ry. Co. Bowers & Sands, for Central Trust Co. Evarts, Choate & Sherman, for receiver of Third Ave. Ry. Co.

LACOMBE, Circuit Judge. In August last there was argued a petition by the receiver of the Third Avenue Railway to instruct receivers of New York City Railway, as officers of the court, to pay him compensation (either as rent or as net earnings) for the use and occupation of the Third Avenue Railway from September 25, 1907, to January 12, 1908. At the same time there was argued a petition by the receiver of the New York City Railway to instruct the receiver of Third Avenue Railway, as an officer of the court, to pay petitioner for certain coal materials and supplies which had been delivered by receivers of New York City to receivers of Third Avenue on January 12, 1908.

At the close of the argument counsel were given a reasonable time to submit their briefs and a stipulation as to dates of purchase of the coal, etc., the fair value of the same, and its specific description. The matter has not been finally submitted, and no excuse is suggested for this extraordinary delay. Counsel are requested to complete their papers and finally submit the petitions for consideration and decision within 10 days.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. (two cases).

GUARANTY TRUST CO. v. SAME.

(Circuit Court, S. D. New York. November 16, 1908.)

Receivers (§ 118*)—Administration of Property—Receivers' Certificates—Purpose of Issue—Repairs.

Receivers for a street railroad company who have been authorized to issue receivers' certificates for betterment and equipment purposes which are made a lien on the property superior to the mortgages may properly use proceeds of such certificates in making repairs on the roadbed of a leased line where it is an essential part of the system, and the lease, which it is the purpose of the receivers and the court to continue, requires the lessee to make repairs, and such repairs are essential to the maintenance of efficient service and the protection of the rolling stock from excessive wear and injury.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. $\ 206$; Dec. Dig. 118.*]

In Equity. On application for leave to expend proceeds of receivers' certificates in repairing roadbed in Madison avenue.

See, also, 161 Fed. 787.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Byrne & Cutcheon, for Pennsylvania Steel Co.
Masten & Nichols, for receivers of Metropolitan St. Ry. Co.
Dexter, Osborn & Flemming, for receivers of New York City
Ry. Co.

Bronson Winthrop, for Morton Trust Co. Davies, Stone & Auerbach, for Guaranty Trust Co.

LACOMBE, Circuit Judge. It is true that the Fourth and Madison is a leased line, but it is a leased line which is an essential element of the system, being the sole connection with the main entrance to Grand Central Station, and apparently profitable. There is nothing to indicate that the receivers should elect to give up this contract, and this application must be decided on the assumption that it will be beneficial for the system as a whole to operate under the lease. But if the lease is to continue, its covenants must be fulfilled and the road be kept in repair; otherwise there will be a breach for which the lease may be terminated. That the road is in a condition of great disrepair is manifest and not disputed. Efficient public service cannot be maintained without extensive repairs. Moreover, upon this line are run the new P. A. Y. E. cars, in which from insurance moneys and proceeds of receivers' certificates there is invested over \$1,000,000. This rolling stock is exposed to much more rapid deterioration by being run over a road in such a wretched condition. It certainly seems a most shortsighted policy to expose this valuable property in which so much money is already invested to such adverse conditions of operation, which may be eliminated by putting the tracks in decent condition. As to the suggestion that these new cars may be shifted elsewhere, it is sufficient to say that by reason of their abnormal size they cannot run on the tracks of any other line until the radii of all curves on that line are lengthened, the cost of which would be very heavy and practically wasted. Furthermore, it must not be overlooked that the public is entitled to consideration, not only the traveling public, but those whose houses abut on the line; they are entitled to insist that the company, or its receivers, who run cars on this line, whether it be leased or owned, shall keep it in repair. The situation presents sharply the question: Shall this leased road be run or abandoned? and, since there is nothing to justify its abandonment, those who run it must pay for its immediate repair, and there is no money to pay for that except the proceeds of the certificates.

CENTRAL TRUST CO. v. THIRD AVE. R. R.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. et al. (Circuit Court, S. D. New York. December 1, 1908.)

 Corporations (§ 565*) — Insolvency and Receivers — Creditors' Suits — Proof of Claims.

In the administration by a court of the property of an insolvent corporation, the fact that all of the stock of certain creditor corporations is own-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed by one of the number does not entitle it to prove claims in behalf of the others, but each must be proved separately.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 565.*]

2. Street Railroads (§ 58*)—Leases—Construction—Surrender of Property by Receivers.

Receivers for a street railroad company, which included in its system several leased lines, within a reasonable time after their appointment elected to surrender one of such lines which they had operated until that time and the rent for which was in default, and the same was turned over to a receiver for the lessor company. The lease provided that all property passing thereunder should be maintained in good repair by the lessee, including all cars and other items of equipment, and on termination of the lease by default or otherwise should be returned, except such as had ceased to exist, as to which the substitutes therefor provided by the lessee, with all increments and additions and all improvements and betterments on the property, should pass to the lessor, which substitutes should be equal in value to the property for which they were substituted. At the time the property was surrendered there was a quantity of coal bought by the receivers for the lessee in the power house of the leased line, for use generally in furnishing power for the system. This could have been removed, but by agreement was turned over to and accepted by the receiver for the lessor without prejudice to the rights of either party. There were also other items, such as oil and repair parts, adapted for use generally on the different lines and bought for that purpose with general funds of the receivership, stored on the leased property, as well as repair parts adapted for use only on the special design of machinery in use in the power house of the leased line. Held, that such of the latter class of items as were bought by the lessee before the receivership had been so appropriated to use on the leased line as substitutes for worn-out parts as to pass to the lessor under the terms of the lease, but that as to the coal and general repair parts there was no such appropriation, and the receivers for the lessee were entitled to recover for the same.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

In Equity. On application for adjustment of certain claims presented by and against receivers for the respective companies.

Bowers & Sands, for Central Trust Co.

Evarts, Choate & Shearman, for receiver of Third Ave. R. R.

Byrne & Cutcheon, for Pennsylvania Steel Co.

Dexter, Osborn & Flemming, for receiver of New York City Ry. Co. Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. The first claim to be considered is

presented by the receiver of the Third Avenue Railroad.

That road was taken possession of by the Metropolitan Company under lease dated April 13, 1900, and subsequently came into possession of the New York City Company, as sublessee, under a lease from the Metropolitan dated February 14, 1902. Upon default in payment of stipulated rental—in the shape of interest due on mortgage bonds of the Third Avenue which lessee covenanted to pay—the mortgage trustee began suit to foreclose, and the receiver therein took possession of that road.

The lease of 1890, like other leases of street surface railroads which have been recently considered by this court, contained careful provi-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

sions for the preservation and maintenance of the leased property. The lessee agreed to "maintain, manage, use and operate and keep in good and working order, condition and repair, at its own expense, the entire line of the said demised railroad or railroads: and all extensions and branches thereof which are now or may hereafter be constructed, and all fixtures and appurtenances thereof, which now are, or hereafter may be constructed; and also keep the personalty hereby demised in good working order, condition and repair, so that the traffic and business of said railroad shall be encouraged and developed and reasonable accommodation given to the public." The lessee further agreed that it would "deliver up said railroad or railroads and all buildings, fixtures and appurtenances at the expiration of the lease or whenever the same shall become inoperative, in good order and repair," and that it would "at the termination of this lease or when for any cause it may cease to be operative, transfer, deliver and return to the party of the first part in good condition, the horses, harnesses, cars, tools, implements, machinery, equipments, stable equipments, office furniture and fixtures, and all property of every kind leased to and used by the party of the second part in the maintenance and operation of the railroad or railroads aforesaid, except that which is hereby absolutely transferred to the lessee (namely the stocks and bonds then owned by the lessor) or which has passed from existence by death or destruction or other cause, and shall also deliver the substitutes, increments and additions provided or made by the party of the second part; and the substitutes for the property impossible to deliver by reason of death or destruction shall be equal in value to that for which they are substituted." The lease also provided "that in case of default in the payment of the rent as aforesaid, or failure of the party of the second part to comply with all or any of the terms of this lease, and such default shall continue for a period of six months, the party of the first part shall have the right to re-enter and re-possess all the demised property, together with the improvements and betterments thereon or thereto appertaining, which right shall not lapse or cease to exist on account of any waiver or condonation of another prior default by implication or agreement, and such re-entry shall not impair the claims of the party of the first part for lawful damages for any defaults of the party of the second part."

When the receiver of the Third Avenue took possession the road, its cars and equipments were in a condition of great disrepair, much of the personal property originally transferred had been used up or had otherwise disappeared and no renewals or substitutes had been supplied to take its place. An examination of the general items of the claim presented discloses its character. We find such charges as "repairs to cars, track and buildings," "constructing and operating stores and supplies," "unpaid franchise taxes," etc. Manifestly the claim is against lessee and sublessee for damages for waste and broken covenants, and in the brief it is stated that counsel believe the Third Avenue has claims which can be asserted against the Metropolitan and New York City Companies, and that he does not ask leave to assert these claims against the receivers of these companies.

There is no reason apparent why the court should itself examine

into these claims in the first instance. The usual practice is to refer them to the special master for investigation and report, and it is understood that this is what petitioner asks leave to do. That applica-

tion is granted.

It is noted, however, that certain claims in favor of the Forty-Second Street Company, the Dry Dock Company, and the Union Railway are included in the enumeration. These are independent roads, and their legal position is not changed by the fact that the Third Avenue owns the whole or a part of their capital stock. The circumstance that the same individual is the receiver of all four roads is immaterial. Each road has an independent claim, which must be presented and prosecuted independently.

2. The next claim belongs in a different category. It is asserted against receivers of New York City and Metropolitan, as officers of

the court.

These receivers took possession of the Third Avenue Road under order of this court on September 24, 1907, and retained possession until on January 11, 1908, it was turned over to the receiver of that road, who had been appointed about a week before. No compensation for the use and occupation of the property during that period has been paid to the Third Avenue or its receiver. As early as October 8, 1907, a memorandum was filed (157 Fed. 443) indicating that the New York City receivers were examining the books to see if the contract (original lease) was or was not one which they should elect to accept. There was no unreasonable delay in conducting that examination, which ended in an election not to accept the contract. See memoranda of December 13, 1907 (160 Fed. 221), and January 4, 1908 (158 Fed. 460). No one could possibly have been misled into the belief that the receivers had agreed or expected to agree to be bound by the covenants of the lease. Under these circumstances they cannot be required to compensate for their use and occupation by the payment of a sum which is the equivalent of the rent stipulated in the lease. See opinion filed October 19, 1908, on petition of Belt Line. 165 Fed. 489. So much is clear. It is further contended, however, that these receivers are under no obligation to pay for the use and occupation of the property during the time they were experimenting with it to see if it were profitable or unprofitable, or at least during some part of that time, i. e., subsequent to October 13th, when the first default occurred. See U. S. Trust Co. v. Wabash R. R., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; Oak Pitts Colliery Co., 21 Ch. Div. 322; Quincy R. R. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632. The court is not inclined, as a matter of first impression, to assent to this proposition, but, like all such questions which depend on a presentation of many facts and circumstances and concerning which there is much judicial literature, it may more appropriately be reserved for consideration when the master's report is filed. This claim is therefore sent to the special master with instructions to take testimony and report whether any net profit, and, if so how much, accrued to the New York City receivers from the operation of the road during the entire period from September 24, 1907, to January 11, 1908; and, if asked to do so by either party, he will similarly report as to 165 F.-31

portions of that period. He will also report the facts, with his opinion, as to the liability generally of the occupying receivers to account for

net profits accrued during such period, or any part of it.

It should be noted in advance that manifestly there can now be made no exact determination as to net profits. A proper item of charge against gross receipts is the amount the operating receivers have paid, or have incurred liability to pay, for damages resulting from accidents happening during their operation of the road. Until the statute of limitations shall have run, no one can tell how large a sum is claimed for such damages, much less how much must be paid to the injured parties. It is suggested, however, that on the accounting some basis of adjustment may be reached by averaging past experiences with the same property, or that ample security may be offered and accepted to cover future damage claims. Whether or not some such arrangement can be made is a matter which may be discussed, and, it is hoped, disposed of before the master.

Inasmuch as this claim is asserted not against the companies, but against receivers as officers of the court, the special master will give it a preference in trial and disposition over other claims before him.

3. The next group of claims is presented by the present receiver of the New York City Railway, succeeding to the rights of the original receivers of that road, against the receiver of the Third Avenue, for various items of personal property which it is asserted belonged to the New York City Company or to its receivers, and which were by them supplied to the latter receiver when he began to operate the Third Avenue road, it being more convenient for all parties to have him take this property (then on the premises) from them at a fair price than to buy it in the open market. The property consisted of coal and various supplies needed for the operation or repair of the road and its equipments. None of this property had been affixed to the realty nor to any personalty that was so affixed, and all of said personal property could have been physically removed from the premises where the same was without disturbing the buildings in which the same then was, or the fixtures therein. Nor was any of it actually put to use on the cars or in carrying on the work of operation. The receiver of the Third Avenue relies upon the clauses of the lease of April 13, 1890, quoted above, and insists that when these various items—coal, oil, waste, curbs, valves, bolts, iron, steel, and brass of different dimensions etc., etc.—were bought and paid for by the New York City (or Metropolitan) or its receivers, and placed in the Kingsbridge power plant or the Sixty-Fifth street yard, it became the property of the Third Avenue Company.

By stipulation the value of all the items has been agreed to. It is also agreed that certain items of iron and steel, aggregating \$179.78, belonged to the Third Avenue Company when the lease of 1900 went into effect, and the claim for their value has been withdrawn. Certain so-called marginal strips are found to be obsolete, and are to be return-

ed to the receiver of the New York City Company.

The principal item is coal; hard coal, 13,065 and odd tons, valued at \$29,397.97, and soft coal, 332 and odd tons, valued at \$1,073.27.

All of this on January 11th was on the plant of the Kingsbridge power house, a small lot of it being in barge at the dock. How much coal was on hand there on September 24, 1907, does not appear, nor what was the daily consumption; but, since it is agreed that between that date and January 12th the receivers bought and placed upwards of 31,962 tons in the bunkers, and the plant was furnishing continually a large amount of power, it may reasonably be assumed that the amount of coal consumed there in the interim exceeded the amount on hand on September 24th. It should be noted that this claim is not against lessees for any breach of covenant in failing to keep up coal supplies, but against receivers who never accepted the lease nor its covenants.

The amount in the plant, January 11th, was as stated above. A few days prior thereto the Third Avenue receiver, who had been appointed January 6th, and receivers of the New York City Railway met in the chambers of the court to arrange for transfer of the road. No overruling necessity required the transfer to be made one week after appointment; it could quite as well have been made in two weeks, or even in three. The road was being run so as to render efficient public service by the old receivers, who could have continued to do so for an additional period; and in the interim they could have removed their own property from the premises, and the new receiver could have bought and secured delivery of all the coal he needed to begin operation of the road. But it would have been a foolish and unnecessary expense to have hauled thousands of tons of suitable coal away and hauled in other thousands in its place. Therefore it was arranged that everything there at midnight of January 11th should be turned over at the same time as the real estate, fixtures, and rolling stock, but without in any way affecting the rights and interests of the parties. Whatever was the property of the Third Avenue would be received without any obligation to account for it; whatever was the property of the New York City receivers, turned over for the accommodation of the new receiver, he would pay fair value for.

The sole question is, Who owned the 13,397 and odd tons of coal on January 11th? As we have seen, it is reasonable to assume that the great bulk of it had been bought by receivers, but the situation would not be changed by the circumstance that a considerable part of it had been bought by the New York City Company. It was bought by the operators of the whole system, and paid for out of their general funds. When bought and paid for, it was their property. If it had been discovered after purchase and delivery that the coal, although up to sample, was not as well adapted for generating power as some other variety, it could have been resold and other coal bought. The circumstance that it was stored on land belonging to the Third Avenue Company is immaterial: the lessee could use the premises to store its own property or that of other leased lines without thereby transferring title. Nor is it material that the purchaser of the coal (whether company or receivers) intended to burn it up in the Kingsbridge furnaces. Such consumption would be for the general uses of the system. At that time the Kingsbridge power plant supplied power to two substations at 146th street and 129th street. These transmitted power to: Third Avenue, from 110th street to 130th street; 125th street, from East River through Manhattan street to North River; Amsterdam avenue, from 125th street to Ft. George; Kingsbridge road, from 165th street to Kingsbridge (these were Third Avenue lines). Second avenue, from 116th street to 128th street; Lexington avenue, from 106th street to 130th street; Madison avenue, from 99th street to 135th street to Lenox; 116th street, from East River to Manhattan avenue to 109th street; Lenox avenue, from 116th street to 145th street; Eighth avenue, from Eighty-Sixth street to McComb's Dam; Columbus avenue, from Eighty-Sixth street to 109th street: Amsterdam avenue, from Eighty-Sixth street to 125th street (these were Metropolitan lines). Broadway, from Eighty-Sixth street to Manhattan street. This was the independent line of Forty-Second street, Manhattanville & St. Nicholas Company, to which power was sold. Besides these lines on Manhattan Island, power generated at Kingsbridge was sold also to the Union Railway, the Westchester Electric Railroad, and the Yonkers Railroad, all of which roads were operated independently.

Manifestly the larger amount of power from the Kingsbridge plant was being supplied to lines not belonging to the Third Avenue Company, and it is difficult to see how intent to use coal, bought with general funds, in getting power in that plant, could operate to transfer the title to the coal thus bought specifically to the Third Avenue

Company.

Other items of the kind above enumerated, iron, steel, brass, oil, curbs, etc., etc., aggregating in value \$12,300.97, were adapted for use generally on the different lines of the New York City Company. The argument as to the coal applies with equal force to them. They were bought with general funds for general uses; they were stored for convenience on Third Avenue property. In the Sixty-Fifth street yard they were practically as conveniently placed for use on Lexington or on Second avenue as on Third avenue. They had never been appropriated to any special use or purpose. For them and for the coal the Third Avenue receiver should pay; had they not been supplied to him by the New York receivers, he would have had to buy them elsewhere.

There is another group of items aggregating \$6,594.20. As to these

the stipulation states:

"The motors, dynamos and other electrical machinery and apparatus for the generation and distribution of electricity upon said Kingsbridge property was of the Westinghouse design, manufactured by the Westinghouse Electric & Manufacturing Company. All other motors, dynamos and electrical machinery and apparatus for the generation and distribution of electricity in the system of the Metropolitan Company or New York City Railway Company were and are of the General Electric design, manufactured by the General Electric Company. These two designs differ greatly in structure and few of the parts of one can be used on the other. In the construction of the Kingsbridge plant certain modifications were made in the Standard Westinghouse design, so that new or extra parts for such modifications must be specially constructed. The steam plant at the Kingsbridge plant differs in some respects from the steam plant of the Metropolitan Company, and these parts of the Kingsbridge plant cannot be used on the steam plant of the Metropolitan Company."

It does not appear whether these items were bought before or after September 24, 1907. Counsel for the New York City receiver submit abundant authority that, under the general principles of law as to fixtures, title would not pass from the purchasing lessee to his lessor by mere intent to use. But under the peculiar language of this lease, the court is of the opinion that such of the items as were purchased by the New York City Company before September 24, 1907, were so appropriated to the Third Avenue road as substitutes for worn-out parts that the receivers of the former road could not hold them against the claim of the latter road or its receiver. If receiver of the New York City Company feels confident that he can show that some of these parts were bought by his predecessors in receivership, he may do so before the master. Any so bought by a party not bound by the covenants of the lease would be classified with the other items above disposed of.

As to so much of the claim as is here determined, there is no reason why payment should be postponed till a decision on the claim for use and occupation. It may take a long time to dispose of that claim, and, when it is disposed of and all charges against receipts allowed, it may be that nothing will be found to be due. It is not necessary to safeguard the Third Avenue receivership by reserving its obligations for a counterclaim. Whatever is found to be due for use and occupation will be a charge against the court's officers for which the corpus of the property will respond, and, in the event of a sale, a lien

to secure such response will be reserved.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. January 2, 1909.)

RECEIVERS (§ 158*)—EQUITABLE RULE AS TO PRIORITIES—CLAIMS ENTITLED TO PRIORITY.

The surety on supersedeas bonds given by a street railroad company on appeals from judgments against it, which has been compelled to pay such judgments on their affirmance after the insolvency of the company, is not entitled to rank as a preferred creditor in the insolvency proceedings against the company with creditors having claims for supplies furnished to keep the road in operation.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 303; Dec. Dig. § 158.*]

Wm. J. Wallace and Henry C. Wilcox, for petitioner. Masten & Nichols, for receivers of Metropolitan St. Ry. Co. J. Parker Kirlin, for Metropolitan St. Ry. Co. Chas. T. Payne, for Morton Trust Co.

LACOMBE, Circuit Judge. This is a petition for an order permitting petitioner to intervene as a party defendant, and directing the special master to classify the petitioner's claim as one entitled to priority and payable by the receivers ratably with those of supply claimants whose demands arose within four months prior to the appointment of receivers and were incurred by the New York City Railway Company as operating expenses, and directing receivers to pay such claim ac-

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cordingly. The claim, which consists of many items, arises under the following circumstances: Prior to the appointment of receivers, whenever a judgment (usually in an action for tort) was entered against the New York City Railway and the company desired to review it on appeal, the petitioner, as surety, executed the supersedeas bond which was necessary in order to stay execution. As such judgments have from time to time been affirmed, petitioner has been compelled to pay the same, and now asks to be reimbursed on the theory that by giving such bonds it prevented interference with the property by levies under execution.

The question has been several times considered, and the decisions are not harmonious. The opinion of the Circuit Court of Appeals for the Sixth Circuit in Whitely v. Central Trust Company, 76 Fed. 74, 22 C. C. A. 67, 34 L. R. A. 303, commends itself, and will be followed

here.

The motion is denied.

AMERICAN HAY CO. v. DRY DOCK, E. B. & B. R. CO. et al.

(Circuit Court, S. D. New York. September 1, 1908.)

Corporations (§ 548*)—Insolvency and Receivers—Creditors' Suits—Procedure—Intervention by Creditors.

In a creditors' suit by one creditor in behalf of all to marshal and distribute the assets of a corporation, in which a receiver has been appointed, where other creditors have filed claims and have proved or are proving them before a special master, it is unnecessary that they should formally intervene and file pleadings as complainants, even though the claim of the complainant should be paid as one entitled to priority; nor is such intervention necessary because of errors in the description of defendants' property in the original bill which are not material.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2185; Dec. Dig. § 548.*]

In Equity. On motion for leave to intervene.

Daniel Burke, for complainant.

Evarts, Choate & Sherman, for receiver of defendant.

LACOMBE, Circuit Judge. This is an application to allow certain creditors holding certificates of indebtedness of the railroad to intervene as parties plaintiff and to file an amended complaint, on the ground that the claim of the original plaintiff (for materials necessary for operation furnished within four months of receivership) is about to be paid. The moving parties have filed their claims and have proved or are proving them before the special master, and interlocutory decree has been entered. Under these circumstances intervention is unnecessary; the cause will go on even though the Hay Company be paid, because the suit was brought in behalf of all creditors; and there is nothing in the changed circumstances calculated to cause delay. If there should be any lack of diligence in expediting it, any creditor who has proved his claim may suggest that fact to the court, and se-

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cure the relief as efficiently as if such creditor were formally named in the record as a party plaintiff. Nor is it any ground for the relief prayed for that there are in the original bill misdescriptions of the property of defendant, nor that such items of such property are not enumerated. All such inaccuracies may be brought to the attention of the special master, who will carefully ascertain what property should be marshaled, and the record may be perfected in final decree.

Motion denied.

In re DRY DOCK R. R.

In re METROPOLITAN ST. RY. CO.

(Circuit Court, S. D. New York. September 15, 1908.)

STREET RAILBOADS (§ 58*)—OPERATION BY RECEIVERS—EXCHANGE OF TRANSFERS.

Receivers respectively for a street railroad system and for a leased line, which was a constituent part of such system but had been surrendered and was being operated independently, authorized to discontinue the exchange of transfers after due notice to the public.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

In Equity. On request by receivers for instructions.

Evarts, Choate & Sherman, for receiver of Dry Dock R. R. Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. When decision on the question of transfers between Third Avenue and Metropolitan Systems was filed March 31, 1908, it was stated that no instructions could then be given with regard to the Dry Dock Line, because there were so many instances where it and the Metropolitan Street Railway made joint use of each other's tracks. The difficulty then existing has since been removed by rearrangement of routes and car movements, and there is no reason apparent why receivers of Metropolitan and of Dry Dock should not discontinue exchange of transfers at the points other than those designated in the petition now filed. No formal order is necessary; this memorandum is sufficient authority, but notice, by posting in cars running on lines affected, should be given for 10 days before the new arrangement goes into effect.

GUARANTY TRUST CO. OF NEW YORK v. SECOND AVE. R. CO. et al.

(Circuit Court, S. D. New York. September 16, 1908.)

Courts (\S 500*)—Jurisdiction of Federal Courts—Suit Relating to Property in Custody of Receivers.

The fact that receivers appointed by a federal court for a street railroad system have been operating a leased line does not draw to that court jurisdiction of a suit to foreclose a mortgage on such line after the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

receivers have elected to surrender the lease and have offered to return the property to the lessor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. $1407 ; Dec. Dig. \\ 500.*]$

In Equity. On application for appointment of independent receiver.

Davies, Stone & Auerbach, for complainant. Masten & Nichols, for receivers of Metropolitan St. Rv. Co.

LACOMBE, Circuit Judge. Several weeks ago the receivers of the Metropolitan Street Railway Company completed an exhaustive investigation which showed that the operation of the Second Avenue Railroad under existing lease entailed a loss of over \$200,000 yearly, and that nearly \$800,000 would forthwith be required to put the road and equipment in thoroughly efficient condition. The owners of the road were notified of this condition of affairs, and the road would long ere this have been returned to them had it not been that negotiations were entered into with the object of ascertaining if some modified compensation could not be agreed to and some provision made for betterments which would enable receivers to continue operation in connection with the other lines of the Metropolitan System. This application for the appointment of an independent receiver indicates the termination of such negotiations. The mere circumstance (in the absence of diversity of citizenship) that the Second Avenue property has remained in the hands of Metropolitan receivers during the pendency of these negotiations should not be controlling as to the forum in which complainant may obtain relief, since receivers have offered to return the property and are ready to deliver to owners or owners' representatives at any time.

The petition is denied, without prejudice to its renewal in a state

court.

GUARANTY TRUST CO. OF NEW YORK v. METROPOLITAN ST. RY. CO. et al.

(Circuit Court, S. D. New York. October 5, 1908.)

Davies, Stone & Auerbach, for complainant. Masten & Nichols, for defendants.

LACOMBE, Circuit Judge. It appears from the registers in the clerk's office that several of the defendants have not filed appearance due on September rule day. Since this is the bill of foreclosure, presumably the parties in default have no defense to interpose; but in case any of them have failed to file appearance by some oversight, application for relief and extension may be made to the court, which will impose such terms as will ensure an early filing of the replication. No delays, other than such as may be necessary to ensure to each party a fair presentation of its case, will be tolerated; in conformity with the instructions of the Supreme Court of the United States, this cause must be pressed to a conclusion.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MORTON TRUST CO. v. METROPOLITAN ST. RY. CO.

GUARANTY TRUST CO. v. SECOND AVE. R. CO.

(Circuit Court, S. D. New York. October 19, 1908.)

 Street Railroads (§ 58*)—Insolvency and Receivers—Disposition of Leased Lines.

Receivers for a street railroad system directed to turn over a leased line previously operated by them, but the lease of which they elected to surrender to a receiver appointed by a state court in a foreclosure suit against the lessor, reserving certain questions as to what property should pass and of accounting between the respective receivers for future adjustment after hearings before a master.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*1

2. Street Railroads (§ 58*)—Leases—Cancellation by Receivers of Lessee.

Under a lease of a street railroad line which required the lessee on its termination for any cause to return all of the property leased, including all tools, implements, machinery, and equipment, or substitutes of equal value, and also a sum of money advanced, to be treated in such case as a loan, where receivers for the lessee terminate the lease they cannot be required to restore property or money which did not come into their possession, but any shortage gives the lessor a claim for damages against the estate of the lessee.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

3. Street Railroads (§ 58*)—Leases—Cancellation by Receivers of Lessee.

Where a lease of a street railroad required the lessee to pay all taxes and assessments against the property, on the cancellation of the lease by receivers for the lessee, they cannot be required as receivers to indemnify the lessor against liability for outstanding taxes which are in litigation, which is a liability of the lessee but not of the receivership.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

4. STREET RAILROADS (§ 58*)-RECEIVERS-DISCRETION TO CANCEL LEASE.

Receivers for a street railroad system, including a number of leased lines, may operate one of such lines for a reasonable time to enable them to determine whether or not to adopt the lease without incurring liability for rental under the lease, but on an election to cancel they will be required to account to the lessor for the net profits of such operation.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

Application for leave to file a petition in re Second Avenue Railroad praying that receivers of the Metropolitan be instructed to turn over the Second and First Avenue Lines to the receiver appointed by the state court, and, upon such filing, for the relief stated.

See, also, 161 Fed. 787.

Bronson Winthrop, for Morton Trust Co. Davies, Stone & Auerbach, for Guaranty Trust Co. Masten & Nichols, for receivers of Metropolitan St. Rv.

LACOMBE, Circuit Judge. The property in question consists of certain street surface railroads, with their equipment, in First and

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Second avenues and various other streets and avenues on Manhattan Island. It was leased by the Second Avenue Railroad Company to the Metropolitan Street Railway Company on January 28, 1898, and is included among the lines leased from the latter company by the New York City Railway Company. The rental stipulated by the Second Avenue lease aggregates \$517,580 per annum, being 9 per cent. on the capital stock of that road and the interest on outstanding mort-

gage bonds.

The receivers appointed by this court, after an extended and exhaustive investigation, ascertained that the operation of these lines at that rental involved an annual deficit of over \$200,000, while it would be necessary in the near future to expend \$800,000 to put the property in proper condition. Thereupon several weeks ago they defaulted on payments falling due under the lease; a receiver of the Second Avenue Road was appointed in the state court, and he now applies to have the property covered by the lease turned over to him, so that he may run the road as an independent concern. Notice has been given to every one who has intervened, and all have been heard. Several questions are presented by the application, some of which concededly can only be answered after a hearing before a special master who can take testimony and ascertain the facts. They will be now considered and disposed of so far as may be practicable at this stage of the case.

1. The roads, buildings, and fixtures, with all such personal property as can be identified as belonging to the lessor, should be returned to its representative—that is, its receiver—subject to and without disturbance of any existing liens. This may be done promptly, but the interests of the public require reasonable notice of the change of operation; the time of return is therefore fixed for one week subse-

quent to the entry of the order to be entered hereon.

2. Subsequent to the making of the lease, the road was changed from a horse car to an electric line, and 275 electric street cars were bought with money furnished by the lessor. The exact type and description of these cars are matters of record, and the Metropolitan receivers assert that they now have on the Second Avenue Line the whole 275 in as good condition as when purchased, ordinary wear and tear excepted, which they are prepared to turn over. The petitioner contends that some (or all) of these cars at one time had placed upon them different motors, bought by the Metropolitan (or New York City) Railway Company, and insist that under a clause of the lease these last-named motors should be reaffixed to the cars, or the value accounted for. That question is one which should first be examined into before a master who will take proof of all the facts, but without waiting for his report thereon the 275 cars should be turned over with the road.

3. The car barn of the lessor at Ninety-Sixth street and Second avenue, with its contents, was destroyed by fire on February 29, 1908. The loss has been adjusted with the underwriters, and collected in whole or in part by receivers of this court. Petitioner asks to have all such insurance moneys on barn and contents (except rolling stock)

paid over to him, except in so far as said moneys are payable to mortgage trustees; and also to have paid to him such portion of the insurance moneys covering rolling stock as may be found to represent Second Avenue rolling stock. In reply it is contended that the 275 cars about to be turned over stand in place of the rolling stock insurance, and that large sums have been paid by the present receivers in clearing away the ruins and rebuilding the barn—so far as such rebuilding has progressed. Manifestly these questions cannot be dis-

posed of until the facts are shown before the master.

4. The petitioner also asks delivery to him of all horses, harness, tools, implements, machinery, equipment, stable equipments, office fixtures, and fixtures and property of every kind used in the maintenance and operation of the railroad, delivered by the Second Avenue Company when possession was taken under the lease, together with the substitutes, increments, and additions provided or made by the Metropolitan Company therefor and thereto. In this connection it should be noted that what is now presented for consideration is not a claim against the lessee company for property converted or allowed to go to waste and destruction. It is a demand that the receivers turn over certain specific things now in their custody, and it cannot be complied with by them if no such specific things have in fact come into their possession. The horses are long since dead, and, the road being now electric, presumably the harness and stable equipments have also disappeared without replacement. The receivers offer to turn over all items that can be identified, and proof may be taken before the master as to any other items which petitioner thinks should come to him. As to tools, implements, etc., it appears that these were bought by the New York City Railway from time to time for use generally on the system. Some of these have been actually used indiscriminately on Second Avenue and on other lines; such would seem not to have been appropriated to Second Avenue Line. Others presumably have been used only in the service of that line, and upon a liberal construction may fairly be held to be a part of its "tools, implements, machinery and equipment." Any such the receivers should turn over with the road, and the master will take testimony and pass upon any which are in doubt.

5. It is contended that Metropolitan receivers should pay over to the petitioner a sum of money equal to the amount of cash delivered by the Second Avenue Company to the Metropolitan at the time it took possession. The lease expressly provides that if the lessor shall resume possession of the demised property on account of any default of the lessee, then the money so received shall be deemed to have been a loan and shall be returned by the lessee. Petitioner may have a provable claim against lessee and sublessee for the whole or any part of this sum, but certainly it never came into the possession of the re-

ceivers, and no obligation rests upon them to repay it.

6. For several years past no franchise taxes have been paid on this property, the amount being in litigation with the city authorities. Petitioner may have a perfectly good claim against lessee and sublessee for failure to protect the property against the lien of these unpaid taxes, but he certainly is not entitled to demand that these receivers

"save harmless and indemnify" the Second Avenue Company against any claim or claims of the city of New York on account of such taxes.

7. Petitioner also prays that Metropolitan receivers be directed specifically to perform a certain contract made at the time the road was electrified under the terms of which electricity from the Ninety-Sixth street power house was to be furnished to the Second Avenue Road at the actual cost thereof per car mile during the unexpired term of the charter of the Second Avenue Company. It does not appear that receivers have ever adopted this contract, and it is difficult to understand upon what theory it is contended that they are bound by it. If petitioner wishes seriously to press such a claim, he may present his evidence and argument before the special master. Metropolitan receivers, however, may make a contract similar to that in the case of the Belt Line for furnishing power for operation of the Second and First Avenue Lines on reasonable terms.

8. It also appears that in the ducts of the Second Avenue Road there are now some cables which transmit power to other parts of the Metropolitan System. It would be unwise to turn the property over without some provision which will protect receivers from being interfered with in the use of these ducts until others on property remaining in their possession can be provided or arrangements made for continuance in present ducts. The details are not fully set forth, but it is a matter which can no doubt be easily arranged between the parties, since Metropolitan receivers state that they are willing to pay reasonable compensation for the privilege. A contract between the receivers covering this point should be presented at the time the order is sub-

mitted for signature.

9. There has been no unreasonable delay on the part of receivers in examining into the question of the propriety of accepting or rejecting this lease. The whole system is most intricate, and the method of keeping accounts made it difficult to distribute receipts and expenses between the different routes. The case is within the principles enunciated in Quincy R. R. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632, but receivers (New York City and Metropolitan) should account for whatever receipts came into their hands from the operation of the road during the period for which no rent has been paid deducting whatever is properly chargeable against the same. This, of course, is a matter to be taken up in the first instance before the master.

In this connection the receivers (New York City and Metropolitan) present a special claim for moneys expended subsequent to their appointment in putting the First Avenue Line between 59th and 125th streets in fit condition to run. That also is referred to the special

master.

MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. (two cases).

GUARANTY TRUST CO. v. SAME.

(Circuit Court, S. D. New York. October 27, 1908.)

STREET RAILROADS (§ 58*)—INSOLVENCY AND RECEIVERS—CONTRACTS BY RECEIVERS.

Where a contract by a street railroad company letting the advertising space in its cars for a stated term was modified by receivers for the company with the approval of the court, on account of changed conditions, by which modification the receivers have received increased compensation, and the lessee has presumably made contracts in reliance thereon, it will not be set aside and the matter reopened against the objection of the lessee, unless for strong reasons shown.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. See, also, 161 Fed. 787.

Bronson Winthrop, for Morton Trust Co. Davies, Stone & Auerbach, for Guaranty Trust Co. Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. Some months ago this subject of advertising in street cars was examined into exhaustively by the receivers, and a hearing was had at which every one, including petitioner, was fully heard. The peculiar nature of the business was brought out, and after consideration the court reached the conclusion that, although it would not be wise to extend the term of the old contract with the advertising company, the receivers might properly agree to a modification which would relieve them from any obligation to furnish space in cars of the Third Avenue System, and would at the same time increase the compensation to be received for space in their own cars. Such a contract of modification was approved in writing by the court, and no one sought to review that disposition of the matter.

During the long time that has since elapsed, the advertising company has paid to the receivers considerable sums it would not have been obligated to pay, except for the modification, and has presumably entered into contracts with third persons agreeing to secure them advertising space during the term originally specified. To undertake now to reopen the whole matter would not be fair to that company. Moreover, nothing is now brought forward which was not before the court and fully considered when the memorandum of April 29th was filed.

Petition denied.

MORTON TRUST CO. v. METROPOLITAN ST. RY. CO.

(Circuit Court, S. D. New York. November 2, 1908.)

Mortgages (§ 493*)—Foreclosure by Action—Pleading and Issues.

A decree of foreclosure may be entered and a sale ordered before the respective rights and priorities of the mortgagees and other lien

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claimants are determined, and without reference to collateral issues permitted to be raised by an intervener by a cross-bill.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1439, 1440; Dec. Dig. § 493.*

Foreclosure in federal courts, see note to Seattle, L. S. & E. Ry. Co. v. Union Trust Co., 24 C. C. A. 523.]

In Equity. On motion to strike out answer. Bronson Winthrop, for complainant. Masten & Nichols, for receivers.

LACOMBE, Circuit Judge. This is a motion to strike out the answer of the tort creditors' committee to the bill of foreclosure, upon the ground that said committee was allowed to intervene solely for the purpose of filing cross-bill and sustaining the issues tendered thereby. The validity of the lease from Metropolitan to New York City Railway has nothing to do with the issues properly raised by bill to foreclose the mortgage. If complainant or any of the original defendants have obscured the issues by raising others which deal not with the right of the mortgagee to insist upon a sale in foreclosure, but with questions as to priorities and liens of creditors, the two subjects will be separated by the court when motion is made to apportion the time for taking proofs. It is well settled that a sale may be ordered before the rights of the parties under the several mortgages and other claims have been fully ascertained and determined. First National Bank of Cleveland v. Shedd, 121 U. S. 74, 7 Sup. Ct. 807, 30 L. Ed. 877. In the case at bar nothing will be allowed to interfere with the orderly progress of the cause to decree of foreclosure and sale; the respective rights of all parties to the proceeds of sale can be adjusted in subsequent decrees under either the original or cross-bill.

The authorities cited in opposition to this motion are not in point, because the committee does not come here as a mere intruder, but by express leave of court to prove if it can, in a plenary suit (instituted by cross-bill) facts which the court has decided should be established in that way rather than upon proof of claim before a master. The circumstance that it is not allowed to serve an answer contesting the validity of the mortgage or the existence of default thereunder is immaterial.

Motion denied.

CENTRAL TRUST CO. v. THIRD AVE. R. CO.

(Circuit Court, S. D. New York. June 10, 1908.)

1. Carriers (§ 12*)—Receivers—Administration of Property—Transfers.

A receiver for street railroad companies will not be required to continue an existing system of transfers in force between such companies and an independent company, not required by law nor contract, and which is unprofitable to the receivership; nor is it a sufficient ground for refusing permission to discontinue such transfers that the franchise of the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

outside company may be thereby forfeited, where, after due notice to them, none of the parties interested in such franchise objects.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

2. CARRIERS (§ 12*)—Acquisition of Franchise in Streets—Consent of Property Owners—Conditions.

The consent of the owners of property abutting on a street to the extension of the line of a street railroad company thereon does not bind the company to continue a system of transfers with another company then existing, where no such condition is expressed therein.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

3. STREET RAILROADS (§ 58*)-RECEIVERS-ADMINISTRATION OF PROPERTY.

A receiver for the property of street railroad companies will not be required to continue an arrangement by which such companies furnished power and the use of their tracks to an independent company without compensation.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. Suits by the Central Trust Company against the Third Avenue Railroad Company, by the Barber Asphalt Company against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company, by the American Hay Company against the Dry Dock, East Broadway & Battery Railroad Company, and by the Lorain Steel Company against the Union Railway Company. The receiver of the defendant roads above enumerated has applied for instructions as to proposed discontinuance of transfers in addition to those considered in an earlier opinion of this court filed March 31, 1908 (161 Fed. 879).

Bowers & Sands, for Central Trust Co.

Evarts, Choate & Sherman, for receiver of Third Ave. R. R. and Forty-Second St. Ry. Co.

Kellogg & Rose, for Barber Asphalt Co.

Daniel Burke, for American Hay Co.

Evarts, Choate & Sherman, for receiver of Dry Dock R. R.

Stetson, Jennings & Russell, for Lorain Steel Co.

Evarts, Choate & Sherman, for receiver of Union Ry. Co.

LACOMBE, Circuit Judge. The propositions submitted on this petition may be more conveniently discussed separately, since the facts are not the same in the case of each road.

1. The Manhattan Elevated Road.

On April 3, 1899, formal contracts were entered into between the Manhattan Railway Company and the four surface roads, which are defendants in those cases, providing for the transfer of passengers from elevated to surface road, and vice versa, upon the payment by the passenger of three cents in addition to the regular fare of five cents. The eight cents for the whole trip, including transfer, was to be collected by the road on which the passenger began his journey, and the eight cents was to be divided equally between the two roads on which the passenger was carried, an accounting being had each month. These contracts expired by their own limitation on May 1, 1904. On April 29th and May 3d of that year, by an exchange of

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

letters between the presidents of the respective roads, the foregoing agreement was continued from year to year, with the provision that the relation might be terminated at any time by service of a written notice of 90 days from either party. The practice of issuing these transfers has since continued, without any other formal action renewing or extending the contract. The receiver has made an examination, and finds that the result of such exchange of transfers during the months of February and March was a net balance against the four surface roads and in favor of the elevated road of \$8,476.36. Because this is obviously unprofitable, and because there are very large opportunities for fraud in the purchase and sale of these transfer tick-

ets, the receiver proposes to terminate the existing practice.

Notice of this application was duly given to the Manhattan Railway Company, which makes no opposition; and there seems to be no obligation, either statutory or contractual, which requires the receiver to continue the existing practice. On behalf of one of the associations which has filed objections to the petition, it is suggested that as to any lines of the Union Railway constructed after this three-cent transfer went into effect, to the construction of which the abutting property owners gave their consent, such consent was given in reliance upon the continuance of the three-cent transfer. No such stipulation was incorporated in any such consent, so far as the receiver can find out, and the company receiving the consent cannot be held to have thereby assumed obligations not therein expressed. It is also suggested that it will be a hardship to many residents of the Bronx to have any existing transfer system curtailed or discontinued. No doubt this is so. but this court is not prepared to hold that such circumstance alone is sufficient reason for requiring its receiver to continue an unprofitable service. It has also been suggested that the Public Service Commission, under section 49 of the act which created it, might require the roads to continue to sell and honor these transfers. Whether that section or any other one gives the Public Service Commission power to compel two independent roads to exchange transfers is a question of state law, the construction of a state statute which may more appropriately be left to the state courts. In the event of the receiver being called upon by the commission to take and give such transfers, he will furnish all the information which he, as operator of the road, may be able to procure, and he will notify the owners and security holders of the several roads now in his hands, and will see that they are given the opportunity to present whatever arguments they may wish to make in opposition. In the ultimate analysis it is the owners of and lienors on the property whose interests would really be affected by such a construction of the statute; the court and its receiver are custodians merely, and are not concerned with its future.

There seems to be no good reason why the exchange of transfers with the Manhattan Railway Company should not be terminated. The last-named company has been duly notified and waives the 90-day notice; but the discontinuance of these transfers should not be undertaken until after notice of intention to discontinue shall have been posted for 10 days in all cars run on such parts of the system as are affected thereby.

2. The Westchester Electric Railroad Company.

This company has a line of track extending south on White Plains road to Fifteenth street, Williamsbridge. From that point south the lines of the Union Railway extend over White Plains road, Olim avenue, and Webster avenue. The Westchester Road runs its cars over Union tracks south of Fifteenth street, and the Union runs its cars on Westchester tracks north of Fifteenth street. Since there is thus a joint use of each other's tracks between the New York, New Haven & Hartford Station at Mt. Vernon and West Farms and Bedford Park Station, the transfer act of 1885 requires the roads there operating to exchange transfers for a single fare. The receiver wishes to stop such single fare transfers, and, in order to do so without violating the transfer act (Laws 1885, p. 525, c. 305), proposes to cease operating Union cars on Westchester tracks, and to prohibit the further use of Union tracks by Westchester cars. There has been no suggestion upon this hearing that such a change of operation was not within the power of the receiver of either road; there is no contract between them securing to either the use of any portion of the other's The receiver for the Westchester Road calls attention to the fact that there are no waiting room facilities for persons who, by reason of the discontinuance of the present through lines, might have to change cars at the junction point (corner Fifteenth street and White Plains road, Williamsbridge), but it is understood that the receiver of the Union does not propose to abrogate the present system till such facilities are provided.

The important question is whether, after the joint use of tracks shall cease, it is within the power of the receiver of the Union Railway to refuse to accept transfer slips from Westchester Railroad passengers, bound south, who may change into the cars of his line at the junction point. A hearing was given some weeks ago, when all interested had full opportunity to present their views. Several of those who then appeared have asked that the matter be sent to a master, but that is unnecessary; the documents and affidavits already submitted make the situation quite clear, and there is no apparent conflict as to the facts.

Except for a document hereinafter referred to, no contract or agreement was ever entered into by the Union Company undertaking to give to passengers coming from points in Westchester county on the line of the Westchester Company conveyance, without further payment, over the lines of the Union Railway. At the time when certain franchises were granted to the Westchester Company, its entire capital stock was owned by the Union, and offices in both companies were held by the same individuals; these individuals were applicants, on behalf of the Westchester Company, for the franchises in question, and, as an argument in favor of the grant thereof, made much of the relations existing between the two companies. The Union Company also indemnified a surety company which became the guarantor of the Westchester Company on certain bonds required as a condition of granting franchises to the latter company. But no agreement or promise of the Union Company is shown, and the court is not satisfied that the acts and statements of the persons who were then its officers can be held to estop the Union Company, which has long since parted with its Westchester stock, from insisting that its obligations shall be measured only by the contracts it entered into and by the requirements of the statutes.

There has been put in evidence a contract between Mr. B. L. Fairchild, of Pelham, and the Union Railway Company, dated June 11, 1898; also a further supplemental contract between the same parties dated October 25, 1899. These need not be recited at length, nor need any of the objections to them be discussed, because the changes now proposed do not conflict with any privileges which the documents purport to secure. They provide for carrying passengers—

"either upon through cars or by transfers at Fordham, by electric railway service from New Rochelle through the Old Boston Post Road or Colonial Avenue, in the village of Pelham through Sixth St. from the Pelham line in Mount Vernon, and southerly from llawn Station to Tremont at 177th St. and Third Avenue in the city of New York. The fare from Pelham to any point along the route * * * and connecting lines shall be at no time greater than from Mount Vernon to such points."

The Union Company receiver proposes to continue his service so that passengers from New Rochelle and the other points named can find cars ready to take them from the city line to Tremont, and does not propose to charge any greater rate of fare for passengers coming from Pelham than for those coming from Mt. Vernon.

As to the Westchester Corpany, however, the situation is very different. In November, 1898, the company obtained from the local authorities of Mt. Vernon franchises to operate its road in certain streets and avenues, with the proviso:

"That on payment of a five cent fare any person shall be carried over the lines of said railroad and any railroal controlled and operated by said company, or by which said company is or may be controlled and operated, through and from the city of Mount Vernon, to One Hundred and Twenty Ninth St. in the Borough of Manhattan, and to and over any of the lines of the Union Railway Company of New York City, at which transfer points have already or may hereafter be established, north of the Harlem River. * * * Upon failure to comply with these conditions this franchise shall be forfeited to the city of Mount Vernon."

Counsel for the Union Company receiver contends that this provision no longer applies, since the Westchester Company is not now controlled or operated by the Union Company. There is force in the contention, but it need not be here discussed. The pending petition will be disposed of upon the assumption that should the Westchester Company be unable to secure transportation, for a single five-cent fare, of its passengers from Mt. Vernon over the Union Lines to 129th street, it will be within the power of the local authorities of that city to sue upon bond and to forfeit the franchises granted in November, 1898. The same assumption may fairly be made as to certain other franchises granted to that company on similar conditions by the villages of Pelham Manor, North Pelham, and Bronxville.

When it became apparent that the carrying out of the changes proposed by the receiver might, at the pleasure of local authorities, result in the destruction of franchises belonging to another corporation, it seemed desirable that notice of this application should be given to

all who had invested in such franchises. The entire capital stock of the Westchester Company was originally owned by the Union Company, and was subsequently transferred to the Third Avenue Railroad Company; it is included in a mortgage by that company to the Central Trust Company as trustee, and the equity has been transferred to the Metropolitan & New York City Railway. The Westchester Company has an outstanding mortgage dated June 2, 1893, which contains an "after-acquired property" clause and covers these franchises. The trustee under this mortgage, the Central Trust Company, and the present holders of the equity of the stock have all been notified of this application; some of them have appeared, but no one makes any objection. It is suggestive that, when it is proposed to take action which may be expected to result in the forfeiture of a franchise, no one who has invested in such franchise as owner or mortgagee raises any protest. Apparently the prospect of developing any value out of these particular franchises under existing conditions is not hopeful, and the figures given by the state receiver showing receipts and disbursements during his operation of the entire system of the Westchester Company are not encouraging.

Upon the record here presented, there seems to be no legal obstacle to the proposed action of the receiver of the Union Railway Company. Such a course would manifestly cause much inconvenience and some loss to residents in the city and villages affected; it may be that the various local authorities, the state receiver, and the petitioning receiver may be able to agree to some modifications which will meet with general acceptance. The situation is well expressed in the brief of counsel for the village of Pelham, as follows:

"It may be impossible to carry a passenger without loss from Mt. Vernon or Pelham to 129th street, a distance of about 12 miles. But carrying a passenger a distance of about 3 to 4 miles from Mt. Vernon to the Bronx Park Station of the Elevated would probably represent a profit. There should be some middle ground where the interests of the communities and the railroad might meet."

The petitioning receiver will, therefore, first endeavor to make some arrangement which will be satisfactory to all interests; but, if unable to do so, he may make such changes in service as the law permits and the business interests of the property in his custody may require. No change, however, should be made without giving public notice thereof 30 days in advance.

3. The Yonkers Railway.

On the Bronx River road north of the city line, Union cars now run on Yonkers Railway tracks; on the same road south of the city line, Yonkers cars run on Union tracks. The Union also runs its cars on Jerome avenue northerly from the city line on Yonkers tracks. In order to avoid this joint use of tracks and consequent application of the transfer act, the receiver proposes to discontinue these services, and thereafter to discontinue the exchange of single-fare transfers. The situation is substantially the same as that outlined above in discussing the Westchester Road. Certain franchises granted by the city of Yonkers to the Yonkers Railway may be forfeited if the present

mode of operation is not maintained. The bulk of the stock of this company is held as that of the Westchester is, but 75 shares are the property of individuals who have been notified of this proceeding. The trustee of a mortgage which covers these franchises as after-acquired property has also been notified. Some of the parties notified have appeared, but none object. The receiver will proceed as indicated in the Westchester case.

One line now operated by the Yonkers Company presents a different situation. On Broadway, Yonkers cars run south on Union tracks from the city line to Kingsbridge. These cars maintain the only service on that line, because there is not at present any connection with other parts of the Union System, and there are no car barns or repair shops on Broadway south of the line. Power is furnished by the Third Avenue Company, but neither for the power nor for use of the tracks does the Yonkers Road pay anything. The receiver asks to terminate this arrangement unless provision can be made for the payment of a fair rent for use of tracks and power. This seems a reasonable proposition, but the record indicates that it may be difficult for the receiver of the Yonkers Company to pay anything. In order to comply with the terms of some of its franchises, he now buys subway tickets from the Interborough Company at five cents and sells them to Broadway passengers at three cents. But that is no reason why the Third Avenue Company should not be paid for its power and the Union for the use of its tracks. The same situation exists here as in the other cases—as to forfeiture of franchises, etc. The receiver. will first undertake to make some satisfactory arrangement with the state receiver and the local authorities, and, failing that, he will take steps to make proper connections and to operate the Union tracks himself from the city line to Kingsbridge. Thirty days' public notice will be given of any proposed change.

LORAIN STEEL CO. v. UNION RY.

(Circuit Court, S. D. New York. October 26, 1908.)

STREET RAILROADS (§ 58*)- RECEIVERS-OPERATION OF ROAD.

A receiver appointed for the property of a street railroad company in a foreclosure suit will not, unless in case of strong necessity, be authorized to discontinue the operation of ears over a portion of the line covered by its franchise, where the effect would be to forfeit its franchise, even though the track over such portion is owned by another company to which he must pay rent and its operation would be unprofitable.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. On petitions of Arthur H. Wadick and another for instructions to receiver for Union Railway.

Stetson, Jennings & Russell, for complainant. Bowers & Sands, for defendant.

LACOMBE, Circuit Judge. These are applications by residents in the district affected for modification of an order made in conformity to

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

decision of this court filed June 10, 1908 (165 Fed. 494). The following quotation from that decision sets forth the question then presented:

"The Westchester Electric Railroad Company has a line of track extending south on White Plains road to Fifteenth street, Williamsbridge. From that point south the lines of the Union Railway extend over White Plains road, Olin avenue, and Webster avenue. The Westchester Road runs its cars over Union tracks south of Fifteenth street, and the Union runs its cars on Westchester tracks north of Fifteenth street. Since there is thus a joint use of each other's tracks between the New York, New Haven & Hartford Station at Mt. Vernon and West Farms and Bedford Park Station, the transfer act of 1885 (Laws 1885, p. 525, c. 305) requires the roads there operating to exchange transfers for a single fare. The receiver wishes to stop such singlefare transfers, and, in order to do so without violating the transfer act, proposes to cease operating Union cars on Westchester tracks, and to prohibit the further use of Union tracks by Westchester cars. There has been no suggestion upon this hearing that such a change of operation was not within the power of the receiver of either road; there is no contract between them securing to either the use of any portion of the other's tracks.'

Fifteenth street, Williamsbridge, is now 229th street, New York City, and will be so referred to hereafter.

After various negotiations conducted in compliance with the suggestion of the court, and which resulted in no agreement, the receiver of Union Railway applied for a permit to open street surface so as to put in a switchback at 229th street. Such permit was refused. Why it was refused does not appear. The place named is the northern terminus of the line built under a franchise from the city of New York to Union Railway, where a switchback would seem to be essential to operation. It was stated unofficially on the argument that the permit was refused without any inquiry as to the legal questions involved, and the representative of the corporation counsel confirms this by stating that the law department was not asked to advise the borough president as to the law. No switchback being provided at 229th street, the Union Railway receiver early in October began to run his cars back from 233d street, using an old switch, and the Westchester Railway receiver ceased running cars south of 233d street.

It now appears that two franchises, which have an important bearing on the situation, were not called to the attention of the court on the argument in June. The Union Railway receiver did not know of their existence, not finding any reference to them in the documents turned over to him. It is surprising that no one else called attention to them, since the hearing was a general one, at which every one in any way interested was invited to present anything he pleased in opposition to receiver's petition. However, no one is fairly subject to any criticism for not presenting this evidence sooner, and the new questions thereby presented can be disposed of now as well as then.

Prior to June 5, 1895, the White Plains road from 229th street to the Mt. Vernon boundary ran through the village of South Mt. Vernon, or Wakefield, which was on that date annexed to the city of New York. On February 18, 1893, that village granted a franchise to the Mt. Vernon & Eastchester Railway Company for the operation of a street railway on the White Plains road from Mt. Vernon to (what is now) 233d street. That franchise was abrogated October 13, 1893. and regranted April 14, 1894. It passed by assignment to the West-

chester Electric Railway Company. On the last-named date the same village granted a franchise for the operation of a street railway on the White Plains road from Mt. Vernon to (what is now) 229th street to the Union Railway Company. The details of these franchises need not now be stated, except to note that they provided that but one set of tracks should be built, over which cars were to be operated by both railway companies. Under these franchises the Union Railway built from 229th to 233d street, and the Westchester Railway from 233d street to Mt. Vernon. There was some dispute on the argument as to who actually built the portion between 233d and Mt. Vernon, but it was finally conceded by every one that the Westchester Company paid for building it and now owns the structure.

Manifestly, these facts present the question as to operation of the railway line through the territory which was formerly South Mt. Vernon under a very different aspect. The Westchester Railway has no authority to run its cars from 233d street to 229th street except solely by some lease, license, or similar arrangement with the Union Railway. The Union Railway has a unitary franchise for the entire distance from 229th street to the north line of South Mt. Vernon, and certainly cannot operate a fraction of the line, and fail to operate the rest,

without exposing itself to forfeiture of the entire franchise.

The question presented here is whether the receiver of Union Railway shall so operate its cars as to invite forfeiture of this South Mt. Vernon franchise. This is a different proposition from that discussed in the opinion of June 10th, as to possible forfeiture of the Westchester Railway and Yonkers Railway franchises. They were roads independent of the Union Railway, and this court assumed that in dealing with the question of the forfeiture of their franchises the local authorities would deal justly with them and give due weight to the consideration that their derelictions, if any, were the result of causes beyond their control. Here, failure to operate would be a complete assent to forfeiture.

In the answer of Union Railway receiver it is stated that he can run no cars over the structure laid in the White Plains road by the Westchester Railway Company without paying that company or its receiver compensation for the use of it, and that under such circumstances the operation of the road would be unprofitable. Upon the argument the representatives of the bondholders and stockholders expressed the same opinion, and it may be assumed that such operation would be unprofitable. But there is a great difference between the election of a receiver, so often approved by the courts, not to accept the obligations of an unprofitable lease, and the abrogation for all time of a franchise, although it may yield no present return. There may be cases where the court would approve of such a course upon the request of all interested financially in the property; but the case would have to be a very strong one, stronger than what we have here. This franchise is not limited in time, while the receivership is temporary; before many months, either through reorganization or by purchase at foreclosure sale, the property will have passed out of the court's into owners' possession. So far as the record now before the court shows, the loss and fixed charges are not so great as to cripple the receivership financially to such an extent that proper service elsewhere in the system cannot be rendered. Operation under this franchise does not bring the Union and Westchester Roads under the terms of the transfer statutes, because when the Union Railway receiver runs his cars to the north line of South Mt. Vernon he does so by virtue of a grant from the local authorities, not at all by virtue of any lease license or permission of the Westchester Railway; the compensation he pays it for the use of its structure is not the sort of contract which that statute contemplates. Moreover, the language of section 104 of the same statute (Laws 1892, p. 1406, c. 676) excludes a road which operates, as the Westchester does, in more than one city or village.

Undoubtedly the present situation presents complications by reason of the circumstance that the Union Railway receiver is obligated under its franchise to operate cars on the structure of another road, which may try to insist on onerous terms and conditions for the use of such structure. But the franchises granted by the village of South Mt. Vernon provided that, if the two companies could not agree upon terms and conditions of joint operation, the questions in dispute should be decided by the trustees of the village. Presumably such powers of arbitration have passed to some present local authority, to whom any dispute as to terms and conditions may in the first instance be most appropriately submitted.

The receiver of Union Railway should therefore proceed to carry passengers under the South Mt. Vernon franchise for the whole distance from 229th street to the north line of South Mt. Vernon, under whatever arrangements as to cars, service, and transfer of passengers he may be able to settle upon with the receiver of the Westchester

Railway, and in conformity with the terms of that franchise.

FARMERS' LOAN & TRUST CO. v. CENTRAL PARK, N. & E. R. R. CO. et al.

(Circuit Court, S. D. New York. June 29, 1908.)

STREET RAILROADS (§ 58*)—RECEIVERS—GROUNDS OF APPOINTMENT—PRESERVATION OF PROPERTY PENDING FORECLOSURE OF MORTGAGE.

The appointment of a temporary receiver in a suit to foreclose a mortgage on street railroad property is discretionary with the court, and in the event of opposition by the mortgagor, which is a live corporation operating the property, such an appointment will not be made unless the integrity of the property is threatened by the action of other creditors. [Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. On application for appointment of temporary receiver in suit to foreclose a mortgage.

Turner, Rolston & Horan, for complainant. Thompson, Vanderpoel & Freedman, for defendants.

LACOMBE, Circuit Judge. The interesting questions raised as to the equity of the bill need not be discussed. The present application

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is for the appointment of a temporary receiver only, and that is a matter of discretion, which, in the event of opposition by the mortgagor, is not exercised unless there is some special reason which makes it necessary for the court to preserve the property by taking possession of it. Usually it happens that there are general creditors who may by judgment, attachment, or execution break up the property or put it out of business. No such condition of affairs exists here. The state is a creditor for unpaid franchise taxes, the amount of which is in litigation in the state courts; but, since it has a prior lien on the property into whatever hands it may come, it is not threatening to seize the property. Excepting, perhaps, the New York City Railway Company, there are no unsecured creditors; nothing in the way of interference with the property is to be apprehended from creditors. The mortgagor is a live corporation, with an existing board of directors, and is expecting at an approaching stockholders' meeting to elect a new board; it is quite competent to run its road or to make arrangements for leasing or for running it, and under these circumstances it would seem inequitable to take the road out of the mortgagor's hands against the mortgagor's objections. Such a course is not now essential to the conservation of complainant's rights.

The motion is therefore denied, without prejudice to its renewal

should circumstances alter hereafter.

BROWN v. SUNDAY CREEK CO.

(Circuit Court, S. D. Ohio, E. D. November 30, 1908.)

No. 1,388.

DEATH (§ 31*)—ACTION FOR WRONGFUL DEATH—WHAT LAW GOVERNS—VIOLATION OF MINING LAW.

A right of action for wrongful death being purely statutory, the action must be brought by the person or persons designated by the statute, and an action for the death of a person through the negligence of a mine owner in failing to comply with the requirements of Rev. St. Ohio 1908, \$301, which provides that, in case of loss of life by reason of "willful neglect or failure" to so comply, "a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost," must be brought by the widow and children of the deceased, and cannot be maintained by his administrator, although Rev. St. Ohio 1908, §§ 6134, 6135, gives a right of action generally for wrongful death to the administrator for the benefit of enumerated members of the family or next of kin of the deceased.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 38; Dec. Dig. § 31.*]

At Law. On demurrer to petition.

Sater & Seymour, for plaintiff.

W. O. Henderson, for defendant.

SATER, District Judge. The petition charges that the defendant willfully and carelessly neglected to hang and adjust, in the main entries of its mine, doors which would close of their own accord, to

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have attendants at such doors to open and close them, to prevent them from staying open longer than was necessary for cars to pass through them, and to keep such doors closed and the mine free from fire, damp and gas, in consequence of all of which the circulation of air through the mine so failed that gas collected in large and dangerous quantities, which, exploding, caused the death of plaintiff's decedent, a track layer in such mine. The decedent left a widow and minor child surviving. The action is brought by his administrator for \$10,000 damages for wrongful death.

The right of a decedent's personal representative to maintain an action and recover damages for death caused by wrongful act, neglect, or default is conferred by sections 6134 and 6135, Rev. St. Ohio 1908, the last of which sections provides that:

"Every such action shall be for the exclusive benefit of the wife, or husband, or children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person; and in every action the jury may give damages not exceeding in any case \$10,000," etc.

The petition is challenged by demurrer on three grounds: Want of legal capacity on the part of the plaintiff to sue, a defect of parties plaintiff, and insufficiency of facts to constitute a cause of action.

Subsequent to the enactment of sections 6134 and 6135, the General Assembly enacted sections 298 and 301, Bates' Ann. St. 1908, in which it named the duties to be performed by mine operators in the ventilation and lighting of mines. The negligence charged in the petition is the defendant's omission to perform some of the specifically designated statutory duties imposed by the last-named section. Following the recital of those duties, the section provides:

"For any injury to persons or property, occasioned by any violation of this act, or any willful failure to comply with its provisions by any owner, agent or manager of any mine, a right of action shall accrue to the party injured, for any direct damage he may have sustained thereby; and, in any case of loss of life, by reason of such willful neglect or failure aforesaid, a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained."

Consideration of the demurrer necessarily involves an analysis of the several above-mentioned sections of the Ohio statute. Sections 6134 and 6135 are general, while those relating to mines and miners are special. The latter control as to all cases especially enumerated in them, while the former sections, being general, embrace all other cases. Litchfield Coal Co. v. Taylor, 81 Ill. 599; Maule Coal Co. v. Partenneimer, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710. In the former sections the amount recoverable is limited to \$10,000; in the latter it is not limited. The former sections give a right of action for mere negligence. 13 Cyc. 318. Section 301, in case of loss of life, by express language gives such right for willful negligence only. Himrod Coal Co. v. Schroath, 91 Ill. App. 234; Consolidated Coal Co. v. Carson, 66 Ill. App. 434; Carterville Coal Co. v. Abbott, 181 Ill. 502, 503, 55 N. E. 131; Odin Coal Co. v. Denman, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45, 13 Cyc. 319; Thompson on Negligence, § 4185. Sec-

tion 6135 requires the action to be brought by the personal representative of the deceased for the exclusive benefit of the persons therein designated, and no other person can maintain the action. Weidner v. Rankin, 26 Ohio St. 522. No such provision is found in section 301.

A right of action for injuries resulting in the death of the party injured arises out of statute, for, at common law, the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages. Mobile Life Ins. Co. v. Brame, 5 Otto, 754, 24 L. Ed. 580; 13 Cyc. 310, 311. Such right of action being purely statutory, the action must be brought by the person or persons designated in the statute, and consequently a suit for damages resulting from the death of the person injured through the negligence of a mine owner can be maintained only by those empowered by the statute to bring White on Personal Injuries in Mines, § 10: 13 Cyc. 329. Such has been the uniform ruling in states having mining statutes analogous to those of Ohio. See Indiana and Illinois cases cited supra; also, Boyd, Adm'r, v. Brazil Coal Co., 25 Ind. App. 157, 57 N. E. 732; Collins Coal Co. v. Hadley, Adm'x, 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353; Hamman v. Central Coal & Coke Co., 156 Mo. 232, 56 S. W. 1091; Missouri & Illinois Coal Co. v. Schwalb, 77 Ill. App. 593; Thompson on Negligence, §§ 4184, 7061.

This action is brought by the decedent's administrator, but the facts pleaded make it a case of willful negligence under the Ohio mining act. In so far as reported cases disclose, no Ohio court has ruled on the question here presented. As will appear, however, from an examination of the cases above cited, brought under the mining acts of Indiana, Illinois, and Missouri, each of which states has a general statute also, whose provisions are substantially the same as those of sections 6134 and 6135, Rev. St. Ohio, it has repeatedly been expressly held, and rightly so, that, in a case such as is made in the petition, the administrator is not the proper person to sue, has no standing in court, and is not entitled to recover.

Demurrer sustained.

In re MUSTIN.

(District Court, N. D. Alabama, S. D. December 1, 1908.)

BANKRUPTCY (§ 391*)—ACTIONS AGAINST BANKRUPT—STAY—VIOLATION OF ORDER.

Jurisdiction is given to a court of bankruptcy by the bankruptcy act to stay proceedings in an action against a bankrupt on a provable debt pending the bankruptcy proceedings, and on an application for such a restraining order the court has power to determine whether the claim sued on is provable, and its determination is conclusive, unless appealed from. A creditor so enjoined, who has not appealed, is subject to punishment for contempt for violation of the order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649, 653; Dec. Dig. § 391.*]

In Bankruptcy. On petition and rule nisi for contempt.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

D. D. Trimble, for bankrupt. M. W. Washington, for respondent.

HUNDLEY, District Judge (orally). This matter comes on to be heard upon the petition of the bankrupt and rule nisi issued to W. C. McCarty to appear and show cause why he should not be punished for contempt for violating the order of the referee made in the above matter, and why a certain suit begun by W. C. McCarty in the inferior court of Birmingham should not be stayed until the matter of the final discharge of the bankrupt arose or until the further orders of the court. The facts, as presented to the court, are as follows:

On September 7th Henry Mustin filed his petition in bankruptcy in the United States District Court for the Southern Division of the Northern District of Alabama, and was duly adjudged a bankrupt on the same day by N. L. Steele, one of the referees for this district. Among his list of liabilities he scheduled one W. C. McCarty, who was notified of said adjudication of Henry Mustin. On October 14th W. C. McCarty filed suit against Henry Mustin, the bankrupt, on the debt scheduled in bankruptcy, and on October 15th the referee issued rule nisi to W. C. McCarty to appear before him and show cause why said suit should not be stayed until the question of the bankrupt's discharge arose. W. C. McCarty appeared and set up as an answer to the rule that the claim proceeded on was one from which a discharge in bankruptcy would not be a release. After taking testimony and hearing argument of counsel, the referee made an order holding the answer insufficient and directing the release of the garnishment. No review was made or asked for by W. C. McCarty, as provided for by General Order No. 27 of the Supreme Court of the United States (18 Sup. Ct. viii). On October 30th W. C. McCarty proceeded to judgment in the inferior court of Birmingham against Henry Mustin, the bankrupt, on the claim scheduled in bankruptcy, and caused a writ of garnishment to issue to the employer of bankrupt, attaching his wages.

From the facts stated it is the opinion of the court that the said W. C. McCarty is in contempt of court in not obeying the order of the referee, made October 15, 1908, in which he was commanded to stay the proceedings commenced in the inferior court of Birmingham until the question of the bankrupt's discharge should arise or until the further orders of this court. Instead of obeying the order of the bankrupt court, W. C. McCarty proceeded to judgment on the theory that the bankrupt court had no jurisdiction to make such order. It was clearly the duty of W. C. McCarty to either review the order of the referee in the proper way or to obey the same. Disobedience is not the proper method of contesting the validity of the order of the bankrupt court. Jurisdiction is lawfully given to the bankruptcy court to stay proceedings pending bankruptcy upon claims which are provable. As jurisdiction is thus given to the bankruptcy court when application is made to it for a restraining order, under this power to determine whether the claim is thus provable an erroneous decision does not make void the judgment of the court.

The court, in passing upon applications under this section of the bankruptcy law, is given the right to determine the question of the provability of debts. This is necessarily so in the execution of the power conferred by the statute. In the administration of justice the courts of the United States by all proper means should endeavor to avoid conflict of jurisdiction with the state courts, and a similar obligation rests upon the latter in reference to matters committed by law to the jurisdiction of the former. In the enforcement of the powers conferred by the laws in bankruptcy matters, so long as the bankruptcy court acts in the matter within its powers, its jurisdiction is exclusive and supreme.

It is the judgment of the court that the said W. C. McCarty be, and he is hereby, ordered to pay a fine of \$25, and it is further ordered that the said W. C. McCarty stand committed until said fine is paid. It is further ordered that said W. C. McCarty do stay, or cause to be stayed, the proceedings now pending in the inferior court of Birmingham, Ala., against Henry Mustin, the bankrupt, until the question of said bankrupt's discharge arises, or until the further orders of this court. It is further ordered that W. C. McCarty be, and he hereby is, taxed with the costs of this hearing.

In re KESSLER & CO.

(District Court, S. D. New York. December 8, 1908.)

Bankruptcy (§ 155*) — Adverse Claim to Property — Transactions Construed.

The bankrupt firm arranged to extend credit to a firm of fruit importers in New York to enable them to purchase fruits from a dealer in London, the business being transacted as follows: Whenever the London dealer sold a consignment of fruit to the importers, he delivered the bill of lading, with a draft on the importers attached, to claimants in London, who thereupon, in accordance with the arrangement with the bankrupts, paid his check for the amount, charged the same to the bankrupts, and forwarded to them the bill of lading and draft on the importers. At the time of bankrupts' failure it happened that claimants had forwarded a bill of lading, but through some defect in the papers had not forwarded the draft, which they received later and retained. The bill of lading came to the bankrupts' receiver, who obtained the goods thereon. Held, that by such arrangement and transactions claimants did not become the owners of the draft or bill of lading, but merely took the same on account of bankrupts; the effect of each transaction being only to make bankrupts their debtors for the sum advanced, and that claimants could assert no rights against the trustee because of the receipt by him of the consignment or its proceeds.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

In Bankruptcy. On motion to confirm report of Peter B. Olney, special master, on petition of United States Mortgage & Trust Company.

On October 30, 1907, Kessler & Co. (hereinafter called Kessler) committed an act of bankruptcy by making a general assignment for the benefit of creditors. Petition was filed against them, and they have been duly adjudi-

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cated. In August, 1907, Kessler issued to Sgobel & Day (hereinafter called Sgobel) a letter of credit for £2,000 in favor of one Rodriguez of London. Of this credit Kessler advised Glyn, Mills, Currie & Co., also of London (hereinafter called Glyn), and closed their letter of advice by forwarding a "press copy of the letter of credit, and recommending all drafts valued on you there against to your kind protection to our debit." The business thus arranged for was, and was expected to be, transacted as follows: Sgobel bought grapes of Rodriguez for importation into the United States. On receiving an order from Sgobel, Rodriguez shipped the grapes, and delivered to Glyn the bills of lading indorsed in blank and a draft on Sgobel for the agreed price. He then drew a check on Glyn for the amount of the draft, and received cash therefor. Glyn immediately charged Kessler with the amount so advanced, and forwarded bills of lading and draft to Kessler. Kessler had long been engaged in this business, and paid Glyn a yearly salary for transacting London business of this nature.

Some time prior to October 30, 1907, Rodriguez, having made a shipment of grapes, applied to Glyn for payment against usual documents. Owing to an inaccuracy in some of the papers, he did not give Glyn the draft on Sgobel, but surrendered his bills of lading duly indorsed in blank, and obtained from Glyn the usual payment. Glyn immediately forwarded to Kessler the bills of lading by mail, stating that the draft would follow. The amount so paid Rodriguez without receipt of draft Glyn immediately charged to Kessler's account. Some days later Rodriguez brought in his draft, but before Glyn forwarded the same to Kessler he learned of the latter's failure. Thereupon the draft was sent to the present petitioners, with instructions to collect for Glyn's account.

Meantime the receiver in bankruptcy in due course of mail had received the bills of lading. When the draft came forward Sgobel refused to pay except out of the proceeds of the property covered by the bills of lading, which property, however, was in the receiver's possession under said bills. This proceeding was brought to determine the respective rights of Glyn and

Kessler's trustee.

Wallace MacFarlane, for trustee. Herbert Barry, for petitioner.

HOUGH, District Judge (after stating the facts as above). The course of business above outlined is well known, and, were it not for the unusual circumstance of the draft and accompanying bills of lading falling into different hands, no formal opinion would seem neces-

sary.

The petition clearly asserts the supposed legal basis of petitioner's demand, viz., that Rodriguez either discounted his draft with Glyn, or that Glyn purchased the same from Rodriguez. I perceive no legal difference in these two statements of petitioner's position. To me the foregoing statement of the business arrangements made, the contracts entered into, and the cotemporaneous interpretation thereof by the parties, constitute a sufficient answer to the proposition. Rodriguez did not discount the draft with Glyn; he merely deposited it for transmission to Kessler, and obtained upon such deposit the entire amount of the draft, without diminution, discount, interest, or commission; and this was the result of an arrangement or contract between Glyn and Kessler, to which Rodriguez was not a party at all, and in which Sgobel was but indirectly interested. Nor did Glyn purchase Rodriguez's draft; he merely advanced the money, not on the draft but on the letter of credit. He did nothing more than Kessler himself would have done had he personally had an office in London, and whatever Glyn did was solely for Kessler's account, and the immediate legal effect of his act was to make Kessler, and no one else, his debtor.

The acts of parties in interest, when they anticipate no trouble, is one of the best criteria for interpreting the contracts they make. Glyn (when he paid out his money) it was a matter of indifference whether the grapes mentioned in the bill of lading spoiled or whether they were worth the advance, or whether Sgobel was or was not good for the amount of the draft—these matters were for Kessler alone; it was he who chose to extend credit on the combined security of the marketability of the grapes and the solvency of Sgobel, no one else. If, as I think apparent, Glyn neither discounted nor purchased the draft, he did not own it when it was delivered to him, and there is nothing in the mere fact of Kessler's subsequent failure to confer an owner's title upon him. In this view it would have made no difference had Glyn retained in his possession both the draft and the bills of lading until after Kessler assigned; Glyn would still have owned none of these documents. Whether, in view of Kessler's indebtedness to him, Glyn might, by appropriate legal proceedings, have recouped himself out of Kessler's property in his hands, upon some theory of lien, need not be discussed; it is enough for this litigation that he did not own either the draft or the bill of lading, and the doctrine of Muller v. Pondir, 55 N. Y. 327, 14 Am. Rep. 259, does not apply.

This litigation, however, may, I think, properly be decided upon another and narrower ground. When Glyn paid Rodriguez certain money for Kessler's account and charged up the amount so paid to Kessler, he took the bills of lading for the express purpose of forwarding the same to Kessler in order that the latter might have the legal title thereto as collateral security for what Sgobel owed him, which was the same sum (in part) that Kessler owed to Glyn. This contractual arrangement was actually carried out, and the moment the bills of lading were deposited in the mail, duly directed to Kessler, the delivery to the latter was complete and Kessler's title perfect, and whatever enforceable rights Glyn might have had while in possession of the bills of lading and after Kessler's assignment were wholly extinguished by such delivery. The promised subsequent forwarding of the draft was something that Rodriguez might have attended to himself, and, so far as Glyn was concerned, it was by his own statement a purely formal act. The bargain was complete, the contract was executed, when the bills of lading were received, paid for, and forwarded to Kessler. It is of course generally true that as between a draft secured by collateral and the collateral itself the former is the principal obligation, but there is nothing unlawful in the reversal of this situation by contract, and that was the case here.

The master's report in favor of the trustee in bankruptcy is confirmed, and final order directed in accordance therewith, including the

recommendations as to costs and disbursements.

HOULIHAN V. CORPORATION OF ST. ANTHONY IN NEW BEDFORD.

(Circuit Court, D. Massachusetts. October 30, 1908.)

No. 123.

REFERENCE (§ 87*)—REFERENCE BY CONSENT—RIGHTS OF PARTIES.

A party to an action at law, who has consented to its reference to an auditor "to hear the parties, state the facts, and report the questions of law and evidence relating thereto which either party may request," and who made no request for findings or rulings at the hearing, is not entitled as a matter of right, after the auditor has completed his report and submitted it to the parties for suggestions as to minor details, to make at that time requests for findings such as to require the auditor to re-examine the whole case and prepare a new report.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 87.*]

At Law. On motion to recommit case to auditor.

Williams & Copeland, for plaintiff.

James E. Cotter, Joseph T. Kenney, and Asa P. French, for defendant.

LOWELL, Circuit Judge. The plaintiff contracted with the defendant to build a church for it according to certain specifications and upon certain conditions. When the church was partly built, the defendant alleged a breach of contract by the plaintiff, took the job out of his hands, and finished it by another contractor. The plaintiff brought an action for breach of the written contract. Among other defenses, the defendants set up nonperformance of the contract by the plaintiff, and also the architect's decision against the plaintiff, which was alleged to be final under the terms of the contract. The defendant further filed a declaration in set-off. The case was referred to an auditor under the following rule:

"And now, to wit. February 12, 1905, by agreement of parties, it is ordered by the court that Clarence H. Cooper be and he hereby is appointed auditor in the above-named action, to hear the parties, state the facts, and report the questions of law and evidence relating thereto which either party may request."

The auditor heard the evidence and the arguments of counsel. No requests for findings or rulings were made at the argument. The auditor prepared a careful and elaborate report and notified counsel when it was finished. A correspondence followed between the auditor and counsel, of which I find the fair intent to be this: The auditor agreed to submit the report to counsel for examination and for written suggestions or corrections in small matters of detail. This was his meaning, and this was the meaning which the correspondence would convey to the ordinary man. The defendant's counsel, however (and no bad faith is suggested), filed 160 requests to the auditor. The auditor refused to consider these requests, as beyond the scope of the understanding between himself and the defendant's counsel, and he filed his report at once. The defendant has moved to recommit, and in support of its motion seeks to rely upon the requests above men-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

tioned. The plaintiff objects to this course, contending that the requests were filed too late. The defendant's 160 requests in effect asked from the auditor a re-examination of the whole case and the preparation of a report almost altogether new. Proper compensation for

the preparation of this report would necessarily be large.

In deciding whether the defendant can rely upon its 160 requests, as upon an absolute legal right, it must first be observed that the defendant's course was so unreasonable, so discourteous to the auditor, so obstructive of the due course of justice, and so productive of unnecessary delay and expense that the considerations must be strong indeed to establish the right. The defendant admits that the auditor might have filed his report at any time without waiting for the defendant's requests, and that this filing would have cut off the defendant's right to submit requests thereafter. Yet the auditor's delay in filing his report was caused solely by an agreement entered into between himself and the defendant. However the defendant's counsel may have understood the meaning of this agreement, it excluded the requests submitted, and left the case open only for minor suggestions of detail. A party to a reference has no right which is so subversive of the prompt and economical course of justice as that here claimed by the defendant.

The defendant is understood to contend that, even if it may not avail itself of its requests as matter of right, yet it may invoke the discretion of the court to recommit the report for errors therein. In order that there may be no failure of substantial justice by reason of any misunderstanding between counsel and auditor, the court has examined the 17 grounds of recommittal alleged by the defendant. In none of them does it find any failure of the auditor which prejudices the defendant. Nothing seems now to be open but the defendant's objections and exceptions, which are mentioned in the auditor's report. In some cases the defendant objected to the introduction of certain testimony before the auditor, and its objections, duly noted, appear in the auditor's report. As these objections were seasonably made, the defendant is entitled to rely upon them at the proper time. If the court shall be of opinion that the auditor erred in admitting any of this testimony, the error can be corrected by proper instructions to the jury at the trial. If, on the other hand, the court shall be of opinion that the auditor excluded any admissible testimony, the defendant may have the benefit of it by introducing it before the jury.

The motion to recommit is denied.

AMERICAN TRUST & SAVINGS BANK V. ZEIGLER COAL CO.

(Circuit Court, N. D. Illinois, E. D. December 5, 1908)

No. 28,197.

Courts (§ 357*)—Federal Courts—Cests on Appeal—Execution.

To authorize a Circuit Court to issue execution for costs awarded by the Circuit Court of Appeals on a writ of error, the mandate from the latter court should contain a special provision directing the same, as

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs, 1907 to date, & Rep'r Indexes

required by Rev. St. § 701 (U. S. Comp. St. 1901, p. 571), relating to the Supreme Court, made applicable to the Circuit Court of Appeals by Act March 3, 1891, c. 517, § 11, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. § 357.*]

On Motion to Set Off Executions Against Each Other.

Charles E. Pope, for trustee.

Henry R. Platt, for Zeigler Coal Co.

SANBORN, District Judge. Motion to set off executions against each other. Execution was issued in this case on a mandate of the Circuit Court of Appeals reversing the judgment, with costs, and remanding the case for further proceedings. Execution was also issued in another case between the same parties, and a motion is made to set off these two executions against each other. On the hearing it was suggested that the execution in this case issued on the mandate was unauthorized and should be quashed. An order having been entered quashing the execution in the other case, the only question

remaining is whether the execution in this case was proper.

On reversing the judgment in the appellate court, the costs of the writ of error were awarded against the defendant, and the usual mandate was sent down under rule 31 (79 C. C. A. cxxxiii, 150 Fed. exxxiii), inserting the amount of costs in the mandate, with the bill thereof; but no special direction is contained in the mandate directing the clerk to issue execution for such costs. It is provided by section 701 of the Revised Statutes (U. S. Comp. St. 1901, p. 571) that the Supreme Court shall not issue execution in cases removed to it from lower courts, but shall send a special mandate to the inferior court to award execution thereupon. This provision is made applicable to the Circuit Court of Appeals by the eleventh section of the act of 1891 (Act March 3, 1891, c. 517, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552]). Whitworth v. U. S., 114 Fed. 302, 52 C. C. A. 214. The rules of the Supreme Court and Circuit Courts of Appeal provide that, when costs are allowed, the clerk shall insert the amount in the mandate, with the bill of items annexed. Rule 24, Supreme Court Rules (3 Sup. Ct. xiii); rule 31, Court of Appeals Rules (79 C. C. A. exxxiii, 150 Fed. cxxxiii).

The mandate in this case does not contain any special provision directing the Circuit Court to award execution. The only authority for issuing execution is the insertion of the costs in the mandate by the clerk of the Court of Appeals. It would seem clear that the statutory authority giving the Court of Appeals power to send a special mandate to the Circuit Court to award execution for the costs has not been met by the mandate in this case, which merely shows the amount of costs and the items thereof. Something more than that would seem to be necessary to authorize execution. The present form of mandate from the Supreme Court, both on affirmance and reversal, contains a judgment for costs in that court, and directs execution therefor. The mandate of the Circuit Court of Appeals of this circuit, on the other hand, adjudges affirmance or reversal, with costs,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—33

and that the cause be remanded to the court below, without any direction for execution.

The execution will therefore be quashed.

THE ARIES.

THE VALENTINE.

(District Court, S. D. New York. November 16, 1908.)

Collision (§ 95*)—Schooner and Tow of Tug—Both Vessels in Fault.

A tug which was proceeding on a southeasterly course in Long Island Sound at night against a strong flood tide with a tow of five barges strung out to nearly a mile in length held in fault for unnecessarily having so long a tow across the usual course of other vessels and nearly stationary, and liable for a collision between one of her barges and a schooner passing westward. The schooner also held in fault for negligent navigation in not avoiding the barge, it appearing by a preponderance of the evidence that the latter was carrying proper lights.

[Ed. Note,—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision.

Libel by the owner of the schooner Julia Davis to recover damages for a collision between the schooner and the barge Valentine, in tow of the tug Aries, about 7 p. m. on January 2, 1908, half a mile south of Race Rock, in Long Island Sound. The Aries, bound east, had a tow of five barges on hawsers, one behind the other, the Valentine being the fourth barge. The steamtug Vigilant, with a tow of four barges, also on hawsers, was about a quarter of a mile away on the port side of the Aries, and a little astern of her, heading in the same direction. The first three barges in tow of the Aries had masts and sails, and carried colored side lights, and the last two barges carried a white light forward and aft. The barges in tow of the Vigilant all carried a white light forward and aft. The schooner Julia Davis, heading in the opposite direction, passed between the two tows, and came in collision with the barge Valentine.

Wheeler, Cortis & Haight (Charles S. Haight, of counsel), for libelant.

Carpenter, Park & Symmers (Samuel Park, of counsel), for claimant.

HOLT, District Judge (after stating the facts as above). The evidence that the proper lights were set and burning on the barge Valentine, with which the schooner Davis collided, seems to me to largely preponderate. Even if I could accept the evidence of the men on the schooner in respect to the lights on the Valentine, there is no substantial denial that there were proper lights on the Bristol, the following barge, and I do not see any explanation of the fact that the schooner continued to hold her course, instead of luffing, except either that they saw the lights on the Valentine and Bristol, and thought that they were a part of the Vigilant's tow, or else hastily assumed that the three vessels in tow carrying red lights constituted the whole of the tow, and were not keeping an adequate lookout. The schooner technically, of course, had the right of way, but that fact did not ex-

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

empt her from the duty of taking all proper steps to avoid collision. She knew that the tide was strong flood, and that the tugs, with their heavy tows, could make but slow progress against it. She could see by their lights that they were on a southeasterly course, and it seems to me rash to have pursued a due west course, after she had entered the lane between the two tows, until she was sure that she had passed beyond the last barge in tow of the Aries. Having been compelled by the evidence to reach the conclusion that the lights on the Valentine were burning and were visible, I cannot avoid the conclusion that the schooner was in fault.

On the other hand, I cannot avoid the conclusion that the Aries was in fault for having so long a tow. The length of the tow, according to the lowest estimate of any witness, was more than 4,200 feet, and according to some of the witnesses was more than 4,800 feet. Here were two tugs coming through the Race side by side, with the flood tide so strong that they were almost stationary, with tows nearly a mile long stretching out behind them right across the course. There is no necessity for tows of such length. They are a constant menace to navigation. The general rule is, of course, that a steam vessel shall keep out of the way of a sailing vessel, and that a tug and tow constitute one steam vessel. But when a tow is made up as the Aries' tow was, and is proceeding against a strong tide, it is almost stationary, and is substantially incapable of maneuvering so as to avoid a sailing vessel, and it itself constitutes an unnecessarily difficult obstacle in a sailing vessel's course.

My conclusion is that the damages should be divided in this case between the schooner and the tug Aries.

In re SQUIER.

(District Court, E. D. New York. November 28, 1908.)

BANKRUPTCY (§ 155*)—JURISDICTION OF COURTS—ADVERSE CLAIM TO PROPERTY.

A custodian of securities deposited by a bankrupt to secure the release of an attachment on the property of a third person, under an agreement with the attaching plaintiff that they should be held to await the outcome of the action, is an adverse claimant in possession, and cannot be compelled to submit his rights to the summary decision of a court of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

In Bankruptcy.

James, Schell & Elkus (Abram I. Elkus, of counsel), for receiver. Alexander & Ash (Mark Ash and William Ash, of counsel), for Ferdinand Gutmann & Co.

Rollins & Rollins (Frank A. Gaynor and Alfred A. Wheat, of counsel), for Windsor Trust Co.

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CHATFIELD, District Judge. This is an application on the part of the receiver in bankruptcy to compel the Windsor Trust Company to turn over to the receiver in bankruptcy certain certificates for 150 shares of stock in the Queens County Trust Company, and for an adjudication that Ferdinand Gutmann & Co. have no claim to said shares of stock. The situation has arisen in the following way:

Frank Squier was thrown into bankruptcy on February 21, 1908. by the filing of an involuntary petition in this court. Upon November 21, 1907. Squier had made an agreement with the Windsor Trust Company and with Ferdinand Gutmann & Co., under which agreement Squier deposited the certificates for the 150 shares of stock with the Windsor Trust Company, to be held to await the outcome of two suits brought by the said Ferdinand Gutmann & Co. against another corporation and two individuals, one of whom, Mr. William M. McCord, filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York upon the 14th day of December, 1907. It appears that in the two actions mentioned attachments had been obtained and levied on the property of McCord on the 14th day of November, 1907, a few days before Mr. Squier made the agreement in question, and it appears from the record that Squier was desirous of becoming surety for the release of these attachments: that, instead of qualifying in the usual way, he, although a third party, deposited these certificates of stock under agreement, and that the attachments were vacated and the property taken under attachment released. Both the Windsor Trust Company and Ferdinand Gutmann & Co. have appeared upon this motion, and have objected to the jurisdiction of this court, and contend that a question of title is involved which cannot be disposed of summarily; while the receiver insists that the property pledged or deposited was that of the bankrupt, over which this court has complete jurisdiction, and that title did not pass by the agreement in question, a copy of which is submitted. The Windsor Trust Company and Ferdinand Gutmann & Co. further contend that they have the right to follow the security by means of which property under attachment is released, even though the attachment itself be vacated by bankruptcy, and the claim under which the process of attachment was obtained be included in the schedules of the bankrupt as a debt from which he would be released by a discharge in bankruptcy.

The recent case of King v. Will J. Block Amusement Company, 126 App. Div. 48, 111 N. Y. Supp. 102 (affirmed by the New York Court of Appeals upon the 20th day of October, 1908, and as yet not officially reported) 86 N. E. 1126, and the case of Klipstein & Co. v. Allen-Miles Company, 136 Fed. 385, 69 C. C. A. 229, may be in conflict. The ultimate determination of the question by the Supreme Court of the United States may be necessary, but with that we have nothing to do. The sole question here is whether the property sought by the receiver is in the possession of a third party, under a claim of title, as to which the bankruptcy court has no more jurisdiction than the District Court of the United States would have over the action if bankruptcy had not intervened, except that temporarily this court has the power to prevent

further transfer of these funds and their possible transmission into the hands of innocent parties. This power is vested in the court, inasmuch as irreparable injury might otherwise be inflicted, and inasmuch as the estate of the bankrupt has a right to proceed, within a reasonable time, to act upon its alleged rights in a court having plenary jurisdiction.

It is not a question whether this court thinks that the attachment could be vacated, or that the security for the release of the attached goods would also be vacated, but rather whether this court finds the third party in possession, holding by a claim of title. This the Windsor Trust Company certainly does, and the case would seem to be similar to that of In re Mayer, 157 Fed. 836, 85 C. C. A. 200, and In re Bailey (D. C.) 156 Fed. 691, no element of fraud, upon which the transaction could be avoided, appearing on the present record.

In so far, however, as the present restraining order has interfered with the prosecution of the suits in the state courts, the restraining order will be continued for a sufficient time to allow the trustee to institute an action for recovery of the stock, if he is advised so to do, and to apply therein for the necessary stay pending the result of such litigation.

In re NEW ENGLAND BREEDERS' CLUB.

(District Court, D. New Hampshire. September 22, 1908.) No. 1,253.

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BANKRUPTCY (§ 72*)—Proceedings Against Corporations—Jurisdiction of Court.

Where a corporation, at the time it was adjudicated a bankrupt, was not and had never been principally engaged in any business which, under the statute, rendered it subject to such adjudication, the court was wholly without jurisdiction to make the same; and such lack of jurisdiction cannot be cured by laches, waiver, or estoppel, but the proceedings must be dismissed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

In Bankruptcy. On report of special master.

Henry F. Hollis, for trustee.

Taggart, Tuttle, Burroughs & Wyman, for Hub Construction Co.

ALDRICH, District Judge. I hold the impression that the facts found by the master, that the Breeders' Club, at the time of the adjudication, was not principally engaged in trading or mercantile pursuits, and that it was never to any extent engaged in such pursuits, present a situation of absolute lack of jurisdiction, and that such lack of jurisdiction cannot be cured by laches, waiver, or estoppel, even as against a petitioner who has no interest in raising the jurisdictional question. I therefore do not pass upon either the questions of fact

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

involved in the claim of waiver, estoppel, or laches, nor upon the question of the legal or equitable interest of the Hub Construction Company.

The proceedings are dismissed. The trustee in bankruptcy ex-

cepts, and the execution of this order is stayed pending review.

CONTRA COSTA WATER CO. v. CITY OF OAKLAND et al.

(Circuit Court, N. D. California. June 29, 1904.)

1. JUDGMENT (§ 663*)—JUDGMENTS OPERATIVE AS BAR—EFFECT OF APPEAL.

Judgment the rule of decision in California binding on the federal con-

Under the rule of decision in California binding on the federal courts, the perfecting of an appeal from a judgment suspends such judgment for all purposes, and deprives it of its effect as an estoppel.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1174; Dec. Dig. § 663.*]

2. Judgment (§ 828*) — Foreign Judgments — Effect of Judgment of State Court in Federal Court.

On an application for a preliminary injunction a judgment between the parties rendered by a state court, although not an estoppel, may properly be given consideration as to pertinent matters which were therein determined.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 828.*

Conclusiveness as between federal and state courts, see notes to 21 C. C. A. 478; 49 C. C. A. 468.]

3. Waters and Water Courses (§ 203*) — Water Companies — Ordinances Fixing Rates—Reasonableness of Rates.

A water company is entitled to receive from rates collected an income which will enable it to pay its actual operating expenses, interest on its bonded or other indebtedness so far as that indebtedness represents money properly expended in or upon its property, and to pay a reasonable dividend on its capital stock so far as the stock represents money actually received and so invested, and in addition thereto a sum sufficient to cover the annual depreciation of its plant.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 203.*]

4. Injunction (§ 137*)—Preliminary Injunction—Questions Considered on Application.

It is a settled rule for the guidance of the discretion of courts on applications for preliminary injunctions to look to the balance of injury and inconvenience, and to consider whether a greater injury will be done by granting than by refusing an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 307; Dec. Dig. § 137.*]

5. WATERS AND WATER COURSES (§ 203*)—INJUNCTION—REGULATION OF RATES. A water company supplying water to the city of Oakland, Cal., held entitled to a preliminary injunction to restrain the enforcement of a resolution of the city council fixing water rates, on giving a bond to protect consumers, it appearing from the showing made that it could not under such rates earn a net income equal to 5 per cent. on the value of its property employed in the service.

[Ed. Note,—For other cases, see Waters and Water Courses, Dec. Dig. § 203.*]

In Equity. On motion for preliminary injunction.

For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Francis J. Heney, Garret W. McEnerney, and John Garber, for complainant.

J. E. McElroy, R. M. Fitzgerald, and Wm. R. Davis, for defendants.

GILBERT, Circuit Judge. This is an application for an injunction pendente lite made by the Contra Costa Water Company, a corporation of the state of California formed for the purpose of furnishing

water to the city of Oakland and adjacent cities.

The bill alleges in substance that the complainant for many years past has been and is now supplying nearly all the fresh water consumed by the city of Oakland and its inhabitants. That, in order to carry out the purposes of its incorporation, the complainant has acquired reservoir sites, buildings, and reservoirs, obtained riparian and other rights and properties necessary to secure the ownership of water caught and impounded in its reservoirs, and has purchased water rights and large tracts of land for the purpose of obtaining an adequate supply of pure, fresh water and preserving the same, as well as other properties necessary and essential in the conduct of its business, the value of all of said properties being in excess of \$8,500,000. That said properties consist of the following: (1) Lake Chabot, having a storage capacity of 5,070,000,000 gallons, a yielding capacity of 8,000,000 gallons per day, and a large drainage area, of which the complainant owns 5,550 acres, said lake being constructed by means of an earthen dam 127 feet high above the bed of the original stream; (2) a system of artesian wells near Alvarado, located on a tract of 377.54 acres, having a yielding capacity under natural flow of 5,000,000 gallons per day: (3) Lake Temescal, having a storage capacity of 250,000,000 gallons and a yielding capacity of 340,000 gallons per day, said reservoir being created by the construction of an earthen dam over 100 feet in height: (4) water rights on Sausal creek, enabling the complainant to utilize water to the extent of 400,000 gallons per day; (5) a system of tunnels in the Piedmont Hills, yielding 117,000 gallons of water per day. That, in connection with said sources of supply, the company owns and operates a distributing plant, consisting of 430 miles of pipe line, 4,000 meters, all necessary stop gates, fixtures, devices, etc., and has within the city of Oakland 16,000 services and 515 hydrants, also 11 storage and distributing reservoirs in addition to the lakes, having a joint storage capacity of 18,000,000 gallons, two mechanical filtrating and straining plants, one each at Lake Chabot and Temescal, four complete pumping plants with an average capacity of 18,000,000 gallons per day, large quantities of material, and supplies of all descriptions, a complete equipment of tools and appliances. That, in addition to these, the complainant owns various described tracts of real estate within the city of Oakland and elsewhere, as well as an established business and all requisite franchise for the conduct of its business of collecting and dispensing water, its said franchise being assessed at the present time at the value of \$1,000,000. That during the year ending June 30, 1905, the operating expenses of the complainant actually and necessarily incurred in operating its works for the purpose of carrying water to the city of Oakland and its inhabitants will amount to the sum

of at least \$113,005. That during said year the complainant will be compelled to pay at least the sum of \$128,887 taxes levied upon its property for that year. That, in addition to supplying said city of Oakland and its inhabitants, the complainant now supplies water to the towns of San Leandro and Emeryville and the inhabitants thereof, and to the inhabitants of a portion of the city of Berkeley, and also supplies water for certain purposes to the county of Alameda. That the total revenue which the complainant will derive from these sources will not exceed the sum of \$401,800. That in order to derive a just income from the water supplied to the city of Oakland and its inhabitants to pay for necessary additions to its plant, its operating expenses. and taxes upon its property, and to pay 7 per cent. upon the present value of its plant, it is entitled to have the rates for the water so furnished so fixed that the gross income therefrom will amount to \$850,-000. That in addition thereto the complainant is entitled to an annual sum for depreciation of its plant, amounting to at least \$82,000. That in January, 1904, the complainant furnished the council of the city of Oakland, in compliance with the law, a detailed statement showing the name of each water rate paver, his or her place of residence, the amount paid for water by each, during the year preceding, also showing all revenues derived from all sources during the said year, and an itemized statement of its expenditures for supplying water during said time. That from said statement it appeared, and such is the fact, that the receipts and expenditures so made by complainant during said time were as follows: Receipts from water rates, \$546,181; from other sources, \$27,401—making a total of \$573,582. That on May 31, 1904, the council of the city of Oakland passed a resolution purporting to fix a maximum rate to be charged by the complainant for furnishing water to the city and its inhabitants for the fiscal year beginning July 1, 1904. That the said rates were fixed arbitrarily and without any consideration or regard to the right of the complainant to a reasonable compensation or to a reasonable income or any income upon its investments, and without consideration of the value of complainant's works or property or its operating expenses or its taxes, or the right of its stockholders to reasonable dividends upon the stock. That in the passage of such resolution the said council, through a majority of its members, declared that no consideration had been given to a large and important and material part of the property and plant of the complainant, used and necessary to be used for the purpose of supplying the city of Oakland and its inhabitants with fresh water, and no consideration whatever was given to the expense of operating the same or the taxes required to be paid thereon. That a fair return and rate of interest upon the present value of the complainant's property, which exceeds the sum of \$8,500,000 for water to be supplied to the city of Oakland and its inhabitants for the fiscal year beginning July 1st, and a just and reasonable rate therefor is 7 per cent. of said sum of \$8,500,000 over and above operating expenses and taxes, and over and above and in addition to at least 2 per cent, upon the value of that portion of said property which falls within the definition of perishable structures, to wit, \$4,500,000. That according to the complainant's

best information and belief the taxes which will be levied upon its property so used by it in supplying said city of Oakland and its inhabitants with water will exceed the sum of \$128,086,96, which is the amount of state, city, and county taxes which were levied upon said property for the year 1903. That the rates purporting to be fixed by said resolution are unjust, unreasonable and unconstitutional, oppressive and confiscatory. That if said resolution is enforced the complainant's gross income for the fiscal year beginning July 1, 1904, after deducting the operating expenses and taxes, will be wholly inadequate to pay a reasonable income or interest upon the actual present value of the property of the complainant in actual use in supplying water to said city and its inhabitants, or any greater income or interest thereon than about the rate of 21/2 per cent. per annum. That no allowance or value was ever made by said council for the franchise of complainant, although the same is assessed by said city of Oakland at the value of \$1,000,000, and taxes are collected by said city from the complainant on that value. That said council has refused to value the established and going business of the complainant at any sum, although such value exceeds the sum of \$1,000,000. That the fair and reasonable value of the service to be rendered by the complainant to the city of Oakland and its inhabitants in supplying them water during the year beginning July 1, 1904, is \$595,000, exclusive of taxes, operating expenses, and a proper allowance for depreciation of the complainant's plant, resulting from its use. That the complainant is ready and able to supply to said city and its inhabitants at the present time 15,000,000 gallons per day of pure fresh water, but that the quantity of water which is necessary to meet the reasonable requirements of said city and its inhabitants at the present time does not exceed an average of 10,000,000 gallons per day.

The bill further alleges that on May 28, 1901, a judgment was rendered in the superior court for the county of Alameda, state of California, in a suit brought by the complainant against the city of Oakland, the council thereof and its members, to set aside an ordinance passed by said council on March 26, 1900, establishing water rates for the year beginning July 1, 1900, which judgment was rendered in favor of the plaintiff therein and against all the defendants. That said court was occupied for a period of seven months in taking testimony upon the issues involved in said suit, and in the judgment it was found, adjudged, and decreed, among other things, that at the date of the commencement of that suit in May, 1900, the value of the property of the complainant, used and necessary to supply the city of Oakland and its inhabitants with water, was then of the value of \$7,000,000. That in said judgment it was further determined, and so stipulated and agreed by and between the parties thereto, that at least seven-eighths of the operating expenses of said complainant were incurred in operating its works and carrying on its business of furnishing water to the city of Oakland and its inhabitants, and that its total revenue during the year ending June 30, 1901, from its consumers of water, other than said city of Oakland and its inhabitants, would not exceed the sum of \$51,750. That by its said judgment said superior

court further found and adjudged that a fair return and rate of interest upon the value of the complainant's property was ? per cent. of \$7,000,000 over and above the operating expenses and taxes mentioned in said decree, and that the complainant was entitled to receive for the water to be supplied by it to the city of Oakland and its inhabitants during the year beginning July 1, 1900, at least 7 per cent. upon \$7,000,000 over and above its operating and other expenses, including the maintenance of its plant and the taxes upon its property, less the income derived by it from the other sources therein mentioned, and found as aforesaid to be the sum of \$51,750. That after the rendition of said decree, to wit, on June 28, 1901, the council of said city of Oakland adopted rates for the year commencing July 1, 1901, which were estimated at that time to yield a gross revenue of \$540,000, which was less by \$112,000 than the amount to which the complainant was entitled to receive under the terms and provisions of said judgment and decree. That the complainant offered to accept said rates with the understanding that, in consideration thereof, said rates should remain undisturbed until such time as the growth of the said city of Oakland would increase its revenues to such sum as it would be entitled to receive under said judgment and decree. That said rates were again adopted by ordinance and resolution passed by the council of said city of Oakland in fixing rates for the year commencing July 1, 1902, and were again adopted in fixing the rates for the year commencing July 1, 1903. That said rates so fixed never have yielded revenues equal to the amount to which the complainant was entitled under the provisions and terms of said judgment and

The bill further alleges that the capital stock of the complainant is 57,026 shares, of the par value of \$100 each. That from July 1, 1899, to December 1, 1902, the market value of said shares ranged from \$72.25 to \$70, and that the highest price at which it sold during said period was \$83 and the lowest was \$63, and that the average price was about \$75 per share.

The bill alleges that during the year 1903 certain politicians commenced an agitation among the inhabitants of the city of Oakland in favor of municipal ownership of waterworks, and misrepresented to the citizens thereof the true and actual value of the complainant's property, and the present mayor and the members of the council of said city did pledge themselves before election to the voters of said city to reduce the rates chargeable by the complainant for its water for the fiscal year commencing July 1, 1904, all of which was done to the end that said city of Oakland might purchase and acquire the complainant's property at a price far below its real and true value. That, by reason of said threats and said actions of the defendants, the market value of the complainant's capital stock did, in the month of April, 1904, decrease and fall to the sum of \$35 per share, and that the highest price at which such stock has been sold during the months of April and May, 1904, is \$37.75 per share, and that the highest price at which it has sold in the market since the election of the present council of the city of Oakland is \$40 per share. That the population

of the city of Oakland, which in 1900 was 66,960, has increased; that in the year 1903 it was about 84,000; that at the present time it is between 85,000 and 90,000; that during the year 1900 the number of services by said complainant of water in said city of Oakland increased 423; in the year 1901, 590, in the year 1902, 629, and in the year 1903, 1,004.

The answer of the city of Oakland denies that the value of the complainant's properties is more than \$4,000,000, and denies that its operating expenses in furnishing the city of Oakland and its inhabitants with water will be more than \$110,000. It denies that the taxes will be more than \$50,795.32. It alleges on information and belief that from all sources the complainant can derive an income of at least \$790,897.93, as appears from its sworn statement filed with the city council of Oakland. It denies that the complainant is entitled to an income upon its property greater than 3 per cent. upon the present value thereof, and denies that it is entitled to a gross income for water supplied to Oakland and its inhabitants during the year beginning July 1, 1904, of more than \$400,000. It alleges that said council, in fixing the rates to be paid complainant for the year beginning July 1, 1904, so fixed the same that the complainant would derive 6 per cent. net upon the sum of \$4,700,000, which was far more than the actual value of the property used by the complainant in supplying the city of Oakland and its inhabitants. It denies that the rates fixed by the resolution of May 31, 1904, were fixed arbitrarily or without due regard to the right of the complainant to a reasonable compensation. It alleges that such rates were fixed with full consideration and regard for the value of the complainant's works and property, its operating expenses and its taxes, and the right of its stockholders to reasonable dividends upon their stock, and with full reference to and consideration of the actual costs of supplying said water. It alleges that the judgment rendered in the superior court of Alameda county has no force or effect, for the reason that the defendants therein duly appealed therefrom to the Supreme Court of the state of California, and said appeal is now pending and undetermined. It denies that a reasonable rate of interest upon the value of the complainant's property used in supplying water to the city of Oakland and its inhabitants during the year beginning July 1, 1904, is 7 per cent., or any more than 4 per cent., over and above operating expenses and taxes. It alleges that the rate fixed by the resolution of May 31, 1904, allows more than a reasonable rate of interest to the complainant on the value of its property used in supplying said city and its inhabitants with water, and that it allows the rate of 6 per cent. above all expenses, taxes, and repairs. It denies that the complainant is entitled to receive for water which will be supplied to the city of Oakland and its inhabitants during the year commencing July 1, 1904, \$850,000, or any sum in excess of \$418,229.42. It denies that since May, 1900, the depreciation from wear and use on property of the complainant does not exceed 1 per cent. of their aggregate value, and alleges that there has been a large depreciation in value, especially in the distributive system, on account of decay of pipes and other structures; that

since May, 1900, the complainant has not kept its plant in good condition and repair, and has allowed it to deteriorate, and such deterioation amounts to more than 10 per cent, of the value of said property. It admits that in fixing the valuation of the complainant's property the council did not take into consideration as an element of value the "going business" of complainant, and alleges that the actual cash value of all the complainant's property used in supplying the city of Oakland does not exceed \$3,500,000, but that the said council in estimating the value thereof, for rate fixing purposes for the year beginning July 1, 1904, fixed the same at \$4,700,000 so as to cover all possible contingencies and do ample justice to the complainant. It denies that the fair and reasonable value of the services of the complainant to be rendered to the city of Oakland and its inhabitants during the year beginning July 1, 1904, will be \$595,000, exclusive of taxes, operating expenses, and proper allowance for the depreciation of the plant from natural causes, and alleges that the fair value thereof will not exceed \$282,000, exclusive of taxes, operating expenses, etc. It denies that the complainant has the capacity during the average year to supply the city of Oakland and its inhabitants with more than 10,000,000 gallons per day, and alleges that its supply is insufficient for the present needs of the city during seasons of drought. It denies that the allegations of the bill in regard to the political agitation therein averred are true, and denies that the present mayor or the members of the council, or any of them, pledged themselves before election, or at all, to reduce the rates chargeable for complainant's water, but alleges that the resolution was adopted after full and fair consideration, and solely for the purpose of establishing a fair and just rate to be paid to the complainant for supplying water to the city of Oakland and its inhabitants.

The complainant introduced the affidavit of Arthur L. Adams, a civil engineer of experience, who stated that he had carefully examined the properties of the complainant; that Lake Chabot had a storage capacity of 5,500,000,000 gallons, yielding 8,000,000 gallons daily; that the total value of the complainant's properties was \$7,034,564, in which he included \$500,000 for going business; that its franchise was worth \$1,000,000, which was not included in his estimate, and that seveneighths of the income of the property should be paid by the city of Oakland and its inhabitants; that the cost of substituted supply to the city of Oakland with a capacity of 11,350,000 gallons would be \$529,-000 per million gallons of daily supply; that, estimating the said supply of water to the Oakland division at \$529,000 per million gallons of daily supply, the total annual supply would be of the value of \$7,-274,000. The affidavit of L. J. Le Conte, United States Assistant Engineer, contained an appraisement made by him in 1886 as an employé of the city, in which he estimated the total probable cost at that time of the structural works of the complainant was \$2,640,872, which estimate did not include real estate, water rights, rights of way, etc. Affiant stated that the estimated total cost of the complainant's works is \$6,456,336.62. This estimate did not include real estate. water rights, rights of way, going business, or franchises. The affidavit of Jas. D. Schuyler, a civil engineer of experience, stated that

he testified as an expert witness in the suit in the superior court of Alameda county on behalf of the complainant; that in the year 1886 he examined and appraised the properties of the complainant, which appraisement was adopted by the council at that time in fixing the water rates; that in 1900 he carefully examined the properties constituting the Oakland division of the complainant, and found the total value of complainant's properties to be \$7,637,329, in which total he included \$500,000, value of going business; that in his opinion the values then found are true and correct; that the present market value of said properties constituting the Oakland division of the complainant and necessary and used in supplying water exceeds the total estimated valuation above stated.

The complainant presented a statement of the assessment for state and county taxes made for the years 1903-04, the total of which is \$4,227,425, and introduced affidavits of bankers and brokers to show the prevailing rate of interest on money invested in large amounts in corporations and established quasi public corporations. Some of these affiants deposed that money could not be had for such investment at less than from 7 to 10 per cent.; the majority were of the opinion that not less than 7 per cent. was reasonable, and that at a lower rate money could not be obtained. The affidavit of William J. Dingee, president of the complainant, stated that the existing bonded indebtedness of the complainant was \$4,600,000, of which sum \$3,500,000 is an indebtedness, the entire proceeds of which were expended upon the properties of the corporation which are used and are necessary in conducting the business of said company in supplying water to the Oakland division: that all of said indebtedness bears interest at the rate of 5 per cent. per annum; that on May 31, 1904, the complainant owed, in addition to said bonded indebtedness, unsecured debts for improvements on its works and system used in supplying the Oakland division with water amounting to more than \$500,000, which bears interest at 6 per cent. per annum, all of which is still owing; that an effort had been made to raise \$1,000,000 on additional bonds prior to the election of the present mayor and council of said city, but by reason of the acts and declarations of said officers the complainant has been unable to place said bonds.

The affidavit of Edward McGary, secretary of the complainant, stated that on May 31, 1904, the total number of active services to dwelling houses and places of business in Oakland was 15,226; that more than 50 per cent. the ratepayers of which are tenants, who frequently move, and who apparently have no property over and above the exemptions to which they are entitled by law; that if the resolution fixing the rates for the fiscal year commencing July 1, 1904, shall in this suit ultimately be declared null and void, the complainant will lose the amount by which the rates are reduced as to that class of ratepayers, unless the enforcement of the resolution is in the meantime restrained, and that as to the remainder of the ratepayers, in order to recover the difference between the amount payable under the new rates and the amount receivable under the old, it will be necessary for the complainant to bring more than 5,000 suits for small amounts and

at great expense; that the number of ratepayers within the city who pay \$1 or less per month for water under the former rates is 1,532, and that the total difference between the old rates and the new as to each of said consumers would be from \$1.80 to \$3.60 per year, and that a separate lawsuit would be necessary to collect each of these amounts; that the number of ratepayers who pay from \$1.05 to \$1.50 per month is 2,294; that as to each of said consumers the difference would be from \$3.60 to \$5.40 per year; that the number of consumers who pay from \$1.50 to \$2.00 per month is 3,910, and the difference between the old rates and the new as to such consumers would be from \$5.40 to \$7.20 per year; that the number of consumers who pay from \$2 to \$2.50 per month is 2,381, and the difference between the old rates and the new as to said consumers would be from \$7.20 to \$9.00 per year; that the number of consumers in which the rate exceeds \$2.50 per month is 4,719; that the rates that have been established by the resolution which is complained of is a reduction of the former rates by about 30 per cent.; that from July 15, 1901, to and including March 1, 1903, the capital stock of the complainant consisted of 49,026 shares of the par value of \$100 per share; that for the last three years, under the rates that have been in effect, the complainant paid dividends the first year at 2.52 per cent. upon the par value of its capital stock, the second year at 5.4 per cent upon the par value of its stock, the third year at .84 per cent.; that on March 1, 1903, the capital stock was increased to \$5,702,600; that from that date to September 17, 1903, dividends were paid at the rate of 2.44 per cent.; that the total amount of dividends paid from January 1, 1903, to September 15, 1903, was 3.28 per cent.; that since September 15, 1903, complainant has not paid dividends, and has not been able to pay any, by reason of the impairment of its credit by political agitation in the city of Oakland favoring the reduction of its rates.

The defendants offered the report of Desmond Fitzgerald, an engineer of experience, who, at the request of the city, had made examination of the actual plant of the complainant and all the property used by it in supplying the city of Oakland and its inhabitants with water, and had, on June 3, 1903, reported the result of his investigation to the mayor. The report so made shows that the estimates were made in accordance with certain instructions from the mayor, the details of which it is not necessary here to set forth. Temescal Lake was omitted from the estimate, Claremount reservoir in Berkeley was included, parts of the distributive system belonging to the complainant outside of Oakland were included. The Piedmont tunnels and Sausal creek supplies were not included. The estimate is "exclusive of stock on hand, real estate, rights of way, and questions of equity." The total estimate of the value of the distributing plant, the San Leandro reservoir and filters, Alvarado pumping plant and wells, Claremount reservoir, Broadway reservoir and pumping plant, Linda Vista reservoir, Highland Park reservoir and pumping plant, and the Orange street reservoir, is \$2,689,185. The defendants also offered in evidence the estimates placed upon the value of the complainant's property by the expert witnesses who testified on behalf of the city of

Oakland in the suit in the superior court of Alameda county, showing that C. D. Marx, professor of engineering at Stanford University, estimated the value at that time of the whole property of the complainant, exclusive of land and water rights, at \$2,974,701; that C. E. Moore estimated the value at \$3,900,000; that A. S. Riffle placed the value on the whole property of the complainant at that date, exclusive of land and water rights, at \$2,990,537, and estimated that the total cost of producing a substantial equivalent of the same would be \$2,529,064; that Wm. Hammond Hall placed the total value of the property of the complainant, including stock on hand, but excluding land and water rights, at \$2,898,543, and estimated that the total cost of reproducing a substantial equivalent of the same would be \$2,016,-941; that D. C. Henny valued the entire property, exclusive of land values, at \$2,924,500; that Lewis A. Hicks valued the entire property, exclusive of land and water rights, at \$2,950,000; that Geo. F. Allardt valued the whole property, exclusive of land and water rights, at \$3,075,208, and estimated the total cost of reproducing a substantial equivalent at \$3,047,061; that M. K. Miller valued the whole property, exclusive of land and water rights, at \$3,225.817, and estimated that the total cost of reproducing a substantial equivalent to the same would be \$2,585,334. It was shown also that, on behalf of the complainant in that case, Arthur L. Adams testified that the value of the entire property of the Contra Costa Water Company was \$7,072,527; that James D. Schuyler valued the whole property, inclusive of real estate and going value, at \$7,692,567; that Louis Le Conte valued the entire property, exclusive of real estate, water rights, going business, and franchises, at \$6,456,336; that W. Kiersted valued the entire property of the complainant at \$7,400,664. The defendants introduced also the affidavit of M. K. Miller, a civil engineer, formerly the city engineer of the city of Oakland, who estimated the value at the present time of the whole property of the complainant, exclusive of land and water rights, at \$3,225,817, and estimated the cost of reproducing a substantial equivalent thereto to be \$2,585,334; also the affidavit of F. C. Turner, now the city engineer of the city of Oakland, who estimated the present value of the structural features of the complainant's system at about \$3,000,000.

The issues of fact presented by the bill, answers, and affidavits are sharply defined. The complainant contends that the total value of its properties is \$8,500,000; that its operating expenses for the year beginning July 1, 1904, will be \$113,005; that its taxes will be \$128,-887; that it should be allowed on account of depreciation of its properties \$82,000; and that in order to meet its expenses and to cover such depreciation, and to pay the interest on its bonds and a fair dividend to its stockholders, it is entitled to receive an annual income from its properties of \$850,000. The defendants contend that the total value of the properties of the complainant does not exceed \$4,000,000; that the city countil allowed more than their value when it fixed the same at \$4,700,000; that \$126,206 is a just allowance for operating expenses, repairs, and renewals of the complainant's works; and that the taxes which the complainant will be required to pay will not ex-

ceed \$50,795. These contentions are widely divergent. There is but one point on which there is substantial agreement; that is, the amount which would be earned by the complainant from the Oakland division under the rates which are fixed by the resolution. It was estimated by the city council at \$459,002, of which it was considered that \$418,000 would be derived from the consumption of water in the city of Oakland. The complainant contends that the amount which would be derived from such consumption of water in the city of Oakland would be the sum of \$401,800. In adopting the resolution, the city council fixed such rates as in the judgment of its members would reimburse the company for its operating expenses, renewals, repairs, and taxes, and allow it 6 per cent. upon the value of its property. The questions arise: Was the valuation sufficient, and was sufficient allowance made

for operating expenses, renewals, repairs, and taxes?

The most important of these questions, and upon which the estimates most widely differ, is that of the valuation. Upon an application for an injunction pendente lite to be determined upon a consideration of the averments of the bill, the denials of the answers and the affidavits of the respective parties, and without the aid of the light which will be thrown upon the contested issues from the oral examination and cross-examination of witnesses, the court is able to consider only the salient features of the evidence, and therefrom to arrive at such conclusion as must guide judicial discretion in allowing or withholding the restraining order. Upon the one side are the affidavits of competent civil engineers, who estimate the total value of the complainant's property at more than \$7,000,000, in which total the structural works appear to have been estimated at about \$5,300,000. On the other side are the affidavits of competent engineers, the average estimates of which place the value of the structural works of the complainant at about \$3,000,000, which, added to the estimate of the value of real estate, water, and water rights contended for by the defendants, would give the whole property of the complainant a total valuation of about \$3,500,000. The mere perusal and examination of these affidavits in the narrow limit of time which is permitted for their consideration carries no conviction that the complainant will by the new rates be denied the equal protection of the laws or be deprived of its property without due process of law. Nor is the court in the possession of any test by which, at the present time, to sift the truth out of the conflicting estimates. The affidavit of one of the civil engineers offered on behalf of the complainant may be said to be discredited to some extent by evidence that on another occasion and in respect to other waterworks he estimated the cost of certain elements entering into the construction of all such works at 50 per cent. lower than his itemized estimate given in his affidavit in this case. Nearly all of the expert witnesses whose affidavits are presented in this case were witnesses in the suit in the superior court of Alameda county. mind naturally turns to the judgment of that court rendered upon the consideration of testimony given orally with the aid of cross-examination, with full opportunity to observe the demeanor of the witnesses, and to the conclusion which it reached after an investigation which

extended over a period of seven months. No suggestion is offered to impeach the conclusiveness of that adjudication, except the fact that the defendants have appealed from it. In some states, and perhaps by the weight of judicial decision generally, it is held that, where the power of an appellate court is confined to the affirmation, reversal, or modification of the judgment or decree which is appealed from, the appeal and the supersedeas merely operate to stay execution and other final process upon the judgment, and that either party may invoke it as an estoppel. In other states, however, it is held that the perfection of an appeal suspends the judgment for all purposes and deprives it of its effect as an estoppel. It is so held by the decisions of the Supreme Court of California. Woodbury v. Bowman, 13 Cal. 634; Murray v. Green, 64 Cal. 369, 28 Pac. 118; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Smith v. Smith, 134 Cal. 117, 66 Pac. 81. It becomes the duty of this court to follow the rule thus established in California under the provisions of the act of 1790, embodied in section 905, Rev. St. (U. S. Comp. St. 1901, p. 677), in which Congress has provided that the records and judicial proceedings of the state courts "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." There is no opportunity here to comply with the suggestion of the court in Harris v. Barnhart, supra, in which it was said that a proper course in such a case would be to suspend proceedings in the second action until the judgment so appealed from shall have become final, after which a supplemental answer averring the proper facts in bar of the action would be in order. But while the judgment of the superior court must, by reason of the fact that an appeal therefrom has been taken, be denied the effect of an estoppel, there can be no doubt that upon this application for a restraining order it should be deemed of persuasive force as evidence, since it is the judgment of a competent court having jurisdiction, pronounced after a full and complete hearing of evidence taken in open court upon the issues involved. In Buck v. Hermance, 1 Blatchf. 322, Fed. Cas. No. 2,081, Mr. Justice Nelson said that a judgment obtained by the plaintiff against other parties sustaining the validity of its patent would be admissible, on a motion for a provisional injunction to stay the defendant from infringing pending the litigation, "as affording strong evidence of the validity of the patent and of the tite of the plaintiff, not for the purpose of influencing the final result, but of preserving the rights of the parties in the meantime." In Naftzger v. Gregg, 99 Cal. 88, 33 Pac. 757, 37 Am. St. Rep. 23, Mr. Justice Harrison, concurring with the opinion of the court in reversing the judgment of the court below, referred to a judgment roll of a judgment which had been appealed from, which was offered to prove an estoppel, and which had for that purpose been received in evidence by the lower court, and said:

"The judgment roll was relevant to the issue presented by the answer, and of a character competent to establish that issue. The objection that it was not sufficient in itself for that purpose went to its weight, and not to its admissibility. It was a judgment that had been rendered between the same parties upon the same cause of action, and by a court of competent juris-

diction, and, unless it is to be held that a judgment is not under any circumstances admissible in evidence until the time for an appeal therefrom has expired, the court properly received it."

In Boston & M. Consol. C. S. & N. Co. v. Montana Ore-Purchasing Co., 26 Mont. 146, 66 Pac. 752, the Supreme Court of Montana, in which state the California rule concerning the effect of a pending appeal prevails, held that, in an application for an injunction pendente lite, the court in determining the application may consider a judgment in a prior action between the parties, although an appeal has been taken therefrom. The court said:

"Why could not the fact, when brought to the attention of the court below, that it had decreed the property as not in any wise belonging to the plaintiff, be considered by it in passing upon the order to show cause why plaintiff and appellant should not have an injunction pendente lite against the defendants in the action, and be regarded in its sound discretion as sufficient reason why the injunction should be denied?"

In Smith v. Smith, supra, the court said:

"It is contended that the rule in this state is that pending the appeal the judgment cannot be used as evidence for any purpose whatever. A rule so general and absolute would manifestly be unreasonable, and goes much beyond the decisions. The rule is simply that one cannot avail himself of an adjudication establishing a right while the judgment is suspended by an appeal."

Turning to the opinion of the superior court of Alameda county in the case referred to, we find that the court said:

"Without entering into a minute discussion of the evidence, I find, after a most careful and painstaking consideration of the record, that the value of the combined properties of plaintiff, now and at the time of the commencement of this action, actually and necessarily used by it in the conduct of the business of collecting and supplying water to the city of Oakland and its inhabitants, to be, in round numbers, \$7,000,000. This includes the San Leandro lake as a source of water supply, and the necessary structures appurtenant thereto, the construction work of the old Contra Costa system other than San Leandro lake, the Alvarado plant, and the element of going or established business.

"The complainant alleges that the property is of a value exceeding \$8,500,000. Mr. Adams places it near \$7,500,000, while Mr. Schuyler estimates it at a higher figure. In this connection, it may be well to note the fact that the experts who testified for the defendants, with the possible exception of Mr. Henny, made no pretense of placing a value upon the plant as a whole; that is, as an entire system installed for a business purpose, with each part having relation to all the other parts. Their valuation seemed to be entirely upon the structural elements of the plant, limited to its value as an engineering construction.

"They appeared, in their estimates, not to have considered the important factor of going or established business. In fact, one of them, Prof. Marx, was made to say on one occasion that the properties under consideration, used for water-supplying purposes, would be, according to his theory and principles of valuation, just as valuable constructed on the Sahara Desert, the absence from which of water and inhabitants is a matter of common notoriety, as the plant concerning which he was giving evidence, while Mr. Hall, another expert for the defense, gravely declared, in explaining his method of valuation, that a well sunk for oil to a depth of a thousand feet, in which no oil was found, and the district in which the well was located was abandoned, would be worth, as an engineering construction, what it cost.

"When asked whether or not they would give such a valuation if called upon to estimate value for rate-fixing purposes, each of the experts for defendant invariably replied that he was not competent to answer the question; that there were equities to be considered in fixing rates, with which he had no concern when called upon to give his judgment as to the value from the standpoint of an engineer, but not as a councilman or court of equity. For the reasons here briefly stated, I regard the testimony of the city's experts as a pal-

pably unsafe guide by which to determine the value of this plant.

"Mr. Allardt, one of the expert witnesses of the defense, after giving his testimony in this cause, was called as a witness to testify before the city council, who were then engaged in investigating the rate question, for the purpose of establishing rates for the year to begin with the 1st of July of the present year, and was thereafter recalled to the witness stand by plaintiff for the purpose of further cross-examination, based upon his testimony given before said council. A careful consideration of his testimony, found at pages 6,919 to 6,963, inclusive, of the transcript, wherein he was cross-examined concerning his testimony given before the city council, goes far towards sustaining the contention of the plaintiff upon the question of valuation. While I do not believe that Mr. Allardt attempted to mislead the court in his testimony given in the first instance, I must confess that I received a very different impression from his testimony given under his last cross-examination than that which was produced upon my mind when he first testified. And this serves as auother illustration of the utter unreliability, due to the manner in which they testified, of the testimony generally of the experts for the defendants for the determination of the question of the valuation of this plant.

"The value above given is, I believe, an equitable adjustment of the question of valuation, and is wholly reasonable under the evidence. The testimony, so strongly relied upon by the defendants of the cost of reduplication, as by the Pinole system, is entitled to consideration in making the estimate, but it is far from being the determinative factor of the problem, first, because of the extremely unsatisfactory showing as to the quantity of water, as to its quality and potableness; and, secend, because cost of reduplication or cost of another adequate supply is by our Supreme Court distinctly declared to be nondeterminative of the question. 'It would, therefore, be highly unjust to permit the consumers to avail themselves of the plea that at the present time similar works could be constructed at a less cost as a pretext for reducing the rates.' San Diego Water Co. v. San Diego, 118 Cal. 568, 50 Pac. 636 (38 L. R. A. 460,

62 Am. St. Rep. 261).

"What has been said of the Pinole system applies with even greater force to the Roberts artesian wells. The sufficiency of the supply in the latter case is

left in even greater uncertainty.

"I conclude, therefore, upon this question, that \$7,000,000, in round numbers, fairly represents the value of the property of the plaintiff, whose use for water purposes has been taken by the state. In other words, this is the sum of plaintiff's investment, estimated in money, for the use of which money plaintiff is entitled to remuneration. This is in accordance with the theory and view advanced in the main opinion of the court in the San Diego Case."

There is no convincing evidence in the affidavits now presented that the property of the complainant, so estimated by the judgment of the court in that case, is now of less value than it was at the time of that decision. Taking that estimate to be approximately correct, as it seems to me in view of the circumstances it should be taken for the purposes of this motion, but for no other purpose, the conclusion necessarily follows that under the rates fixed by the resolution of May 31, 1904, assuming that the complainant's taxes will be but \$50,794, as contended for by the defendants, the complainant will receive a revenue of less than 4 per cent., net, per annum upon said valuation. Assuming that the taxes will, according to the complainant's showing, be \$128,887, the net revenue will be less than 3 per cent. per annum.

It becomes unnecessary upon this hearing, therefore, to further consider the question of the amount of the complainant's liability for tax-

es. The complainant assumes that for the coming year its property will be taxed as it was last year, \$128,887. It admits that of the total of last year's taxes it has paid but \$50,795, and that it contests its liability for the remainder thereof. The taxes so contested are taxes upon the franchises to lay pipes in the streets of the city of Oakland. The defendants deny that these franchises will for the coming year be assessed for city taxes. This, if true, does not dispose of the question of their assessability for state and county taxes. It is obviously impossible at the present time to say what taxes the complainant will be required to pay for the coming year over and above the \$50,795, its admitted liability. Nor would it be possible to arrive at a conclusion concerning that branch of the case without adjudicating questions that do not properly belong to the domain of the present investigation. Those questions must be relegated to the final determination of the issues involved between the parties to this case.

The complainant undoubtedly has the right to receive from water rates an income which will enable it to pay its actual operating expenses, its taxes, its interest on its bonded or other indebtedness so far as that indebtedness represents money properly expended in or upon its property, and to pay a reasonable dividend on its stock so far as the stock represents money actually received and so invested, and in addition thereto to receive a sum sufficient to cover the annual depreciation of its plant. Said the court in San Diego Land & Town Company v. Jaspar, 189 U. S. 442, 23 Sup. Ct. 572, 47 L. Ed. 892:

"It no longer is open to dispute that, under the Constitution, what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

In Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 215, 24 Sup. Ct. 241, 48 L. Ed. 406, the court, in reaffirming its ruling in San Diego Land Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154, said:

"The appellants in that case contended that in fixing what were just rates the court should take into consideration the cost of the plant and of its annual operation, the depreciation of the plant, and a fair profit to the company above its charges for its services. It was observed by the court that undoubtedly all these matters ought to be taken into consideration and such weight be given them when rates are being fixed as under all the circumstances would be just to the company and to the public."

In Spring Valley Water Company v. City, etc., of San Francisco (C. C.) 124 Fed. 574, in a case in this court similar to the present case, Judge Morrow, on an application for an injunction pendente lite, held that an ordinance adopted by the supervisors of the city of San Francisco establishing rates which would yield less than 5 per cent. upon the value of the property used and necessary to be used in the supply of water to that city operated to deny the water company the equal protection of the laws and to deprive it of its property without due process of law, and granted a temporary restraining order against the collection of rates so fixed. That precedent will be followed in this case, and the injunction pendente lite will be granted. In so holding, there is no intention to express an opinion that the conten-

tion of the complainant will ultimately prevail, nor to say that the judgment of the superior court of Alameda county will, if that case be still pending on appeal, be admissible in evidence on the final hearing of this case.

It is proper to add that I have not even approximately arrived at a conclusion upon the merits of the case. The general presumption which the law indulges, that the action of officers authorized by law to fix rates in such cases is correct, is not to be disturbed by the fact that the rates fixed by the city council in this instance create a very substantial reduction of the rates fixed by their predecessors in office. Each council must act upon its best judgment upon the evidence which is in its possession. There is in my opinion nothing in the facts shown in this case to justify the charge that in adopting the resolution which is complained of the council acted arbitrarily or were actuated by improper motives or by any purpose save to do what in their judgment was right between the complainant and the city and its inhabitants. A temporary restraining order will work no substantial injury to the defendants or to the consumers of the water. They will be amply protected by a bond to cover the amount by which the rates are reduced by the resolution. On the other hand, if the order were denied and the contention of the complainants should finally be sustained, it is evident that the complainant would be subjected to serious inconvenience and injury, notwithstanding the remedy afforded it by that section of the resolution which permits it to shut off water from premises on which the rentals are 30 days in arrears, and would be required to bring a multiplicity of suits, which it is one of the functions of a court of equity to prevent. It is a settled rule for the guidance of the discretion of courts in cases such as this to look to the balance of injury and inconvenience, and to consider whether a greater injury will be done by granting than by refusing an injunction. In United States v. Duluth, 1 Dill. 474, Fed. Cas. No. 15,001, Mr. Justice Miller said:

"When the dauger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted unless the case made by the bill is satisfactorily refuted by the defendant."

See, also, Palatka Water Works v. City of Palatka (C. C.) 127 Fed. 161, and City of Newton v. Levis, 79 Fed. 715, 25 C. C. A. 161, and cases there cited, and Indianapolis Gas Co. v. Indianapolis (C. C.) 82 Fed. 245.

An injunction will be allowed as prayed for, restraining the defendants pendente lite, or until the further order of the court, from enforcing the resolution of May 31, 1904, and the complainant will be required to give a bond in the sum of \$130,000 to answer for all damages which the defendants or any person injured by reason of the injunction may sustain, if, upon the entry of the final decree herein upon the merits, said resolution shall be sustained.

BRICKHOUSE v. BROOKS et al.

(Circuit Court, E. D. Virginia. November 5, 1908.)

1. Courts (§ 282*)—Jurisdiction of Federal Courts-Federal Question.

An action against election officers to recover damages for the wrongful rejection of plaintiff's vote for a member of Congress is one arising under the Constitution of the United States, and is within the jurisdiction of a federal court, where the damages are laid at more than \$2,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 820; Dec. Dig. § 282.*

Jurisdiction in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.]

2. COURTS (§ 328*) — JURISDICTION OF FEDERAL COURTS — AMOUNT IN CONTRO-VERSY.

In an action under Rev. St. § 1979 (U. S. Comp. St. 1901, p. 1262); to recover damages for depriving plaintiff of rights secured to him by the Constitution and laws of the United States under color of a state statute or law, the plaintiff is not required to allege that defendants acted maliciously, and a failure to do so does not authorize the court to determine as matter of law that only nominal damages are recoverable, and that therefore the action is not within the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. § 328 *

Jurisdiction of federal courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

3. CONSTITUTIONAL LAW (§ 68*) — JUDICIAL POWERS — POLITICAL QUESTIONS—ADOPTION OF CONSTITUTION.

Whether a state Constitution was duly ordained by the people of the state is a political question, and where it has been promulgated and recognized as valid and in force by the executive and legislative departments of the state, and accepted and acquiesced in by the people, the legality of its adoption cannot be brought in question in a federal court.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 125; Dec. Dig. § 68.*]

At Law. On demurrer to declaration and plaintiff's demurrer to special plea.

John S. Wise and Carter & Hays, for plaintiff.

William A. Anderson, R. C. Marshall, and Frank W. Christian, for defendants.

GOFF, Circuit Judge. This suit was instituted by virtue of section 1979 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1262), which reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The plaintiff claims damages of the defendants because of their refusal of his vote at an election held on November 4, 1902, in the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Second congressional district of the state of Virginia, at Huntersville precinct, of Norfolk county, when a representative in the Congress of the United States was voted for: the plaintiff in his declaration alleging that he was then a citizen of the United States, and a citizen and resident of the state of Virginia possessing all the qualifications of a voter under the Constitutions of the United States and of the state of Virginia, and entitled to cast his vote for such representative at said election: that the defendants were the judges of election at said precinct, duly appointed and acting as such at that election, and that it was their duty to accept his ballot and deposit it in the ballot box; that on the day mentioned, and during the time that the defendants were holding said election, the plaintiff, a lawful voter, presented himself to said defendants as such judges and tendered to them his ballot in form and manner as required by the laws of the state of Virginia, and requested them to receive his vote and permit him to cast his ballot at such election: that the defendants unlawfully refused to treat the plaintiff as a lawful voter at said precinct, and did then and there hinder and prevent the plaintiff from voting, and did unlawfully deprive him of his right to vote at said election, to the damage of the plaintiff \$5.000.

The defendants appeared and moved the court for an order, which was granted, requiring the plaintiff to file a statement of the particulars of the claim for damages asserted in his action, especially stating upon what set of registration books he claimed to have been registered as a voter on November 4, 1902, whether he was registered upon the books of registration made up under the Constitution and ordinance of the state of Virginia which took effect on July 10, 1902, or whether he was registered on the registration books made up under the Constitution and laws of the state of Virginia which existed prior to July

10, 1902.

The plaintiff, complying with this order of court, filed a statement in which he said that at the time of such election he was duly registered at said precinct upon the registration books made up for it under the Constitution and laws of the state of Virginia, which were in force immediately prior to July 10, 1902, which he alleged were in force on the 4th day of November, 1902, and that he relied upon that registration for his right to vote at that election; that on said day of election he was or should have been registered upon certain other books of registration made up under a certain alleged Constitution and ordinance of the state of Virginia, which defendants claim took effect on July 10, 1902, but which plaintiff alleges were, together with the registration said to have been made pursuant thereto, null, void, and of no effect, which in no wise affected his right to vote at that election, which he claimed was derived by him from his having duly registered as a voter at such precinct under the Constitution and laws of the state of Virginia in force prior to the enactment of said alleged Constitution of July 10, 1902, and the ordinance and registration thereunder, plaintiff declaring that he claimed no right whatever under such spurious Constitution and ordinance which is said to have taken effect on July 10. 1902, or under the registration made thereunder.

The defendants then demurred to the plaintiff's declaration, assigning as cause therefor that this court has no jurisdiction of this suit, as the declaration does not state a case arising under the Constitution and laws of the United States; because the acts of defendants complained of are not alleged to have been malicious or corrupt, and consequently a verdict for \$2,000 damages would be so excessive that the court would be required to set it aside, and therefore the amount of damages alleged in the declaration is merely colorable, for the purpose of giving jurisdiction to the court; that the declaration does not allege any wrongful acts on the part of the defendants, or any cause of action against them, for the following reasons: (a) It does not allege that the plaintiff was entitled to register and vote in accordance with the provisions of the Constitution and ordinance of registration of Virginia which took effect on July 10, 1902, and the act of the General Assembly of Virginia of July 28, 1902 (Laws Ex. Sess. 1902–04, p. 11, c. 10); (b) it does not allege that the plaintiff's name was entered as a registered voter on the registration books which were in the hands of the judges at the Huntersville precinct on the day of the election mentioned in it, to wit, November 4, 1902; (c) it does not allege that the acts of the defendants complained of were maliciously corrupt or willfully wrongful—and also because it fails to allege under what Constitution and law of Virginia, and upon what registration books, the plaintiff was registered as a voter at Huntersville precinct on said election day. The plaintiff duly filed a joinder in such demurrer.

The defendants also tendered severally their plea of not guilty and put themselves upon the country, and the plaintiff joined issue on the plea of not guilty. The defendants then tendered a special plea, in which they alleged that the plaintiff ought not to have and maintain his action against them, because that the General Assembly of Virginia, by an act approved March 5, 1900 (Laws 1899-1900, p. 835, c. 778), did in accordance with the then existing Constitution of Virginia, provide that the question, "Shall there be a convention to revise the Constitution and amend the same?" should be decided by the electors qualified to vote for members of the General Assembly at an election to be held on the fourth Thursday in May, 1900; that the said act provided the method for holding such election and declaring the result thereof; that an election was duly held pursuant to said act, and that a majority of the qualified electors voting thereat decided in favor of a convention for the purpose mentioned, and that an act was duly passed, entitled "An act to provide for the selection of delegates to the Constitutional Convention, for the convening of said delegates, the organization of the convention, and for submitting the revised and amended Constitution to the people of the state of Virginia for ratification or rejection"; that the act provided that delegates to the convention should be elected on the fourth Thursday in May, 1901, apportioned the representation therein among the different counties and cities of the state, declared the manner of conducting the election and announcing the result thereof, provided that the persons elected should on Wednesday, June 12, 1901, at 12 o'clock, meet in the hall of the House of Delegates at the Capitol in the city of Richmond, in general

convention to consider, discuss, and propose a new Constitution, or alterations and amendments to the existing Constitution, and that such revised and amended Constitution should be submitted to the qualified voters of the commonwealth for ratification or rejection; that so much of said act as provided for the election of delegates to the convention and the assembling of the convention was constitutional and valid, but that the part thereof which undertook to restrict the power of the convention to proposing a new Constitution and to require the same to be submitted to the qualified voters of the commonwealth for ratification or rejection was unconstitutional and invalid; that the election for delegates to said convention was duly held, and that the delegates elected assembled in general convention in conformity with said act, and proceeded to frame and adopt a revised and amended Constitution for the commonwealth of Virginia, as well as a schedule and ordinance of registration, which was appended to and made part of such Constitution; that by section 25 of said schedule it was provided that the Constitution, except as otherwise provided, should go into effect on July 10, 1902, at noon, and by section 24 thereof it was provided that the Governor of the commonwealth should issue his proclamation announcing that such revised and amended Constitution had been ordained by the people of Virginia assembled in convention, through their representatives, as the Constitution for the government of the people of that state, and that it would go into effect as such, subject to the provisions of the schedule, on July 10, 1902, at noon, and also that he should call upon all the people of Virginia to render their true and loyal support to the same as the organic law of the commonwealth; that the Governor of Virginia did, on the 27th day of June, 1902, in pursuance of that provision, issue his proclamation in the form and to the effect required by said section 24; that provision was made that the General Assembly should convene on July 15, 1902, which it did, and that all of its members and officers, pursuant to the requirements of said schedule, took and subscribed an oath to support the Constitution of the United States, and the said revised and amended Constitution of the state of Virginia; that said oath was on that day, or subsequently, taken and subscribed by all of the members of the General Assembly except E. P. McLean, a member of the House of Delegates, who refused to take such oath, and thereupon said House declared his seat vacant, and a writ of election issued under which his successor was elected, who did take such oath: that the Governor and all other executive officers of the commonwealth of Virginia, and all iudges of the courts of record of that state, did severally take and subscribe such oath; that said revised and amended Constitution, schedule, and ordinance have been recognized by the General Assembly in acts which have been passed from time to time since July 15, 1902; that on July 15, 1902, the General Assembly adopted a joint resolution that the said revised and amended Constitution, so ordained by the convention, be duly recognized as the Constitution of Virginia; that article 2 of said revised and amended Constitution relates to the elective franchise and qualification for office, which defendants fully set forth in their plea; that the ordinance to provide for the registration of

voters under said revised and amended Constitution, annexed to it, contained certain provisions and requirements, which were also fully set forth, and that in it boards of registration were appointed for the several magisterial districts and wards of the counties and cities of Virginia, including Tanner's Creek magisterial district, in the county of Norfolk, in which Huntersville precinct, referred to in plaintiff's declaration, is located, and that the persons appointed for such district accepted the appointments, and duly qualified as registrars, and did act under and in accordance with the ordinance of registration, and the act of the General Assembly of Virginia approved July 28, 1902, as the board for the registration of voters for said precinct, in the month of September, 1902, and prior to the 15th day of October, 1902, and did open books of registration for the purpose of registering all persons who should apply who were entitled to register under said revised and amended Constitution prior to January 1, 1904, and that they did in the manner and form required by the ordinance and statute make up, sign, and certify on oath books of such registration in duplicate for said precinct, and caused one set of the same to be forwarded to the clerk of the county court of Norfolk county, and did retain in its own custody the other copy a reasonable time before the election held on November 4, 1902, and did in due time deliver such books to the judges appointed for said Huntersville precinct, to be used by them in conducting said election; that said board did in the manner and form required by section 19 of the revised and amended Constitution, and by the act so approved July 28, 1902, make a roll containing the names of the persons so registered in and for the Huntersville precinct, which roll was sworn to and certified by said board of registrars, and forwarded to and filed for record in the clerk's office of the circuit court of Norfolk county; that the name of the plaintiff had been entered on the registration book for Huntersville precinct, which was made up under the statute of the state of Virginia in force prior to the 10th day of July, 1902, but that said registration books had not been furnished to defendants as judges of the election so held at such precinct, and were not in the hands of the judges of election on the 4th day of November, 1902, when the election was held, and defendants did not know on said election day that plaintiff's name had been entered on said books; that the registration books made up under the Constitution and ordinance of registration which took effect July 10, 1902, and said act of assembly, were the only books of registration that were in the hands of defendants as judges of election at the election held on November 4, 1902; that the plaintiff's name was not on either of the registration books, or on said roll, so made under the Constitution, ordinance, and statute mentioned; that the plaintiff was assessed on the land books of said county of Norfolk for the year 1901 with real estate of the assessed value of \$750, on which taxes amounting to more than \$1 had been assessed and had been paid to the state by the plaintiff for the year 1901, and plaintiff at the time of such election was the owner of such real estate, and that as required by the ordinance of registration and said act of assembly the treasurer of Norfolk county had furnished to the board of registrars of Tanner's

Creek district a certified list containing the names of all persons within that district who for the year 1901 had paid as much as \$1 in state taxes on property owned by and assessed against them, and that such list contained the name of the plaintiff and was in the hands of the board of registrars at the time when they had made the registration of the lawful voters of Huntersville precinct, prior to such election, and that plaintiff was not disqualified from voting under article 2 of the Constitution of Virginia which took effect on July 10, 1902, if he had been duly registered under it, but was entitled by the express terms of that Constitution and of the ordinance to be registered as a voter, and to be placed on the registration books made up thereunder and under the act of July 28, 1902; that the name of the plaintiff was not on said registration books for that precinct, either for white voters or for colored voters, nor was it on the roll made up under said Constitution, ordinance, and act, which books were delivered to the judges of election to be used in conducting the election held on November 4, 1902, which constituted the only lawful registration books which could be used by the judges of election in conducting that election, and were the only registration books in defendants' hands on that election day; that, when plaintiff presented himself and offered to vote at Huntersville precinct at said election, defendants rejected his vote and refused his application that he be allowed to cast the same, because his name was not entered upon the last-mentioned registration books, and in so acting defendants obeyed the mandate of the act of assembly in such case made and provided; that lawfully and in good faith defendants refused to permit the plaintiff to vote at said election.

To this special plea the plaintiff filed a demurrer, assigning in sub-

stance for cause the following:

First. That the plea admits that the General Assembly of Virginia did by an act approved February 16, 1901 (Laws 1901, Ex. Sess. p. 262, c. 243), provide for the selection of delegates to the constitutional convention referred to therein, for the convening of the delegates thereto, the organization of the convention, and for submitting the revised and amended Constitution to be prepared by that convention to

the people of the state of Virginia for ratification or rejection.

Second. That while it appears by the plea that delegates were elected under said act, and that they convened at Richmond, Va., on June 12, 1901, at the Capitol, it nowhere appears in said plea that the delegates did organize the convention by taking and subscribing the oath required by article 3, § 5, of the Constitution of Virginia, before entering upon the discharge of their functions as officers of that state, and that in fact said convention was not lawfully organized, because none of the members thereof took and subscribed that oath, and that therefore, the members having failed to take and subscribe the oath, all the proceedings of the convention were null, void, and of no effect, and hence said plea is bad in law.

Third. That said plea is not sufficient in law, for the reason that it is not true as matter of law, as is alleged in the plea, that so much of said act as provided for the election of delegates to the convention and the assembling of the same is constitutional and valid, while that

part of said act that undertook to restrict the power of the convention to proposing a new Constitution, and requiring the same to be submitted to the qualified voters of the commonwealth for ratification or rejection, was unconstitutional and invalid, but, to the contrary, the law is that each, all, and every provision of said act was constitutional and valid; that the provisions of said act required that if the convention completed its work before October 5, 1901, the Constitution framed by it should be submitted to the qualified voters of the commonwealth as a whole, or by separate articles or sections, as the convention might determine, for ratification or rejection, at the general election to be held November 5, 1901, and that if the work of the convention was not finished before October 5, 1901, it should remain for the next General Assembly to enact such measures as it should deem proper for submitting said Constitution to the people of the state for ratification or rejection; and plaintiff is advised that the convention, even if it was a lawfully organized body, which plaintiff does not admit, but denies, had no lawful authority to adopt any revised or amended Constitution for the commonwealth of Virginia, or any schedule and ordinance of registration as set forth in said plea, but that the powers of the convention were limited by said act to framing a Constitution to be submitted to the qualified voters of the commonwealth as a whole, or by separate articles or sections, for ratification or rejection at the general election to be held November 5, 1901, or, if the work of the convention was not finished before October 5, 1901, it should remain for the next General Assembly to enact such measures as it should deem proper for submitting said Constitution to the people of the state for ratification or rejection. Hence plaintiff insists that the action of the convention in proceeding to frame and adopt a revised and amended Constitution, and a schedule and ordinance of registration appended to it, as well as the attempt made by said convention to provide that the Constitution should go into effect on July 10, 1902, at noon, were and are ultra vires, null, void, and of no effect.

Fourth. That as it does not appear in said plea that the convention was lawfully organized, by the members thereof taking and subscribing the oath required by article 3, § 5, of the Constitution of Virginia, before entering upon the discharge of their functions as members of said convention, and does not appear by the act of assembly set forth in the plea that the convention, whether it was properly organized or not, had no power to frame and adopt a revised and amended Constitution for the Commonwealth of Virginia, and the schedule and ordinance of registration appended thereto, the proceedings of the convention were ultra vires, null, void, and of no effect whatever, and all the other and subsequent proceedings mentioned in said plea based upon the alleged action of the convention were likewise null, yold, and of no effect; that is to say, the requirement of section 25 of said schedule that the Constitution, except as otherwise provided therein, should go into effect July 10, 1902, at noon, was null, void, and of no effect; that the provision of section 24 of said schedule that the Governor of the commonwealth should issue his proclamation announcing that said revised and amended Constitution had been ordained by the people of

Virginia assembled in convention, through their representatives, as the Constitution for the government of the people of the state, and would go into effect as such, subject to the provisions of the schedule, on July 10, 1902, at noon, was null, void, and of no effect; that the proclamation of the Governor of the commonwealth of Virginia, dated the 27th day of June, 1902, made pursuant to the provisions of section 24 of the schedule, was null, void, and of no effect; that the provision made by the convention that the General Assembly should be convened on July 15, 1902, and that all its members and officers should take and subscribe an oath to support the Constitution of the United States and said revised and amended Constitution of the state of Virginia, was ultra vires, null, void, and of no effect, and that the action of said General Assembly pursuant to said last-mentioned requirement was also null, void, and of no effect; that the action of the Governor and of the other executive officers of the commonwealth of Virginia, and of all the judges of the courts of record, in taking and subscribing the said oath in pursuance of section 22 of the schedule was null, void, and of no effect; that the recognition by the General Assembly of the revised and amended Constitution, and of the schedule and ordinance of registration, were null, void, and of no effect, as was also the joint resolution of July 15, 1902, adopted by both Houses of the Virginia Legislature; and that the Constitution as ordained by said convention and recognized by the General Assembly as the Constitution of the state of Virginia was null, void, and of no effect.

Fifth. That article 2 of said Constitution is null, void, and of no

effect.

Sixth. That the ordinance providing for the registration of voters prior to the year 1904, annexed to and made part of said Constitution,

is null, void, and of no effect.

Seventh. That the act of said convention in appointing registrars for the several magisterial districts and wards of the counties and cities of Virginia, and especially for Tanner's Creek district, in the county of Norfolk, was ultra vires, null, void, and of no effect, and that the act of the persons appointed for said district in accepting the appointment as such registrars, and in qualifying as such, was illegal, null, and void, as was also the action of such registrars under the alleged ordinance of registration and under the act approved July 28, 1902.

Eighth. That the action of the board of registrars in opening books of registration for the purpose of registering all persons who should apply, and in making up, signing, and certifying on oath books of registration for said Huntersville precinct, was illegal, null, and void.

Ninth. That the action of said board in making up a roll containing the names of persons registered in and for said Huntersville precinct, and in forwarding and filing it, was illegal, null, and void, and that all the acts and doings of said board relating to plaintiff's right to vote were nullities.

Tenth. That plaintiff, under the laws existing and in force prior to July 10, 1902, was a duly registered voter at said Huntersville precinct, as shown by said plea.

Eleventh. That the defendants were lawfully chosen judges of election at Huntersville election precinct prior to July 10, 1902, and were not appointed by said convention or by any alleged officer under any authority conferred by it, and, as is shown by the plea, they knew that plaintiff was a duly registered voter on the registration books for said precinct, made up under the statutes of the state of Virginia in force prior to July 10, 1902; that prior to November 4, 1902, defendants as judges of election at said precinct used as their guide to the qualification of voters the registration books made up under and in accordance with the law of Virginia in force prior to the 10th day of July, 1902, under which defendants had theretofore allowed the persons whose names appeared thereon to exercise the right of suffrage at that precinct, and that it appears by the plea that the defendants on the 4th day of November, 1902, voluntarily and without compulsion abandoned the lawful registration books for said Huntersville precinct, and accepted in lieu thereof the unlawful and void registration books made up under the unlawful Constitution and ordinance which took effect as alleged on July 10, 1902; that in so doing defendants assumed all risk that said newly made up registration books might not be the lawful registration books, and became liable for their action to plaintiff if such books should be unlawful; and plaintiff avers that said special plea is not sufficient in law, because it does not appear by anything therein averred that said newly made up registration books were, or at any time became, the lawful registration books at Huntersville precinct, but that, on the contrary, it does not appear from matters set forth in said plea that the registration books which were made up under the statutes of the state of Virginia in force prior to July 10, 1902, were the lawful registration books for that precinct, that plaintiff's name was upon said lawful registration books, and that defendants, being the judges of said precinct, were bound by law to have said lawful registration books in their possession on the day mentioned, to refer to same, and to permit the plaintiff to vote when he applied to do so, but that, instead of having such lawful registration books in their possession, with plaintiff's name thereon, defendants voluntarily on the day and year mentioned, while acting as judges of election at that precinct, abandoned the lawful registration books and accepted other and unlawful registration books on which plaintiff's name did not appear, and used the same at the election at that precinct on the day and at the time mentioned, and, being in possession of such unlawful registration books, made them the guide of their action at said election, and unlawfully excluded the plaintiff from his right to vote at that precinct, because his name was not on the unlawful books, whereas it was the duty of defendants as judges of said election to continue as they had theretofore done to use the lawful registration books for Huntersville precinct, on which plaintiff's name appeared as a registered voter.

To this demurrer by the plaintiff to the defendants' special plea the

latter filed their joinder.

The demurrer to the declaration is without merit. The plaintiff alleges that under the Constitution and laws of the United States and

of the state of Virginia he was in all respects entitled and qualified to cast his vote for a Representative in the Congress of the United States, at the election held for members of Congress, on Tuesday, November 4, 1902. The right to vote for a member of Congress is not derived solely from the Constitution and laws of the state, but it has its foundation in the Constitution of the United States. This court has jurisdiction of any action under the Constitution, laws, or treaties of the United States, in which the matter in dispute exceeds the sum or value of \$2,000, and it is apparent from the declaration that this suit is of that character. The damages are laid at \$5,000. The amount of the recovery is for a jury to say. This court has no right to hold that the amount in controversy is not sufficient to support its jurisdiction. Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; North American Transportation & Trading Co. v. Morrison. 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061.

The plaintiff alleges that he is a citizen of the United States, and a citizen and resident of the state of Virginia, subject to no disqualification whatever, but possessing all the qualifications of a voter entitled to cast his vote for a Representative in the Congress of the United States, under the Constitution and laws of the United States and of the state of Virginia. The insistence in the demurrer that the declaration is defective because it does not allege that the plaintiff was entitled to register and vote in accordance with the provisions of the Constitution and ordinance of registration of Virginia which took effect on July 10, 1902, and of the act of the General Assembly of Virginia which took effect on July 28, 1902, cannot be sustained, as the complaint is sufficiently comprehensive in alleging all the requirements necessary to show that the plaintiff was, under the Constitutions and laws then in force, entitled to case his vote at the election referred That the plaintiff would have likely failed in sustaining his said allegations is not a matter to be considered on demurrer. In reaching this conclusion I have not considered the bill of particulars as part of the declaration, as was suggested by counsel it would at least be proper to do.

The claim that, as the acts of the defendants are not alleged to have been willful or malicious, the damages must therefore necessarily be colorable only, and merely nominal, is without force in cases of this character. It was not necessary that the plaintiff should allege in his declaration that the defendants in rejecting his vote acted either maliciously or intentionally wrongful. The statute under which the plaintiff proceeded does not so require, and the rules of pleading applicable to common-law suits, to which the defendants refer in the effort to sustain their demurrer, do not apply to this action. The Supreme

Court in Giles v. Harris, supra, says:

"We have recognized, too, that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount capable of

estimation in money" [the words "that amount" referring to the sum of \$2,000 necessary to give this court jurisdiction].

Defendants' demurrer to plaintiff's declaration will be overruled.

We come now to consider the defendants' special plea and the plaintiff's demurrer thereto. Did the matters alleged in the plea justify the defendants in refusing the plaintiff's vote, when offered under the circumstances set forth in his declaration? For all purposes relating to the demurrer they are conceded to be true. If they constitute a defense, the demurrer must be overruled.

In support of the demurrer, counsel for plaintiff argues with ability and force the invalidity of the registration ordinance, as also of the Constitution of Virginia that went into effect, as claimed by defendants, on the 10th day of July, 1902. The plea asserts and the demurrer admits: That the General Assembly of Virginia provided for the submission to the qualified voters of Virginia of the question: "Shall there be a convention to revise the Constitution and amend the same?" That the act provided the method of holding the election and of ascertaining the result thereof. That the election was held, and that a majority of the qualified voters decided in favor of a convention for the purpose mentioned. That the General Assembly passed an act providing for the selection of delegates to the constitutional convention, for the convening of the delegates, for the organization of the convention, and for submitting the revised and amended Constitution to the people of the state of Virginia for ratification or rejection. That such act provided for the election of delegates on the fourth Thursday of May, 1901, apportioned the delegates among the different counties of the state, and required that those elected as such should meet at the Capitol in the city of Richmond, on Wednesday, June 12, 1901, and that the convention should organize and consider a proposed and new Constitution, which should be submitted to the qualified voters of the state of Virginia for ratification or rejection. That the election for delegates was duly held, and that the delegates assembled at the time and place mentioned in the statute.

The plea alleges that the members of the convention proceeded to frame and adopt a revised Constitution, and the demurrer insists that the plea is bad in law, because it nowhere appears by it that the delegates did organize the convention as required by the law under which they assembled. In support of the demurrer it is insisted that, before the acts of the delegates elected to the convention could be made binding on the parties to this suit, such delegates should not only meet as provided by law, but should also, before entering upon the discharge of their duties, take and subscribe the oath as provided for in the Constitution of Virginia in force when the delegates convened. The oath referred to, found in section 5 of article 3 of that Constitution, reads

as follows:

"All persons, before entering upon the discharge of any function as officers of this state, must take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of the state of Virginia; that I recognize and accept the civil and political equality of all

It is conceded that this oath was not taken by the delegates constituting the convention, they concluding that they were not officers of the state in the sense that those words were used in said Constitution. The insistence of the plaintiff's counsel is that by refusing to take that oath the convention rendered all of its proceedings null and void. It is also claimed that the registration ordinance passed by the convention, set up and relied on by the defendants in their special plea, and attached to and promulgated with the Constitution and schedules, was a nullity; the Constitution not having the power to so legislate, as the right to so enact was vested only in the General Assembly of Virginia.

Another point made by plaintiff in support of the demurrer involves questions of supreme importance in our system of government, and is worthy of the serious consideration of those whose duty it is to determine them. It denies the right of the convention to disregard the limitations placed upon its powers, found in the conditions imposed by the Congress of the United States (Act Jan. 26, 1870, c. 10, 16 Stat. 62) and by the Constitution of the state of Virginia under the provisions of which the convention assembled.

The special plea also insists that so much of the act of the General Assembly of Virginia, by virtue of which the convention convened, as provided for the election and assembling of delegates to the convention is constitutional, but that the part of said act which undertook to restrict the power of the convention to proposing a new Constitution, and requiring the same to be submitted to the qualified voters of the commonwealth for ratification or rejection is unconstitutional and invalid. The demurrer to the plea puts that averment in issue, and insists that the convention had no authority to act in any way, or to consider any matter, except as it was authorized to do by the act convening it.

It is not the province of the courts to make either Constitutions or laws; but after the sovereign people have declared the one, and their representatives have enacted the other, then it is the duty of the courts to determine the rights of the people between themselves under such Constitutions and by such laws. Under our system of government the people of the states may amend their respective Constitutions, or make and declare new Constitutions, as they have provided for, whenever they think their common welfare will be promoted thereby, due regard being had for the provisions of the Constitution of the United States; and whether or not the restrictions and the requirements of that Constitution have been duly observed in the Constitutions of the states, and whether or not the states admitted into the Union have observed the demands of their enabling acts, are political questions, to be determined by the executive and legislative branches of the federal government. This policy has been adhered to since the adoption of the Constitution of the United States. The reason for it is obvious, not, as has been suggested, because the courts are controlled by rigid rules of construction and by precedents, but because they must not

invade the dominion nor usurp the duties of the other departments of the government, by which questions relating to public policy, governmental necessities, and political rights are considered when laws are passed and proclamations are issued. Luther v. Borden et al., 7 How. 1, 12 L. Ed. 581; Texas v. White, 7 Wall. 730, 19 L. Ed. 227; Jones v. U. S. 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691.

This court will not decree concerning the policy of public measures, nor will it pass on the expediency of the action of the legislative and executive departments of the government, but will construe and apply the enactments of the one and the acts of the other after those departments have discharged the duties assigned them. It will not hesitate to decide all judicial questions properly before it, but it will decline to enter the political domain, and will refuse to attempt by its decree to dispose of matters confided to the official action of others.

That the Constitution of the United States and the laws of the Congress passed in conformity thereto are supreme throughout the nation, and that it is the duty of all judges to so decree, anything in the Constitution or laws of any of the states to the contrary notwithstanding, is conceded by all whose opinions are worthy of consideration. Will it not also be universally conceded that, before it can be decided by the courts whether or not the Constitution of any state has incorporated therein anything contrary to the Constitution of the United States, in cases where unfortunately there is a controversy as to which of two instruments is the valid Constitution of a state, it must first be determined which is the Constitution of that state, to which the people thereof owe their allegiance? It is concerning this ascertainment whose duty it is to decide it—that I find myself compelled to differ with the insistence of the plaintiff as it was presented in the oral argument by the learned and distinguished attorney who so ably and eloquently represented him.

Whether or not the people of the state of Virginia have duly adopted the Constitution in controversy in this case is a political question, not to be disposed of by this court, but by the legislative and executive departments of the government of that state. Those departments having recognized and promulgated that Constitution, having declared it valid and in force, it consequently is the fundamental law of Virginia, so to remain until it is changed by the people of that state, or overthrown, not by the courts, but by revolution. The Supreme Court of Appeals of Virginia, in Taylor v. Commonwealth, 101 Va. 829, 831,

44 S. E. 754, 755, says:

"The Constitution of 1902 was ordained and proclaimed by a convention duly called by direct vote of the people of the state to revise and amend the Constitution of 1869. The result of the work of that convention has been recognized, accepted, and acted upon as the only valid Constitution of the state by the Governor in swearing fidelity to it and proclaiming it, as directed thereby; by the Legislature in its formal official act adopting a joint resolution, July 15, 1902, recognizing the Constitution ordained by the convention which assembled in the city of Richmond on the 12th day of June, 1901, as the Constitution of Virginia; by the individual oaths of its members to support it, and by its having been engaged for nearly a year in legislating under it and putting its provisions into operation; by the judiciary in taking the oath prescribed thereby to support it, and by enforcing its provisions; and by the people in their primary capacity by peacefully accepting it and acquiescing in it, by

registering as voters under it to the extent of thousands throughout the state. and by voting, under its provisions, at a general election for their representatives in the Congress of the United States."

In that case it was contended that the convention of 1901–02, was without power to promulgate the Constitution it ordained, and it is well to note that the Supreme Court was impelled to the conclusion it announced without deciding directly that specific question. In effect that court held that, as the question presented by the record, relating to the validity of the Constitution, was in character political, and as that instrument had been acknowledged by the state government—by the legislative, executive, and judicial departments thereof—and also by the people, it thereby became the fundamental law of the state, and that consequently it was the duty of the court to adjudge that the citizens of Virginia did owe obedience and allegiance to it.

It does not follow from the conclusion I have reached that this Constitution may not contain certain provisions in conflict with the requirements of the Constitution of the United States and of the laws made in pursuance thereof, and, if that be so, then in proper proceedings it will be so adjudged; the result being that those provisions in conflict with the supreme law will be null and void, and not the Constitution in its entirety. The claim of the plaintiff in this action is that said Constitution of the state of Virginia is null and void, and not that it is in some particulars in conflict with the Constitution of the United States and the laws made thereunder.

Whether or not this Constitution of Virginia is consistent with the requirements of the federal Constitution, relating to a republican form of government, is a question to be determined by the legislative and executive departments of the government of the United States. In regard to such matters the courts will not take the initiative, but will await the action of the departments mentioned, and when they have acted will be bound by the conclusion they have reached. If such action has not been taken by those departments of the government, the presumption is that the necessity for it did not exist, and the courts will not infer that they have either refused or neglected to promptly and efficiently discharge the duties imposed upon them.

The plaintiff's demurrer to the defendants' special plea will be

overruled.

In re EMERSON MINING CO.

(District Court, N. D. Georgia. December 11, 1908.)

SALES (§ 473*)-CONDITIONAL SALES-FAILURE TO RECORD.

Where a contract for the sale of machinery, reserving title in the seller until payment, was not recorded like a chattel mortgage in the county where the machinery was placed and kept, as required by Clv. Code Ga. 1895, § 2777, the reservation was invalid as against a purchaser of an interest in the property without notice; but as to the remaining interest, on which such purchaser took a chattel mortgage, which he also failed to record, it was entitled to priority because prior in time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1384; Dec. Dig. § 473.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. On intervening petition.
J. M. Wood, for Cincinnati Equipment Co.
Henderson Halman, for Edward McDowell.

NEWMAN, District Judge. The question for determination here arises on the intervening petition of Edward McDowell in the above-stated bankruptcy case. The contest is over a steam shovel sold by the Cincinnati Equipment Company to the Emerson Mining Company on November 25, 1905, with a written reservation of title. The home of the Emerson Mining Company is in Fulton county, but its plant and the place where the steam shovel was located at and before the time bankruptcy proceedings were instituted is in Bartow county. The paper containing the reservation of title was not recorded in Fulton county until June 23, 1906, more than six months after the shovel was sold, and was not recorded in Bartow county until the 7th day of September, 1907, after the petition in bankruptcy was filed. The statute of Georgia (Civ. Code 1895, § 2777) provides that conditional bills of sale to personalty must be recorded in Georgia in the same manner as mortgages on personalty are recorded.

It was necessary, to make this condition sale effective, that the paper containing the reservation of title to the steam shovel should have been recorded both in Fulton county and Bartow county. The statute of Georgia provides for the record of mortgages on personalty in the county where the mortgager lives, and also in the county where the mortgaged property is located. If the personalty is out of the state when the mortgage is executed, and is afterwards brought into the state, the same rule applies, except that it should be recorded within six months after the property is brought into the state. This paper containing the reservation of title was executed, as I understand it, before the property was brought into Georgia. It is immaterial about this, however, for in any event the paper was not properly recorded.

On January 14, 1907, the Emerson Mining Company executed and delivered to Edward McDowell the following paper:

"Whereas, there has been paid to us by Edward McDowell, of Atlanta, Ga., the sum of twenty-four hundred dollars (\$2,400), the receipt whereof is hereby acknowledged, we hereby sell and transfer unto the said McDowell, with full warranty of title, a two-thirds (%) undivided interest in a certain Bay State steam shovel, now on the Jones Iron ore property, being operated by this company and located near Emerson, Bartow county, Georgia."

On July 6, 1907, the Emerson Mining Company gave to McDowell the following paper:

"Whereas, Edward McDowell, of Atlanta, Georgia, is making advances of money to the Emerson Mining Company (operating near Emerson, Bartow county, Georgia), and is otherwise a creditor of said company: Now, in consideration of the above, the said Emerson Mining Company by its president hereby sells and transfers to the said McDowell its one-third (1/2) interest in the Bay State steam shovel, now in use at the iron ore mine being operated near Emerson, Ga., by said company; the intention of this bill of sale being to secure said McDowell against possible loss of any of the above indebtedness. However, when the said Emerson Mining Company shall have discharged the indebtedness or obligations to said McDowell, then this instrument shall be canceled or become void."

Checks are in evidence, given by McDowell to the Emerson Mining Company, indorsed and collected by that company, as follows: October 29, 1906, \$500; November 15, 1906, \$700; November 20, 1906.

\$600; January 14, 1907, \$600.

The difference between the two papers given McDowell by the Emerson Mining Company, as set out above, is apparent at a glance. The first paper gives to McDowell an absolute unconditional title to two-thirds undivided interest in the steam shovel. The second paper shows that it was given to secure an indebtedness, and must clearly be construed as a mortgage, or a bill of sale to secure a debt, having practically the same effect as a mortgage. Neither of these papers was recorded.

While there is some contention here that at the time these papers were executed and delivered to McDowell he was put in possession of such facts as would have caused him, by reasonable inquiry, to know that the title to the steam shovel was in the Cincinnati Equipment Company, I do not think that this contention can be sustained. It cannot be fairly concluded from the evidence that McDowell had such knowledge as would put him on notice of the contract between the Cincinnati Equipment Company and the Emerson Mining Company; that is, of the reservation of title. So, in my judgment, the rights of McDowell as against those of the Cincinnati Equipment Company must be determined by the construction placed on the papers executed and delivered to him by the Emerson Mining Company.

The first paper, conveying to him absolutely and unconditionally a two-thirds undivided interest in the steam shovel, is such that as to this two-thirds interest his right prevails over that of the Cincinnati Equipment Company. As to the last paper, which I construe to be merely a mortgage, it not being recorded, and the paper containing the reservation of title in the Cincinnati Equipment Company not being recorded, the rule, "First in time, first in right," should be applied, and the right of the Cincinnati Equipment Company is greater than that of McDowell.

It has been contended here that the fact that the last paper executed was a mere mortgage should throw light upon and give color to the first paper executed, and that it indicates as to both a mere intention to secure a debt due to McDowell. I do not think so. In the last paper the Emerson Mining Company conveyed to McDowell "its one-third interest in the steam shovel," etc., showing that the only title it then claimed to have in the steam shovel was this one-third interest. Why the papers should have been made in this way, and why the transaction occurred as it did, we are not informed by the evidence; but, for some reasons unknown to the court, we see that title to the twothirds undivided interest was conveyed to McDowell unconditionally, and that the other one-third interest was mortgaged to secure a debt. I do not think any other construction can properly be given these papers, and therefore the decision of the referee will be modified to this extent, and a decree may be taken that McDowell had and has a two-thirds undivided interest in the steam shovel, and the Cincinnati Equipment Company has a one-third undivided interest.

The action of the referee as to the payment and apportionment of costs should be modified in accordance with the conclusions reached here as to the rights of the parties.

CITY OF OROVILLE v. INDIANA GOLD-DREDGING CO. (Circuit Court, N. D. California. October 20, 1908.)

No. 14,773.

1. Waters and Water Courses (§ 52*)—Obstruction of Stream—Right to Natural Flow.

A company owning a part of the bed of a stream which it is devoting to private purposes is bound to exercise the highest care not to so obstruct the stream as to cause it to overflow and injure property on the banks in cases of freshets, which, although unusual, are known to have occurred in the past and are to be anticipated. Such freshets cannot be considered acts of God nor extraordinary floods.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 44; Dec. Dig. § 52.*]

2. WATERS AND WATER COURSES (§ 61*) — OBSTRUCTING NATURAL FLOW OF STREAM—INJUNCTION.

Defendant was dredging for gold in the bottom of a river in such manner as to leave a ridge of gravel, sand, and stones across a large part of the stream from 10 to 30 feet in height above the level of the bed of the stream, and obstructing its flow at a point opposite the site of complainant city, and increasing the danger of overflow, which had on two occasions within 50 years caused great damage to property in the city. Held, that the danger to the public health and welfare from such obstruction was such as to entitle complainant to an injunction to restrain the extension of the work in such manner as to increase the obstruction.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 61.*]

In Equity. On motion to dissolve injunction.

Robert T. Devlin, A. P. Black, and Carleton Gray, for complainant. R. F. Lewis and Ralph C. Harrison, for defendant.

DIETRICH, District Judge. The city of Oroville is situated upon the left bank of the Feather river, the town site comprising a comparatively level tract of land bounded upon the north and the west by the river channel, which is shallow and of variable width. The defendant is the owner of a portion of the bed of the river, and has engaged in extracting the gold from the gravel thereof by means of a dredge. The dredge was constructed on the left bank of the river near the point where it bends to the south, and after its completion it was moved out into the channel almost at right angles to the current for a distance of about 800 feet, and thence down and substantially parallel with the course of the stream a considerable distance. Behind the dredge and throughout its entire course a ridge of sand, gravel, and stones is left, varying from 10 to 30 feet in height above the level of the bed of the stream, and forming a continuous barrier to the free flow of the water, reaching from the left bank to within

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

about 300 feet of the right bank. No part of the channel thus dredged is submerged during the low-water season, but during a portion of each year the entire bed is covered by water. The river is supplied by both rain and melting snow, and after the manner of mountain streams, the fluctuations in the flow are great and irregular both as to time and degree. It is conceded that a rise of 18 feet above low water is not unusual, and at least twice within 50 years it has reached approximately 30 feet. One of these extreme freshets occurred in the year 1907 (before defendant commenced its operations), at which time much of the town site was submerged, to the great inconvenience and damage of the complainant and its inhabitants. To provide against a recurrence of such a catastrophe, plaintiff at once took steps to erect a levee along the left bank of the river, which, however, has not been completed.

Held that:

1. The primary function of a natural water course being to carry away and discharge the waters which it receives, the defendant, in altering the channel of Feather river, owes to the plaintiff the duty not only of making provision for the ordinary flow of water, but of exercising the highest circumspection to avoid obstructions which will injuriously affect the complainant in periods of unusual high water. While the defendant is not bound to provide against extraordinary floods, which competent and skilled persons familiar with the history of the river and with its watershed cannot reasonably anticipate, it cannot ignore freshets which are known to occur, although rarely and at irregular intervals. Neither rarity nor irregularity is a legal equivalent of "extraordinary," and where a stream is commonly subject to great fluctuations, as here, floods which have occurred twice within 50 years, and which differ from other freshets only in degree, and which are the result not of abnormal conditions, but of the conjunction, infrequent and irregular though it may be, of causes, each of which naturally and commonly recurs, such as snows, rains, winds, and sunshine, cannot be deemed to be acts of God. The mere apprehension of possible danger is insufficient to invoke equitable interference against the prosecution of a useful or profitable enterprise; but here, while the time of a repetition of the flood of 1907 cannot be calculated and is wholly uncertain, the fact of such recurrence is not only possible but highly probable, and neither a consideration of the defendant's profit, nor even the preservation of the enterprise itself, furnishes a sufficient reason for compelling the complainant to fortify itself against the added peril incident to the defendant's operations or stand in constant fear of the dire consequences of an overflow, which, while it might not occur in a generation, might spread disaster at any season. The health and safety of a populous community are involved. and, if it were otherwise, there is no public policy which is more solicitous for the acquisition of the wealth in the bed of a river than for the preservation and protection of that which has already been created upon its banks.

2. For light reasons courts will not grant interlocutory injunctions, but it is not the invariable rule that relief will be denied unless it ap-

pears free from all possibility of doubt that injury will inevitably flow from the act sought to be restrained. Regard must be had for the nature of the threatened conduct complained of, and for the character and extent of the probable as well as the inevitable results thereof, and for all the other circumstances of the case. Where, as here, upon the one side there is to be considered only the profit of a purely private enterprise, and, upon the other, the health and safety and property of a large number of people, and where the injury, if it is actually realized, will be immeasurable and irreparable, and where the obstruction is of such a character that it cannot be removed or materially diminished in the presence of imminently impending disaster, the court may properly grant or continue an interlocutory injunction upon a showing which is not entirely free from conflict and doubt.

3. In restraining the threatened conduct of a defendant during the pendency of a suit, as a general rule, a court will restrict the scope of the injunctive order to the protection of the substantial rights of the applicant, the aim being to interfere with the operations of the defend-

ant only so far as may be actually necessary.

That part of the ridge of gravel left by the defendant parallel with the thread of the stream is in itself not a material obstruction, and therefore, while the motion to dissolve will be denied, the injunction will be modified so as to permit the defendant to elongate this ridge indefinitely down the stream, upon the condition that it make an opening in the transverse ridge at least 50 feet in width.

VISANSKA v. COHEN et al.

(District Court. N. D. Georgia, October 16, 1908.)

BANKRUPTCY (§ 303*) — FRAUDULENT TRANSFERS BY BANKRUPT — RECOVERY OF PROPERTY BY TRUSTEE.

A finding by a special master that a conveyance of real estate by a bankrupt shortly before his bankruptcy was merely colorable and without consideration, and made for the purpose of defrauding creditors, and that his trustee in bankruptcy was entitled to recover the same as a part of his estate, under Bankr. Act July 1, 1898, c. 541, § 70, subd. "e," 30 Stat. 566 (U. S. Comp. St. 1901, p. 3452), as amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 (U. S. Comp. St. Supp. 1907, p. 1032), hcld supported by the evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. 462 ; Dec. Dig. 303.*]

In Equity. On report of special master.

Slaton & Phillips and Dodd & Dodd, for complainant. Etheridge & Etheridge, for defendant.

NEWMAN, District Judge. By consent of counsel this case was referred to Chas. T. Hopkins, Esq., special master. He has heard the evidence in the case and has submitted a report. Exceptions to the report were filed before the special master and overruled by him.

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The exceptions have been renewed in the District Court. This case is peculiarly of that class where the report of the master is valuable and where it is entitled to great weight. The reference was by consent, and the special master was agreed to by the parties. It deals with the question as to whether the sale of certain real estate in the city of Atlanta, made by Cohen, who soon afterwards was adjudged a bankrupt, to Weiner, was a bona fide transaction, made in good faith for a valuable consideration, or whether it was a mere colorable transaction, fraudulent in character, and made for the purpose of defrauding creditors. The master finds the latter to be true.

Cohen claims to have gone to Washington, D. C., and to have there sold to Weiner (without any previous negotiations having taken place) a house and lot in the city of Atlanta for the sum of \$3,000. Weiner and Cohen claim that Weiner had loaned to Cohen's son some time previously \$300, and to Cohen's wife shortly thereafter \$500. These sums, aggregating \$800, were allowed as part of the purchase price, and the claim is that \$2,200 was paid by Weiner in currency. Cohen claims that he brought this \$2,200 to Atlanta and paid it out on what he calls "confidential debts." He introduced a number of witnesses, who say that he paid them various sums of money. The master evidently did not believe them. Not a single piece of writing was introduced to show that he owed any of these debts, or any receipts for the same when they were paid. Weiner's business and the evidence with reference to his surroundings and condition indicate that he must be a man of small means. He claims to have borrowed \$700 of the money he paid Cohen; \$400 from his sister, and \$300 from a close personal friend. No notes or evidence of indebtedness of any kind were offered to show that any such transaction really took place. Weiner claims to have had the other \$1,500 in currency at his home in Washington.

Cohen made no effort whatever to sell the property in Atlanta before leaving for Washington. He was in the whisky business in Atlanta, and all this occurred about the time of the passing of the prohibition law by the Legislature in Georgia, whereas he concedes he was in bad shape financially. Cohen was in possession of the property when the bankruptcy proceedings were instituted, and is still in possession. He claims to be paying rent to Weiner under a lease which he obtained from him for a year, after he made the deed for the property to Weiner. An extract from the report of the special master is as follows:

"Upon the hearing it was contended in behalf of the trustee that the transaction in question was fraudulent, under different views of sections 60b, 67c, and 70c of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 562, 565, 566 [U. S. Comp. St. 1901, pp. 3445, 3449, 3452]), as subsequently amended (Act Feb. 5, 1903, c. 487, §§ 13, 16, 32 Stat. 799, 800 [U. S. Comp. St. Supp. 1907, pp. 1031, 1032]). Narrowed down to a practical basis, the controversy in question upon the trial assumed the phase of whether a bona fide transaction occurred in Washington, D. C., between defendants Cohen and Weiner. The testimony and agreed stipulation of facts introduced has convincingly led to a conclusion with reference to the facts which renders resort to legal standards practically unnecessary. Upon considering all the evidence introduced, I am reasonably satisfied that no such transaction as is stated by defendants Cohen

and Weiner occurred in Washington, and that the purported deed is colorable only, and is intended for the protection of defendant Cohen. I desire somewhat at length to give the reasons that have induced this conclusion, in order that, if a review is desired, there will be no difficulty in placing the finger upon the error committed."

The master then sets out in considerable detail the facts surrounding this alleged transaction, which I have endeavored to summarize briefly above. The special master then concludes his report as follows:

"In conclusion, upon the facts I find that Cohen was the owner of a house and lot; that he knew his bankruptcy was inevitable; that he applied to a relative of his wife in Washington to protect him to the extent of his home, by entering into a bare, colorable transaction; that he did not in good faith and for a valuable consideration sell his home to Weiner; that no consideration was paid by Weiner to him; that Weiner knew at the time the financial condition of Cohen, and entered into the scheme for the purpose of protecting Cohen; that the alleged sale was made for the purpose and with the intent of hindering, delaying, and defrauding Cohen's creditors; that almost immediately upon his return to Atlanta he consented to be adjudged a bankrupt and to the appointment of a receiver; that Mr. Harris, a close mutual friend of both Cohen and Weiner, received the deed in question, the lease from Weiner to Cohen, and selected Messrs. Etheridge to represent both Cohen and Weiner. course, needless to say that Messrs. Etheridge had nothing to do with the transaction prior to the active institution of the bankruptcy proceedings, and were in no way cognizant of nor responsible for what transpired. I further find that the trustee is legally entitled to and is the owner of the property in question, and a decree to that effect should be entered."

The evidence before the master is certainly sufficient to sustain, and I think it fully sustains, the report. The conclusions the master draws are justified by the facts, and consequently the exceptions will be overruled and the report confirmed.

A decree may be taken in favor of the trustee for the property in controversy.

CRAIG v. WELCH MOTOR CAR CO. et al.

(Circuit Court, S. D. New York. December 10, 1908.)

CORPORATIONS (§ 668*) — FOREIGN CORPORATIONS — ACTIONS AGAINST—JURIS-DICTION.

Under the rule of the federal courts, service of summons in New York on a director of a corporation of another state temporarily in New York on private business, or in connection with a single transaction of the corporation in that state, does not give a court jurisdiction in a personal action against the corporation, where it has never done business in New York, and has no office, agent, or property there.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2613; Dec. Dig. § 668.*

Service of process on foreign corporations, see notes to Eldred v. American Palace Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

On Motion to Set Aside Service of Summons.

Olcott, Gruber, Bonynge & McManus, for plaintiff. Rollins & Rollins, for defendant Welch Motor Car Co.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. This action was begun in the Supreme Court of New York to recover damages for personal injuries. The defendant, a corporation of the state of Minnesota, engaged in the manufacture of automobiles, appeared specially to remove the case to this court, and now moves to set aside the service of the summons.

The defendant never has done, and does not now do, any business in this state, nor has it any office, agent, or property here. But, a dispute having arisen between it and a New York corporation which was in the habit of purchasing its automobiles as to credits claimed by the latter, the defendant sent one Welch to New York to make some settlement. A purchase by the defendant of the capital stock and assets of the New York corporation were one of the features under consideration. While these negotiations between Welch and the New York corporation were pending, one of the defendant's directors, named Swart, came to New York, as he says, on his way to visit his old home at Amsterdam. Perlman, president of the New York company, says that Swart came to his office every day between September 1st and 11th, and often discussed the pending negotiations. After he went to Amsterdam the settlement fell through, and Perlman told the attorneys of the plaintiff in this case that Swart could be served at Amsterdam, and himself had the summons served.

As the cause of action arose here, the service was good in the courts of this state, under section 432, Code of Civil Procedure. But the rule in the federal courts is different. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. The affidavits satisfy me that Swart was not acting for the defendant while in this state, and, if he were, a single transaction would not be enough to make service on him as a nonresident director good service on the defendant in the federal courts. Conley v. Mathieson Co., 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Pennsylvania Lumbermen's Insurance Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; Good Hope Co. v. Railway Co. (C. C.) 22 Fed. 635; Boardman v. S. S. McClure Co. (C. C.) 123 Fed. 614; Louden Co. v. American Co. (C. C.) 127 Fed. 1008; New Haven Pulp Co. v. Manufacturing Co. (C. C.) 130 Fed. 605; Buffalo Glass Co. v. Manufacturers' Glass Co. (C. C.) 142 Fed. 273.

Motion granted.

In re HARTWELL OIL MILLS.

(District Court, N. D. Georgia. December 5, 1908.)

BANKRUPTCY (§ 60*) — INVOLUNTARY PROCEEDINGS — ACTS OF BANKRUPTCY — GENERAL ASSIGNMENT—CORPORATIONS—"GENERAL ASSIGNMENT."

A resolution adopted by the stockholders of a corporation, authorizing the board of directors, through a committee to be appointed by it, to advertise and sell the property of the corporation at auction at not less than a stated price, and to pay the debts of the corporation with the proceeds, with power to declare such sale off in a certain contingency, was not a general assignment, which constituted an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3422), as amended by Act Feb. 5, 1903, c. 487, § **2**, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 60.* For other definitions, see Words and Phrases, vol. 4, pp. 3052-3054.]

In Bankruptcy. On involuntary petition.

W. L. Hodges, for alleged bankrupt.

A. G. & Julian McCurry and Moore & Pomeroy, for petitioning creditors,

NEWMAN, District Judge. In July, 1908, an involuntary petition in bankruptcy was filed against the Hartwell Oil Mills. The Hartwell Oil Mills filed an answer to the petition, denying insolvency and that it had committed any acts of bankruptcy as alleged. The matter was referred to E. L. Upson, Esq., as special master, to hear evidence and pass upon the questions raised by the petition and answer. He has filed a report, finding that at the time the petition in bankruptcy was filed the Hartwell Oil Mills was not insolvent and that it had not committed any act of bankruptcy. The special master having found that the Hartwell Oil Mills was not insolvent, it became unnecessary for him to consider, and it is unnecessary to consider here, some of the minor grounds of bankruptcy alleged—preferential payment to creditors.

Exceptions have been filed to the report of the special master, and the same have been argued and submitted. The first question raised is on the allegation in the creditors' petition to the effect that the Hartwell Oil Mills had, within four months before the filing of the petition, made a general assignment for the benefit of creditors. The evidence to sustain this allegation is this: On June 3, 1908, at a regular meeting of the stockholders of the Hartwell Oil Mills, it was determined that it was important that all the stockholders be present in person or by proxy at this meeting, and the meeting appears to have been adjourned to June 20, 1908. At all events, on June 20, 1908, there was an adjourned meeting of stockholders at which a majority of the capital stock was represented. New officers for the corporation were elected, and on motion the following resolution was adopted:

"Resolved: That the board of directors appoint a commission, to compose of three, to advertise for 30 days and sell at public sale on the first Tuesday in August, nineteen hundred and eight, at twelve m., the Hartwell Oil Mills and machinery, ginnery, and the whole oil mill plant for cash. That the upset price be fixed at twenty-two thousand five hundred dollars (\$22,500.00). That, if the debts of the mill can be arranged for between now and the date of the sale by the board of directors, then the sale may be declared off by a majority of the board of directors. That no bid shall be recognized by the commission until the bidder shall first deposit with the commission a certified check to twenty-five hundred dollars, to be forfeited to the Hartwell Oil Mills if he does not comply with the term of his bid within ten days of the sale. That the board of directors be and are hereby authorized to make title to the purchaser of said property in conformity to sale made by commission. That the board of directors fix the compensation of the commissioners. That, if the said property be sold, then the board of directors are directed to wind up and setfle the debts of the mill according to law."

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is claimed that this action of the stockholders constituted a general assignment for the benefit of creditors. The special master found that it did not, and he found correctly. The commission to sell the mill, as shown by the advertisement in evidence, consisted of two of the directors and Mr. George C. Grogan, an attorney at law, who held a proxy, as shown by the minutes of the meeting of stockholders on June 3d. The action of the stockholders simply amounted to the appointment of a committee—commission, as it was called—to endeavor to sell the property of the company to the best advantage and wind up its affairs. Before the date of this sale arrived, financial arrangements were made by the officers of the mill which rendered the sale unnecessary. I hardly think this question needs discussion.

The next matter for consideration is that of the insolvency of the Hartwell Oil Mills. There was considerable evidence on this ques-

tion before the special master. In his report he says:

"I find the preponderance of the evidence establishes the fair market value of the property of the Hartwell Oil Mills to be over twenty-five thousand dollars (\$25,000). I find that the total indebtedness of the said mills is less than \$25,000. I find that the Hartwell Oil Mills was not insolvent on the 31st day of July, A. D. 1908, the date these involuntary proceedings were filed."

An examination of the evidence taken before the special master and filed by him shows this finding to have been abundantly sustained. While there was some evidence the other way, the special master correctly concludes that the weight of the evidence was that the company was entirely solvent.

The petition in bankruptcy in this case should be dismissed, and it

is so ordered.

Ex parte GREEN et al.

(District Court, S. D. New York. November 19, 1908.)

1. HABEAS CORPUS (§ 113*) — APPEAL FROM JUDGMENT DISCHARGING WRIT — STAY PENDING APPEAL.

Under rule 33 of the Circuit Court of Appeals (79 C. C. A. xxxvi, 150 Fed. xxxvi) which provides that on an appeal from a decision of the court discharging a writ of habeas corpus the prisoner may, for good cause shown, be detained in the custody of the court or be enlarged upon recognizance, a prisoner indicted for crime in one district and apprehended in another, who after a full hearing before a commissioner has been ordered returned for trial and whose application for discharge on habeas corpus has been denied, is not entitled as a matter of right to a stay pending an appeal, and unless probable cause for an appeal is shown.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 113.*]

2. BAIL (§ 44*)—RIGHT TO BAIL.

Under rule 33 of the Circuit Court of Appeals (79 C. C. A. xxxvi, 150 Fed. xxxvi), providing that on appeal from an order discharging a writ of habeas corpus the prisoner may be detained in custody or enlarged on recognizance, a prisoner indicted in one district and apprehended in another is not entitled as a matter of right to be admitted to bail.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 44.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The petitioners, Morris Green and Martin Green, indicted for violation of the postal laws in the Middle district of Pennsylvania and arrested in the Southern district of New York, after examination were committed to the custody of the marshal by a United States commissioner to await the issuance of a warrant of removal. A writ of habeas corpus was issued to inquire into the legality of their detention, which, after a hearing, was dismissed. An application was thereupon made for allowance of an appeal, for a supersedeas, and for bail pending appeal.

Max J. Kohler, for the motion.

Henry L. Stimson, U. S. Atty., and Francis W. Bird, Asst. U. S. Atty., opposed.

HOLT, District Judge. The right to a stay in this case depends upon the second paragraph of rule 33 of the Circuit Court of Appeals (79 C. C. A. xxxvi, 150 Fed. xxxvi). That provides that on an appeal from a decision of the court discharging a writ of habeas corpus the prisoner may, for good cause shown, be detained in the custody of the court or be enlarged upon recognizance. I think there is no good cause shown in this case. In my opinion, the law as it exists does not require that, when a man has been indicted for a crime in one district of the United States, and has been apprehended in another and has had a full hearing before a commissioner on the question of his removal, he should be entitled as of course to a stay on an appeal from the decision holding that he should be removed, unless the judge is convinced that there is probable cause for an appeal on some ground of error. Prisoners in this class of cases should not be permitted to delay their trial for several years by litigation as to the mere question whether they shall be taken across the state line for trial, unless some probable cause for an appeal is shown.

The motion for bail and for a supersedeas is denied.

Ex parte RONCHI.

(District Court, S. D. New York. November 17, 1908.)

BAIL (§ 47*)—JURISDICTION OF APPLICATION—APPEAL FROM JUDGMENT DENYING WRIT OF HABEAS CORPUS.

A judge of a circuit or district court who has discharged a writ of habeas corpus is not given power to admit the prisoner to bail pending an appeal from his judgment by paragraph 2 of rule 33 of the Circuit Court of Appeals (79 C. C. A. xxxvi, 150 Fed. xxxvi).

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 47.*]

Habeas Corpus. On motion for bail pending appeal.

A writ of habeas corpus was issued on petition of Arturo Ronchi alleging that he was restrained of his liberty in violation of law by the Commissioner of Immigration of New York under an order of the Secretary of Commerce and Labor, that petitioner be deported to

[•]For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the country whence he came as an alien unlawfully in the United States. The writ was discharged, and petitioner made application for an appeal, and for bail pending appeal.

Pratt, Koehler & Russell (Addison S. Pratt, of counsel), for the motion

Henry L. Stimson, U. S. Atty., opposed.

HOLT, District Judge. If the question were an original one, my personal opinion would be that the court would have power to take bail in this case, under paragraph 2 of rule 33 of the United States Circuit Court of Appeals. 150 Fed. xxxvi, 79 C. C. A. xxxvi. But the construction of the paragraph is doubtful, and it was held by Judge Brown, in Re Iasigi (D. C.) 79 Fed. 755, and by Judge Ward, in Re Funaro (no written opinion filed), that there is no such power. Judge Adams held, in the Crawford Case (no opinion), that there was such power, but the circumstances in that case were peculiar. Upon the whole, I think that, in the absence of any authoritative decision of the appellate court, I should follow the Iasigi and Funaro Cases.

Moreover, if the court has the power to take bail in such a case, it is a discretionary power, to be exercised under rule 33 for good cause shown. I do not see that any such cause has been shown in this case. It is claimed that Ronchi left Italy after having embezzled trust funds. If the charge is true, bail will not procure his attendance unless it is

fixed at a higher figure than the amount embezzled.

The motion for bail is denied.

COX v. CITY OF PHILADELPHIA.

(Circuit Court, E. D. Pennsylvania. December 11, 1908.)

No. 316.

MUNICIPAL CORPORATIONS (§ 762*)—RESPONSIBILITY FOR DEFECTS IN STREETS—WORK OF INDEPENDENT CONTRACTOR.

The fact that a city kept an inspector on the ground where a contractor for a street railroad company was working, who pointed out what he deemed dangerous places made in the streets by the work, for the protection of persons using the streets, but who had no power to interfere with the contractor or direct its employés, did not render the city liable as a principal for an injury resulting from an excavation or depression caused in a street by the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1605, 1606; Dec. Dig. § 762.*]

At Law. On motion by plaintiff for new trial.

Goodman & Mitchell, for plaintiff.

Andrew Wright Crawford and J. Howard Gendell, for defendant.

J. B. McPHERSON, District Judge. The plaintiff's injury was the result of stepping into a depression upon the surface of a public highway, and she sued the city of Philadelphia to recover damages there-

^{*}For ether cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for. It appeared, however, from the evidence offered on her behalt, that the presence of the depression was directly due to the act or omission of the Millard Construction Company, a corporation that was then engaged in building the Market Street Subway under a contract with the Philadelphia Rapid Transit Company. Upon this state of facts it is conceded by counsel for the plaintiff that the construction company was an independent contractor, liable for its own defaults, and that the city cannot be compelled to answer in the present suit unless it exercised such control over the contractor's work as to make the enterprise practically its own, and has thus become liable as a principal for the neglect of an agent. An effort was made at the trial to prove the city's control, but in my opinion the evidence was by no means sufficient. It simply showed that the city had an inspector on the ground watching the progress of the work, and that this inspector pointed out to the construction company from time to time what he considered to be unsafe or dangerous places, whereupon the construction company would give the matter such attention as seemed to be needed. This was a very proper precaution on the part of the city, and was no doubt taken in order to protect citizens who were obliged to use the highways while the building of the subway was going on. But the evidence showed no control whatever by the city over the manner of doing the work. The inspector had no power to direct the employés of the construction company, or to interfere with their method of operation. His duty was merely to watch and report to the contractor, but he could not make his recommendations effective, and the contractor was not bound to adopt his suggestions. The case is apparently ruled by Eby v. Lebanon County, 166 Pa. 632, 31 Atl. 332, followed in Hookey v. Oakdale Borough, 5 Pa. Super. Ct. 411, 412. I think the plaintiff has sued the wrong defendant.

The motion for a new trial is refused.

WELCH v. FARMERS' LOAN & TRUST CO. et al.

LASLEY V. SAME.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1908.)

Nos. 1,786, 1,787.

1. VENDOR AND PURCHASER (§ 265*)—VENDOR'S LIEN—LOSS OF LIEN AS AGAINST SUBSEQUENT PURCHASER.

A vendor's lien, being a creature of equity, and not of positive law, must yield to a superior equity, and cannot be enforced against a purchaser or mortgagee without notice and for a valuable consideration from the vendee, who has been clothed by the vendor with apparent full title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 700, 702; Dec. Dig. § 265.*]

2. VENDOR AND PURCHASER (§ 254*)—VENDOR'S LIEN—EQUITABLE LIEN—PAY-MENT TO BE MADE IN PROPERTY.

Where, in carrying out a contract to convey a tract of land and assign certain judgments for a lump sum, the vendor was paid a part of such sum in cash and for the remainder accepted a covenant from the grantee to convey to him a stated number of town lots, to be laid out, no vendor's lien arose in his favor, especially where it did not appear how much of the expressed consideration was for the land, nor how the cash payment was applied.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 254.*]

3. VENDOR AND PURCHASER (§ 265*)—VENDOR'S LIEN—ESTOPPEL TO ASSERT LIEN AGAINST SUBSECUENT MORTGAGEE.

An owner of land gave an option to purchase the same, which was assigned to a corporation. The corporation issued and sold bonds secured by a mortgage on such land and other lands, and the vendor, with knowledge of such fact, conveyed the land by a warranty deed and accepted part payment of the price from the proceeds of the bonds. Held, that no vendor's lien arose in his favor for the unpaid purchase money as against the mortgagee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 700-712; Dec. Dig. § 265.*]

4. JUDGMENT (§ 685*)—PERSONS CONCLUDED—DECREE ESTABLISHING LIEN—MORTGAGEE NOT MADE PARTY.

A corporation executed a mortgage to a trustee to secure its bonds, which it sold. To a suit by a third person to establish a vendor's lien on a part of the land mortgaged the trustee was not made a party, and while the purchaser of the bonds was a party he had previously transferred the same. *Held*, that a decree therein establishing a lien was not conclusive as against the mortgage.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 685.*]

5. JUDGMENT (§ 593*)—Splitting Causes of Action—Foreclosure as to Part of Property.

A judgment creditor of a mortgagor levied on lands which were included with others in the mortgage. He then brought a such in equity, making the mortgagee a party, in which the mortgage was foreclosed as to such lands only; the decree providing that it should be without prejudice to the right of the mortgage to enforce its mortgage against the lands not involved in the suit. Held, that such decree was within the power of the court, and that the partial foreclosure did not estop the mortgagee from maintaining another suit to foreclose on the re-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—36

maining lands as against persons claiming liens thereon who were not parties to the prior suit.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 593.*]

6. Action (§ 53*)—Splitting Causes of Action—Persons Entitled to Object.

The rule against splitting causes of action is mainly for the protection of the defendant against excessive costs, and when he does not object other parties cannot.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 53.*]

7. VENDOR AND PURCHASER (§ 254*)—VENDOR'S LIEN—EQUITABLE LIEN—BLENDING CONSIDERATION WITH OTHER DEMANDS.

Where a conveyance of land furnished only an indefinite part of the

Where a conveyance of land furnished only an indefinite part of the consideration for an indebtedness from the vendee to the vendor, the vendor has no lien upon the land for a balance remaining due on such indebtedness

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 254.*]

8. Corporations (§ 668*)—Process—Service by Publication—Affidavit.

Under Rev. St. Ohio 1908, § 5046, which provides that "before service by publication can be made an affidavit must be filed that service of summons cannot be made within this state upon the defendant to be served by publication," an affidavit is insufficient to authorize service by publication upon a foreign corporation where it states only that service cannot be made within the state upon an individual defendant "and" such corporation, and states no facts showing that the corporation is not doing business in the state and subject to service therein.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 668.* Service on foreign corporations, see notes to Eldred v. American Palace Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

J. M. McGillvray and C. B. Matthews, for appellants.

W. O. Henderson, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The controversies in the two appeals above entitled originated in the same case, that of a suit in equity brought by the Farmers' Loan & Trust Company against the Consolidated Wellston Coal & Iron Company and other defendants, among whom were the appellants, Welch and Lasley, to foreclose a mortgage given to the said loan and trust company by the said coal and iron company to secure an issue of bonds of the latter company. Welch and Lasley were made defendants in that suit because they claimed an interest in the mortgaged property superior to the mortgage. defendants filed separate answers, each claiming a vendor's lien upon a considerable part of the lands covered by the mortgage, to which liens they claimed the mortgage was subordinate, and they prayed that their liens might be established as paramount to the mortgage and for relief accordingly. The court below rejected both of these claims, holding, for reasons stated in its opinion, that they had no foundation in equity. The circumstances on which each of the claims

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

are founded are so far similar that they were heard on one record and as one case, but with regard, also, to the slightly differing facts. We shall therefore dispose of both appeals by one opinion. Extended narrations of facts regarded as pertinent to these appeals by the counsel for the parties, for the purpose, we presume, of meeting the different views which it was thought the court might entertain of the legal questions involved, are made in their briefs; but we shall sift out only such

as we deem necessary to the proper disposition of the cases.

One Wells undertook the project of founding extensive manufacturing and mining industries at Wellston, Ohio, and, as one of the means, organized a corporation, the Consolidated Wellston Coal & Iron Company, with capital stock amounting to \$4,000,000; and, acting in its behalf, he proceeded to acquire large tracts of land in the vicinity, deemed necessary for its purposes. Among these was one of 465 acres which had once belonged to the appellant Lasley. The latter had sold and conveyed it to Welch, the other appellant, Yeoman, Milburn, and other grantees. The grantees, on account of fraud alleged to have been practiced on them by their vendor, filed a bill in the state court praying for rescission, and they obtained a decree rescinding the sale, and awarding them several judgments for money against Lasley for which the land was directed to be sold. The sale was made, but did not realize the amount of the judgments. Ultimately the title to the land under the sale became lodged in Welch. In this state of affairs Wells obtained from Welch an option for the purchase of the 465 acres and some of the judgments against Lasley, and thereupon assigned his option to the Consolidated Wellston Coal & Iron Company. Welch, anticipating the purchase under the option, executed his deed, bearing date October 14, 1887, and transmitted it to the First National Bank of Wellston, with the following letter of instructions:

"October 14, 1887.

"First National Bank, Wellston, Ohio—Dear Sir: I herein hand you my deed to the Consolidated Wellston Coal & Iron Company to 465 acres of land adjoining Wellston; also assignment of John and J. M. Welch of judgment against H. G. Lasley; also agreement to procure assignment of judgment against Lasley in favor of Yeoman & Milburn—all of which papers I send you at request of Mr. H. Wells, of your city, for greater convenience of payment by him of the consideration named in the deed inclosed, viz., \$41,216. Upon payment of this sum you will please deliver to his order the deed and other papers inclosed, and not otherwise. I retain full control over the deed and papers, and you will please consider that you receive them, not in escrow for both grantor and grantee, but subject to my order, unless he pay in the money before they are recalled by me. Please acknowledge the receipt of these papers, and advise me should the money be paid in.

"Very truly yours, J. M. Welch."

The bank acknowledged the receipt of the letter and contents, reciting the instructions contained in the letter. Meantime Wells was negotiating for the borrowing of money by the coal and iron company on its bonds, secured by a mortgage on its property, for the purpose of paying, among other things, for the land they were buying of Welch. He had so far succeeded that on or about the 10th day of October, 1887, an agreement for a loan was effected with one Hinckley of Chicago, and the bonds of the company secured by a mortgage of that

date to the Farmers' Loan & Trust Company, the mortgage above mentioned now being foreclosed in the principal suit, were prepared; but on what day they were delivered does not certainly appear. The mortgage was recorded November 5, 1887. This mortgage by its terms covered certain tracts of land definitely described, among which was the 465-acre tract, and all the company's other property then owned or thereafter to be acquired. Out of the proceeds of the bonds and mortgage, Wells, who conducted the business for his company, appropriated \$30,000 to pay Welch for the 465 acres. Welch was present at the time when Hinckley's money was received at the Wellston bank, and, although there is some conflict in the testimony, the court below was convinced, and we are convinced, that Welch was aware that the tract he had agreed to sell was included in the mortgage and that the money he was to receive was part of that thus procured by Wells. It appears that the amount which was to be paid Welch was the sum which it had cost him, and this at the date last mentioned had not been figured out; but Wells had supposed the \$30,000 would cover it. Later on he ascertained from Welch that it amounted to \$41,216, which was the consideration named in Welch's deed to the company above mentioned. Thereupon Wells made another arrangement with Welch for the satisfaction of the purchase price, and by this his company was to pay \$30,000 in money and in lieu of the excess of \$11,-216 was to become obligated to convey to Welch 50 lots in Wellston. Then on November 12, 1887, Welch indorsed on his letter of October 14, 1887, to the bank, the following:

"November 12, 1887, Wellston, Ohio.

"First National Bank, Wellston, Ohio—Dear Sirs: You are hereby authorized to deliver to the Consolidated Wellston Coal & Iron Company, of Wellston, Ohio, the deed and assignments within mentioned as soon as the draft for \$30,000, this day given me by you, on New York City, has been paid. As I have agreed, with the consent of the within-named H. Wells, to accept the said \$30,000 cash and the obligation of said company to convey to me 50 lots in Wellston in full payment of the consideration price of said 465 acres and said judgments.

Very truly,

J. M. Welch."

The obligation entered into by the company was as follows:

"Wellston, Ohio, November 12, 1887.

"Whereas, Johnson M. Welch, of Athens, Ohio, proposes and has agreed to sell to the Consolidated Wellston Coal & Iron Company, of Jackson county, Ohio, 465 acres of land, part of the farm, near Wellston, Ohio, known as the 'Lasley farm,' said 465 acres being the same deeded to said Welch by the sheriff of said Jackson county; and whereas, said Welch is willing to accept at the price of \$200 each and as a part of the purchase price of his said land, fifty (50) of the inlots, to be surveyed and laid off by said company as an addition to the said town of Wellston, out of the lands now being purchased by said company: Now, therefore, it is agreed hereby between the said company and said Welch that said Welch may subscribe for said fifty (50) lots, and that the said subscription may be marked 'Paid'; that said company hereby acknowledges payment in full, at said rate of two hundred dollars (\$200) for each lot, of said fifty (50) lots, by a credit of the sum of ten thousand dollars (\$10,000) on the purchase money of said 465 acres; that at the first 'drawing' or division of the lots of said company, to be hereafter made, said Welch shall participate therein on the same terms and have equal rights with the other subscribers to said lots; and as soon as it shall be ascertained by said 'drawing' or division what particular fifty (50) lots have been thus

'drawn' by or aparted to said Welch, the said company are to convey to him by good and sufficient deed, with covenant of general warranty, and give him possession thereof.

The Consolidated Wellston Coal & Iron Company,

"By Harvey Wells, President,
"H. S. Williard, Treasurer,
"Johnson M. Welch."

On or about that date the deed of Welch was delivered to the company. Welch has made efforts to secure the conveyance of the 50 lots from the company, but they have been unavailing. Reserving now another question which concerns the effect of a decree of the state court upon the matter we are now considering, and to be presently examined on its own facts, enough has been stated to develop the first question, which is whether Welch is entitled to assert an implied lien upon the land in question for that part of the consideration agreed to be paid to him which was in excess of the \$30,000 which he actually received.

The general rule is well settled that ordinarily the vendor of real estate or of an interest therein is entitled to a lien upon the estate sold for so much of the purchase price as remains unpaid at the time of the conveyance; and it is admitted that this general rule is recognized as prevailing in Ohio, nor is it doubted that it is a principle of equity recognized by the courts of the United States in all jurisdictions wherein it is not otherwise ordained by the local law. But the rule has its limitations. Being a creature of equity, and not of positive law, it must yield to a superior equity. So it cannot prevail against a purchaser from the vendee, for value, without notice of the existence of such a lien; for it must be admitted that one who has not taken the precaution to protect his right by some visible muniment of it, and allowed another to wear the appearance of ownership and of the power of disposition, stands upon far lower ground in the estimate of equity than one who, in good faith and relying upon the appearances which the original vendor has permitted his vendee to assume, has become a purchaser and has paid the consideration of his purchase. Hence the exception to the rule is that, while the lien may be asserted against the yendee and all others standing only on his right, it cannot prevail against those who have also acquired an equity which puts them on higher ground than that of the first vendee. A subsequent purchaser, although for value, yet having notice of the facts which would entitle the first vendor to a lien, an heir, an assignee in bankruptcy, or any other who has parted with nothing, is not clothed with an equity, but has only the right of the vendee, and cannot deny the

So far we have had regard to the circumstances in which a lien once arising may survive or become ineffective. This was due to the full statement of the nature of such a lien. It remains to consider, although it is confessedly not the logical order, the circumstances which will prevent the implication of an intent to reserve a lien; for it is upon such an implication that the doctrine rests. Lord Elden, in his opinion in the well-known case of Mackreath v. Symmons, 15 Ves. 329, said that in every case the intention must be inferred from its special circumstances; and yet in the extended course of practice sev-

eral particular circumstances have been recognized as quite decisive criterions. One of these quite apposite to the case before us is thus stated in Snell's Principles of Equity (2d Ed.) 109, as the "true rule":

"Although the mere giving of a bond, bill, promissory note, or covenant for the purchase money, or the granting of an annuity secured by bond or covenant, will not be sufficient to discharge the equitable lien, yet where it appears that the note, bond, covenant, or annuity was substituted for the consideration money, and was in fact the thing bargained for, the lien will be lost."

For a technical statement, it would seem to have been more accurate to say that in such circumstances no lien would be implied. But in substance it no doubt states the settled rule of law in England and is the prevailing law in the United States. Bispham's Principles of Equity, § 355; Bayley v. Greenleaf, 7 Wheat. 46, 5 L. Ed. 393; De Cordova v. Hood, 17 Wall. 1, 21 L. Ed. 587; Fisher v. Shropshire, 147 U. S. 133, 13 Sup. Ct. 201, 37 L. Ed. 109; Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, 14 Sup. Ct. 842, 38 L. Ed. 802; and Whiteley v. Central Trust Company, 76 Fed. 74, 22 C. C. A. 67, 34 L. R. A. 303, where this subject was fully considered in the opinion of Judge Lurton, for this court. Many of the most authoritative decisions were there cited and canvassed. In that case the consideration for the conveyance was the covenants of the grantee to do certain things and were not for the payment of money. The only difference between that case and this is in the fact that there the covenants were the whole consideration, while in this the covenant extends to that part of it only which was not otherwise paid. But that circumstance is immaterial. The principle and the rule are the same in both cases. And the law in Ohio is the same as that above stated, not only as regards the general rule, but also in respect to the qualification of it just noted. Williams v. Roberts, 5 Ohio, 35; Mayham v. Coombs, 14 Ohio, 428; Dietrich v. Folk, 40 Ohio St. 635; Mutual Aid, etc., Company v. Gaske, 56 Ohio St. 298, 46 N. E. 985.

If in the present case the contract indicated by Welch's first letter to the bank had been the real contract and had been carried out, doubtless, in the absence of any other controlling equity, the lien for the unpaid purchase money, if any had been withheld, would have attached. But it was altered, and in lieu of the excess beyond \$30,000 the covenant of the company to convey the 50 lots was substituted in its stead. Having taken that covenant for part of the consideration, Welch could no longer resort to the contract of sale as the foundation of his right. His remedy was on the covenant of the company for the conveyance of the lots, either for its performance or for damages for its breach. The failure of the latter to convey them did not restore him to his original position. If the lien did not attach at the time of his conveyance, it would not spring into existence upon the failure of the company to perform its contract.

But, further, it appears that certain judgments against Lasley were included in the sale, and that for no separate value or price. It may be that it would have been competent if the original bargain had gone through, and the bargain was that the purchaser should pay what the property had cost Welch, some data could have been supplied to show

how much of the purchase price the judgments represented. But the basis of the cost to Welch was not the basis on which the contract was concluded. Moreover, it is impossible to say how the \$30,000 which was paid was applied, whether in payment for the land or the judgments, or in what parts. It was paid for the purchase of all, "in a lump." In such a case of the sale of land and of personal property, with no definite price for either, the equitable lien for the purchase price does not attach to the land, for there are no means supplied for distinguishing how much of the price should be fastened upon the land and how much was due to the personal property for which the law gives no lien; and equity will not attempt to surmount such difficulties for a vendor who has been so careless as not to preserve some means upon which the court can act. 2 Jones on Liens, § 1072, and the title of "Mixed Considerations," 29 Am. & Eng. Ency. of Law (2d Ed.) 745.

For these reasons, we think that in the circumstances mentioned no lien accrued to Welch for that part of the purchase price for his conveyance which was represented by the company's covenant to convey the 50 lots to him. Other reasons leading to the same result are urged by counsel, of which we shall take notice of some only, one of which is the one on which the court below relied in rejecting the claim, namely, that Welch was, during the progress of the transaction which culminated in his conveyance, aware of the fact that the coal and iron company was securing the title to these 465 acres for the purpose of mortgaging them to raise money for its objects, among which was the purchase from him of this tract of land. To do this he must have understood that the proposed mortgagee would require a clear title, or at least would be likely to depend upon the apparent muniments of title to the property to be mortgaged, and would have no means of guarding against secret liens. Equity required, especially since one object of the transaction of borrowing was to accomplish the transaction with himself, that he should have then disclosed his claim. Instead of this, he remained silent and took \$30,000 of the borrowed money. By giving a deed which on its face purported to convey a clear title and recited the payment of the purchase money, knowing that this was what the mortgagee expected, he only fulfilled the known expectations of his grantee and of the mortgagee. It is true, as urged by his counsel, that the mortgage was executed some days before Welch made his conveyance. But for some time before Wells had held an option to purchase the land. The purchase would involve the making of a clear title to the land by Welch. Wells assigned his option to the company, which, of course, carried the right to demand a clear title. And this was what Welch's deed professed to give. But it would not give it if Welch were permitted to set up the secretly reserved lien he now claims. The option to purchase was the foundation of the conveyance, notwithstanding the variation in its terms in regard to the purchase price, and the conveyance, being with full covenants of warranty, would have relation to the time when the option was given. And it is just that this should be so, for otherwise the vendor might, before giving his deed, impair the value of the property and disappoint the vendee. In its salient facts the truth is that from the giving of the option by Welch to the delivery of his deed the several steps were parts of one transaction. We quite concur in the opinion of the court below in thinking that the decree might well be rested upon the ground that Welch is precluded by his own acts, accompanied by his knowledge of what was

going forward, from setting up his claim for a vendor's lien.

All that has thus far been said concerns the merits of the original transaction. But another matter has supervened which gives us pause and requires consideration of its effect upon the rights of the parties as they stood upon their original footing. On July 27, 1889, a year and nine months after making his conveyance, Welch, having failed to obtain the 50 lots which the company had promised him, filed a petition in the court of common pleas of Tackson county against the Consolidated Wellston Coal & Iron Company and Hinckley, setting forth the conveyance by him and the agreement of the company to convey the 50 lots as part of the consideration, and its failure, though often requested, to comply therewith, and praying that a lien on the lands conveyed might be established in his favor and that the lands might be sold to satisfy it. The defendants answered the bill, denying, upon the grounds stated, that Welch ever had, or was then entitled to, any lien upon the premises. Evidence was taken, and upon the hearing that court decreed that Welch was entitled to a first and paramount lien upon the lands in question, and ordered them to be sold to satisfy it. This judgment was affirmed upon appeal by the Circuit Court, and upon further appeal by the Supreme Court of Ohio. The appellant Welch relies upon this judgment as an estoppel which prevents this complainant, the Farmers' Loan & Trust Company, from denying that he has the lien he claims. But the loan and trust company was not made a party to that suit, and, although Hinckley was, all of the bonds had before that time been hypothecated by him to banks and a private party for loans made to him in good faith and without knowledge of any lien upon the lands mortgaged to secure the bonds superior to said mortgage. The bonds were in the possession of the pledgees, and the debts they secured remained unpaid. The company had in the meantime conveyed the land to Hinckley and had become wholly insolvent. The only party, therefore, who was seriously affected by the decree of the state court of common pleas was Hinckley in his position of the owner of the equity of redemption in respect of the land. There is no published report of the decision of the Supreme Court, and we are not aware whether any opinion was filed. If there had been, we should have felt bound to consider it. with its other decisions upon the same subject, in determining what the law of Ohio is. But, while the evidence in that case has been stipulated into this, other testimony has been taken which has a material bearing upon essential questions, and it is by no means certain that the state court would have reached the same conclusion if all that now appears had been put before it. At all events, we are satisfied that under the settled law of Ohio the lien here claimed could not be sustained. See the Ohio cases above cited.

Another distinct and somewhat peculiar defense is presented by counsel, which is this: This mortgage, as has been observed, covered not

only the 465 acres, but several other tracts, which for the sake of brevity in description we will call "the other lands." One Jones obtained a judgment against the Consolidated Wellston Coal & Iron Company in a state court of Ohio, and levied an execution on the "other lands," and filed a petition in aid thereof, bringing in, with other defendants, the Farmers' Loan & Trust Company as a lien claim-The latter company answered, setting forth its claim by mortgage, and praying that it be declared a first lien, and that it be foreclosed as respected the "other lands." The court directed the lands to be sold, which was done; and the court, having found the mortgage to be a first lien, directed the proceeds of the sale to be paid to the holders of bonds past due. But the court in its decree "further ordered, adjudged, and decreed that this decree and all proceedings thereunder are, and shall be, without prejudice to any right or suit of said Farmers' Loan & Trust Company to sell any of the property embraced in said mortgage to it and not included in the foregoing order to sell, or to foreclose said mortgage in respect to any lands or tenements not described in the petition of the plaintiff." Counsel urge that by this partial foreclosure, splitting the cause of action as it is called, the mortgage was entirely merged in the judgment and ceased to longer incumber the 465 acres which is the subject of the present suit. This, of course, assumes that the court which rendered the decree was without the power to order that the proceedings in that suit should be without prejudice to the right of the Farmers' Loan & Trust Company to have recourse to the 465 acres for the further satisfaction of its debt. But neither Welch, nor Lasley, the other appellant, were parties to that suit, nor could they properly have been made parties, for they had no interest in the land over which the jurisdiction of the court was being exercised. Not being parties, they were in no wise prejudiced by the decree. Not being affected by it, they were not thereby estopped from asserting any previous right they possessed. As they were not themselves bound by it, so neither was the Farmers' Loan & Trust Company affected in any relation which it held toward them, for estoppels must be mutual.

But, aside from this consideration, we think that the court had power to direct the sale of the lands brought under its control by the petition of Jones, at the same time saving the security of the other mortgaged property unaffected by its proceedings. Jones was entitled to enforce the lien of his judgment upon the "other lands," and the court could not do otherwise than to enforce the lien by selling the land. It might, perhaps, have ordered them sold subject to all prior liens; but it might, also, if it saw fit, having the proper parties before it, sell the land free of the liens, marshal the liens, and apply the proceeds of the sale to the liens in their proper order. The situation was somewhat complex, and it was the peculiar province of a court of equity to so shape its course as to do justice to all the parties concerned. It seems to us that the scheme was a judicious one, but of this we need not judge. It is enough that the court had the power to mold its remedies as it did. As observed by Earl, J.:

"This principle (that is, the result of splitting a cause of action) is rigidly enforced in common-law actions; but there must be many cases in equity

where the courts, having ample power to so mold the relief granted as to prevent injustice, will not enforce it unless equity in the particular case requires it." O'Dougherty v. Remington Paper Company, 81 N. Y. 496, 500.

To the extent of the proceeds of the sale of the "other lands," the burden of the mortgage on the 465 acres was relieved. Besides, the rule relating to the splitting of causes of action exists mainly for the protection of the defendant; that he be not twice taxed for the same cause of action. But the coal and iron company acquiesced in the judgment and took the benefit of it in the reduction of its debt. "The creditor has not the right to assign the debt in parcels, and then, by splitting the causes of action, subject his debtor to the costs of more suits than the parties originally contemplated; but, when the debtor himself does not object, no other party can object for him." Marziou v. Pioche, 8 Cal. 522, 536; Claflin v. Mather, 98 Fed. 699, 39 C. C. A. 241; Mills v. Garrison, 3 Keyes (N. Y.) 40. So much as we have here said is applicable to the appeals of both the appellants, Welch and Lasley, except so far as relates to Welch's suit for a lien in the state court.

Proceeding, now, to the further consideration of the Lasley appeal, we observe, as before stated, that Lasley had at one time owned the 465 acres: that he had sold it to Welch and others: that the sale had been rescinded on their complaint: that several judgments for the purchase money had been awarded in favor of the purchasers and against Lasley: that the lands had been sold under the decree for the satisfaction of the judgments; that the sale had been confirmed, and a deed or deeds had been given to the purchaser or purchasers, and the title thereunder had come to Welch. While Wells was engaged in securing these lands from Welch for the Consolidated Wellston Coal & Iron Company, Lasley set up a claim to them. What was the foundation or the nature of his claim does not appear, and no one connected with his suit seems to know. From all that does appear, the plain inference is that there was nothing of substance in it. Nevertheless, he asserted a claim, and Wells was constrained to agree to pay him \$10,000 for it and the release of a personal judgment against himself, all of which has been paid, except \$2,000, for which Lasley now claims a lien upon the land. If Lasley's claim was colorable, and made bona fide, it would doubtless furnish a legal part consideration for the agreement to pay him the \$10,000. If there was nothing in it, and it was set up solely for the purpose of obstructing Wells in his negotiations for the land and the borrowing of money until his exaction should be satisfied, a question might arise in respect to the equity of his claim and the nature of the interest to which it could attach. His deed was a quitclaim deed and operated only to convey such interest as he had. If it conveyed no interest, to what did his supposed lien attach? The general rule would be that the vendor's lien would attach to the interest conveyed, and not to a whole property of which it is a part. If a tenant in common should sell his interest, and there remained unpaid part of the purchase money, his lien would attach to the interest he sold; certainly not to the shares of the other tenants. But how shall the interest which a quitclaim deed conveys be measured? Sometimes, indeed, a quitclaim contains

a grant and operates as a conveyance, or it may be a mere release of an indefinite claim. It may be a substantial interest, or it may be the "shadow of a shade." Quite often it approximates the latter. And it may be that the uncertainty of the measurement ought to preclude the application of the doctrine to a case where it is not employed to convey a title to property, but only to remove a cloud, or some uncertain and problematical interest. This topic is suggested and argued by counsel for the appellee somewhat. However, we do not find it neces-

sary to make a decision upon it.

But the \$10,000 agreed to be paid to Lasley had other considerations besides his quitclaim deed. Among them was a judgment which he had against Wells, which as part of the agreement was to be extinguished. But how much was to be allowed for that does not appear, nor, as it seems, was there any apportionment of the \$10,000 as the consideration for either of the matters and things surrendered by Lasley. For this reason, as we said of a similar feature of Welch's claim, the lien, because of the uncertainty in settling its extent, could not be maintained. Besides, as in Welch's case, the mortgagee of the Consolidated Wellston Coal & Iron Company had no notice of Lasley's claim of lien upon the mortgaged property. All that it might have known through Wells, who was acting for it, was that Lasley had asserted a claim of some sort, but that Wells had bought it up in a transaction in which his own affairs were commingled. But whether or not the coal and iron company might be affected, neither the Farmers' Loan & Trust Company or its beneficiary had notice of Lasley's claim at the time of the receiving of the bonds and mortgage and parting with the money which was the proceeds of the loan. There is a contention that they had such notice; but it is refuted by the strong improbability that they would accept an incumbered title, and the weight of the positive evidence is opposed to that conclusion. Lasley's quitclaim deed was executed October 17, 1887. Thus it will be seen that this transaction was running along pari passu with that with Welch. We have no doubt that Lasley knew, as well as Welch, that Wells was trying to get a title which he could offer as free from incumbrance, and it would be inequitable that he should make a deed which would promote such a purpose and after it had been accomplished bring forward a secret lien to impair the fruits of it. In Kettlewell v. Watson, L. R. 26 Ch. Div. 501, it was held by the Course of Appeals that, notwithstanding the vendors retained the possession of their deed, yet their agent had permitted it to be registered in a county where, as in this country, a registration law prevailed, and this was apparently done to facilitate sales of the land by the vendee the vendor's lien for unpaid purchase money was gone, so far as subsequent innocent purchasers of the vendee were concerned. The same rule of law had been conceded by Fry, J., in the court below; but he had held in favor of the lien, because he held that the agent, in permitting the registration, had acted without authority.

Lasley claims, however, that his lien has already been established by an adjudication of the court of common pleas, and affirmed by the Supreme Court of Ohio, in a suit brought by him in October, 1889, against the said coal and iron company, the Farmers' Loan & Trust Company, and Hinckley to establish this same lien. It suffices to say of that suit that it would seem to have the effect claimed for it if the court acquired jurisdiction of the Farmers' Loan & Trust Company. It is claimed by the latter company that the proceedings taken to bring it before the court were not sufficient in law. No personal service of process was had, the company being a New York corporation. Provision is made by statute in Ohio for substituted service on non-residents of the state by publication of notice. Section 5046 of the Revised Statutes of Ohio of 1908 provides as follows:

"Before service of publication can be made, an affidavit must be filed that service of summons cannot be made within this state upon the defendant to be served by publication, and that the case is one of those mentioned in the preceding section; and when such affidavit is filed, the parties may proceed to make service by publication."

The affidavit made in that case was this:

"State of Ohio, Jackson County-ss.:

"Hiram G. Lasley, being first duly sworn, says that service of summons cannot be made in this state upon defendant Francis E. Hinckley and the Farmers' Loan & Trust Company; that said Hinckley resides in Chicago, Illinois, and said Farmers' Loan & Trust Company is a corporation organized under the laws of New York; and that this action or case is one of those mentioned in section 5048 of the Revised Statutes of this state. Hiram G. Lasley.

"Sworn to and subscribed before me this October 21, 1889.

"T. J. Williams, Clerk,

"E. P. Williams, Deputy."

The court below stated its reasons for holding the affidavit void as follows:

"The affidavit shows that service of a summons could not have been made in this state on both Francis E. Hinckley and the Farmers' Loan & Trust Company, but does not show that service could not have been made on the Farmers' Loan & Trust Company alone. The context shows that the company is a corporation organized under the laws of New York, but for aught that appears it may have been doing business in this state and may have had an office and a managing agent here, upon whom service could have been made. There is no context, showing that 'and' was used by a mistake, which would justify the court in correcting the mistake by substituting for it the word 'or.' The attempted service, therefore, based upon this affidavit, is insufficient, and did not bring the Farmers' Loan & Trust Company before the court."

And the court cites Galpin v. Page, 18 Wall. 366, 21 L. Ed. 959, Morse v. Presby, 5 Foster (N. H.) 302, and Williamson v. Berry, 8 How. 495, 12 L. Ed. 1170. To the writer of this opinion the criticism of the learned judge seems too astute, and that the natural meaning of the affidavit, taken in connection with its obvious purpose, is that neither of the defendants named could be served in this state. But the rule upon this subject is for a strict construction, and I am not disposed to differ from the other members of the court, who are inclined to concur with the court below.

The result is that the decree, in respect to both the cases above entitled, will be affirmed, with costs.

NOTE.—The following is the opinion of Thompson, District Judge, in the court below:

THOMPSON, District Judge. November 2, 1893, the bill in this cause was filed to foreclose a mortgage covering 21 parcels of land, marshal liens, sell the

land, etc. July 14, 1892, more than three months before the filing of the bill herein, a suit was brought by Ebenezer Jones, trustee, in the court of common pleas of Jackson county, Ohio, against the Consolidated Wellston Coal & Iron Company, Francis E. Hinckley, the Farmers' Loan & Trust Company, the complainant herein, and others, to enforce a judgment lien against 20 of said parcels of land, marshal liens, sell the land, etc. January 30, 1893, the Farmers' Loan & Trust Company filed an answer in said suit, contesting the claim of Jones, trustee, to a lien on said 20 parcels of land, setting up its own lien thereon, stating that it did not then desire that its mortgage should be foreclosed, but praying that the lien thereof be declared to be the first and best lien on said lands. February 15, 1898, the Farmers' Loan & Trust Company filed an amendment to said answer praying that its mortgage might be foreclosed, the priority of the liens determined, the lands sold, and the proceeds applied to the payment of its mortgage. Afterwards, a decree was rendered, in said suit, foreclosing said mortgage, determining the order of priority among the several lienholders, and ordering the sale of 20 parcels of land and the distribution of the proceeds thereof, but providing that said "decree and all proceedings thereunder are and shall be without prejudice to any right or suit of said Farmers' Loan & Trust Company to sell any of the property embraced in said mortgage to it, and not included in the foregoing order to sell, or to foreclose said mortgage in respect to any lands or tenements not described in the petition of said plaintiff." Afterwards the 20 parcels of land were sold, and the balance of the proceeds remaining, after paying costs, taxes, etc., were applied in part payment of the bonds secured by said mortgage. Afterwards the complainant dismissed the bill herein as to the 20 parcels of land sold by the decree of the state court and as to all of the defendants save the Consolidated Wellston Coal & Iron Company, Francis E. Hinckley, Ebenezer Jones, individually and as trustee, Johnson M. Welch, Hiram G. Lasley, and John S. McGee, and filed an amendment to the bill setting up the proceedings in the state court, the sale of the 20 parcels of land, the distribution of the proceeds thereof, and prayed that the mortgage be foreclosed as to the twenty-first parcel of said lands, containing 465 acres, and that all liens thereon be marshaled, and that said parcel be sold and the proceeds distributed, etc.

The defendant Welch answered, setting up the following defenses, namely: (1) That the right to maintain a suit on the bonds and mortgage was merged in the decree of the state court. (2) That he has a vendor's lien on said 465-acre tract of land prior and paramount to the mortgage lien of the complainant. The defendant Lasley also answered setting up the following defenses, namely: (1) That the right to maintain a suit on the bonds and mortgage was merged in the decree of the state court. (2) That he has a vendor's lien on said 465-acre parcel of land established by the court of common pleas of Jackson county, Ohio, in a cause in which the complainant herein was a party defendant and before the court, and which decree was afterwards affirmed on appeal by the circuit and Supreme Courts of Ohio.

To these answers formal replications were filed, and the case was submitted upon a stipulation of facts agreed to by the parties, and the testimony of certain witnesses in the form of depositions, and the testimony of other witnesses transcribed from stenographic notes taken in the course of various litigations

in the common pleas and circuit court of Jackson county, Ohio.

First. Was the right to foreclose the mortgage upon the 465-acre parcel of land merged in the decree of the state court foreclosing the mortgage against the other 20 parcels of land? The rule of law which forbids the party complaining from subjecting a defendant to two or more suits, instead of one, by splitting a single cause of action, is not applicable to this case. The purpose of the rule is to protect defendants against the vexation, delay, and expense of litigation by piecemeal. The suit in the state court was not brought by the Farmers' Loan & Trust Company, nor was it brought to foreclose the mortgage in question, nor to foreclose any lien upon the 465-acre parcel. The Farmers' Loan & Trust Company was a defendant in that suit, and by crosspetition set up its mortgage lien upon the 20 parcels which Jones, trustee, the plaintiff in that suit, sought to subject to the payment of his claim. The Consolidated Wellston Coal & Iron Company, the mortgagor, and Francis E.

Hinckley, the purchaser of the bonds and of the lands, who have been sued twice, are the only defendants who have any reason to complain of the splitting of the cause of action; but they have not complained, and, on the contrary, acquiesced in a provision in the decree permitting the Farmers' Loan & Trust Company to foreclose the mortgage in respect to any lands and tenements not described in the petition of Jones, trustee, and would now be estopped thereby from complaining. Welch and Lasley have not been sued twice. They were not parties to that suit, and were not necessary parties thereto, and their rights were in no wise prejudiced by the decree therein. The right of the Farmers' Loan & Trust Company to enforce its mortgage lien against the 465-acre parcel was not merged in the decree of the state court.

Second. Had Welch a vendor's lien on said 465-acre parcel prior and para-

mount to the mortgage lien of the complainant herein?

A vendor's lien on the 465-acre parcel was established against the Consolidated Wellston Coal & Iron Company and Francis E. Hinckley by the decree of the court of common pleas of Jackson county, Ohio, which was afterwards affirmed by the circuit court of Jackson county, Ohio, and by the Supreme Court of Ohio, and as against them is final and conclusive: but the Farmers' Loan & Trust Company was not a party to the suit in which the decree was rendered, and the question presented is whether a vendor's lien can be asserted against it, the Farmers' Loan & Trust Company, the mortgagee of the vendee? Harvey Wells was the promoter of a scheme to make Wellston a seat of manufacturers, the "Birmingham of Ohio," as stated in his circular letter to Welch, January 14, 1888. (See Exhibit P.) In furtherance of this scheme he organized the Consolidated Wellston Coal & Iron Company. Neither he nor the company had the money or the lands necessary for the successful prosecution of the scheme. In order to raise money to buy lands, the company issued bonds and secured them by mortgage on lands acquired and to be acquired. The lands in question, although not then acquired, were described in the mortgage by metes and bounds. The mortgage was signed, acknowledged and delivered on the 10th day of October, 1887, and was received for record and recorded on the 5th day of November, 1887. Some time in the summer of 1887 Welch gave Wells an "option" on the lands in question, the 465-acre parcel described in the mortgage, which Wells afterwards assigned to the The price fixed was to be substantially what the property cost This was afterwards declared by Welch (much to the surprise of Wells) to be \$41,216. On the 14th day of October, 1887, Welch executed a deed conveying said lands to the company, the consideration price expressed in the deed being \$41,216, and on the same day deposited the deed with the First National Bank at Wellston, with a letter of instructions which reads as follows: "October 14, 1887.

"First National Bank, Wellston, Ohio—Dear Sirs: I herein hand you my deed to the Consolidated Wellston Coal & Iron Company to 465 acres of land adjoining Wellston; also assignment of John & J. M. Welch of judgment vs. H. G. Lasley; also agreement to procure an assignment of judgment against Lasley in favor of Yeoman & Milburn—all of which papers I send you at the request of Mr. H. Wells, of your city, for greater convenience of payment by him of the consideration named in the deed inclosed, viz., \$41,216. Upon payment of this sum you will please deliver to his order the deed and other papers inclosed, and not otherwise. I retain full control over the deed and papers, and you will please consider that you receive them, not in escrow for both grantor and grantee, but subject to my order, unless he pay in the money before they are recalled by me. Please acknowledge receipt of these papers, and advise me should the money be paid in.

"Very truly yours, J. M. Welch."

The receipt of the deed and assignments was acknowledged by the bank in a letter of which the following is a copy, viz.:

"Wellston, Ohio, October 15, 1887.

"Received of J. M. Welch one deed and two assignment papers, to be held in trust and to the order of J. M. Welch, but to be handed over to Harvey Wells

If said Wells shall pay into this bank to the order of said Welch the sum of forty-one thousand two hundred and sixteen (\$41,216.00) dollars before said Welch shall order otherwise. Respectfully, J. H. Sellers, Jr., Cashier."

"To J. M. Welch, Athens, Ohio."

Afterwards, under date of November 12, 1887, Welch wrote on the back of his letter of October 14, 1887, the following statement, namely:

"November 12, 1887, Wellston, Ohio.

"First National Bank, Wellston, Ohio—Dear Sir: You are hereby authorized to deliver to the Consolidated Wellston Coal & Iron Company, of Wellston, Ohio, the deed and assignments within mentioned as soon as the draft for \$30,000 this day given me by you on New York City has been paid, as I have agreed with the consent of the within-named H. Wells to accept the said \$30,000 cash, and the obligation of said company to convey to me 50 lots in Wellston in full payment of the consideration price of said 465, and said judgments.

Very truly,

J. M. Welch."

Welch knew that his land was to be paid for out of the proceeds of the sale of the mortgage bonds (stipulation, p. 7, par. 20), and that Hinckley, the purchaser of the bonds, had deposited with the First National Bank of Wellston sufficient moneys to pay for the land purchased by the company (including Welch's lands), deeds for which had been deposited with the bank, to be delivered when the purchase price should be paid. Nevertheless, on that day (November 12, 1887) he entered into an agreement with Wells to reduce the price of his land to \$40,000 and accept in payment thereof \$30,000 in cash and 50 lots in Wellston, and consented to the payment of the balance of the original purchase price to Wells out of the moneys so deposited. In carrying out this agreement \$30,000 in cash was paid to Welch by the bank, and the company delivered to him its obligation to convey to him the 50 lots, and in addition thereto Wells transferred to him his (Wells') right and title to 25 other lots in Wellston, and assigned to him stock of the company of the face value of \$2,500, and the balance of the original price, namely, \$11,216, was paid to Wells out of the moneys so deposited. The spirit of speculation was then rife, and, inspired by the optimism of Wells, he may have considered the lots and stock of greater value than \$10,000, or he may have been influenced by the fear that Wells would refuse to take the land at the price asked. Wells was surprised when informed that the property had cost Welch \$41,216, and refused to pay more than \$30,000 in cash. He insisted that he "could not go on with the deal unless the money part was reduced to \$30,000." The weight of the evidence shows that Welch, when he delivered the deed to the company, did not expect to get more than \$30,000 in money for his land, and that he relied on the obligation of the company to convey to him the 50 lots "in full payment of the consideration price." He did not look to the land to secure the performance of the contract to convey the lots, nor will he be permitted to do so now, in view of the fact that he delivered the deed under circumstances which justified the mortgagee in believing that the purchase price of the land had been paid in full. Under the circumstances presented he is estopped from setting up the lien, and, more than that, the mortgagee has the superior equity and a legal lien, which attached at the same instant when it is claimed a vendor's lien attached, namely, when the deed was delivered. Fiske v. Potter, 2 Abb. Dec. (N. Y.) 144, 145.

Third. Is the decree of the state court establishing a vendor's lien in favor of Lasley binding upon the complainant and the bondholders represented by it? The complainant was made a party defendant in the suit in which the decree was entered, but denies that it was duly or legally served with process, or that it in any way submitted itself to the jurisdiction of the court, and insists that the question of jurisdiction may be submitted to, and should be determined by, this court. It is admitted that no summons for the complainant "was issued in said cause, and that there was no other affidavit for service by publication, or other service by publication, or other proof of publication, than those of which said copies are hereto attached." (See stipulation, p. 6, par. 15.) The question for determination is whether the affidavit for service by publication was in substantial compliance with the provisions of

section 5046 of the Revised Statutes of Ohio of 1908, which provides as follows: "Before service of publication can be made, an affidavit must be filed that service of summons cannot be made within this state upon the defendant to be served by publication, and that the case is one of those mentioned in the preceding section; and when such affidavit is filed, the parties may proceed to make service by publication." The affidavit reads as follows:

"State of Ohio, Jackson County-ss.:

"Hiram G. Lasley, being first duly sworn says that service of summons cannot be made in this state upon defendant Francis E. Hinckley and the Farmers' Loan & Trust Company; that said Hinckley resides in Chicago, Ill., and said Farmers' Loan & Trust Company is a corporation organized under the laws of New York; and that this action or case is one of those mentioned in section 5048 of the Revised Statutes of this state. Hiram G. Lasley.

"Sworn to and subscribed before me this October 21, 1889.

"T. J. Williams, Clerk,
"E. P. Williams, Deputy."

The affidavit shows that service of a summons could not have been made in this state on both Francis E. Hinckley and the Farmers' Loan & Trust Company, but does not show that service could not have been made on the Farmers' Loan & Trust Company alone. The context shows that the company is a corporation organized under the laws of New York; but for aught that appears it may have been doing business in this state, and may have had an office and a managing agent here upon whom service could have been made. There is no context, showing that "and" was used by a mistake, which would justify the court in correcting the mistake by substituting for it the word "or." The attempted service, therefore, based upon this affidavit, is insufficient, and did not bring the Farmers' Loan & Trust Company before the court.

But it is urged that the court is one of general jurisdiction, and it must be presumed as a matter of law that it had jurisdiction to render the decree which Lasley seeks to enforce against the claim of the complainant. In Galpin v. Page, 18 Wall. 366, 21 L. Ed. 959, it is said by Mr. Justice Field that "the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent." The record here is not silent. It shows that service by publication was not made in compliance with the laws of Ohio. Service by publication is authorized by special statutes in derogation of the common law, and there must be a strict and literal compliance therewith. In Morse v. Presby, 25 N. H. 302, the Supreme Court of New Hampshire says: "A court of general jurisdiction may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not apply to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment and as to the person to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it."

Here the record shows that the state court did not acquire jurisdiction of the person of the complainant herein, and the decree, therefore, would be open to collateral attack; but in fact the defendant Lasley is setting up his decree and seeking to enforce it as a lien upon the lands in question superior to the mortgage of the complainant. It is said in Williamson v. Berry, 8 How. 495, 12 L. Ed. 1170, that "it is an equally well settled rule of jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and are brought before the latter, by a party claiming benefit of such proceedings." It does not appear that Lasley had any interest in the land which would entitle him to a vendor's lien. On cross-examination he testified as follows: "Q. Can you state what was the character of the title which you claim in that property? A. No, sir; I do not know that I can. Q. You say you do not know what sort of a claim or title you did have? A. No, sir; not at that time I do not know. As I understood it, we were working for a title, to see if we had any."

Lasley had a judgment against Wells for \$9,000, and was prosecuting a suit to find out whether he had any title to the land in question. Wells had judgments against Lasley for \$6,740, and in order to get rid of the judgment for \$9,000 and Lasley's suit for title to the land, which Wells was buying from Welch, he offered to cancel his judgments against Lasley and pay him \$10,-000, \$8,000 in cash and \$2,000 in lots, if Lasley would cancel his judgment, dismiss his suit, and give Wells a quitclaim deed to the lands in question. Lasley accepted this offer, executed the quitclaim deed, canceled the judgments, and dismissed his suit; and Wells on his part canceled his judgments, paid Lasley \$8,000, and had the company agree to convey to him 10 lots at \$200 a lot. The transaction was between Wells and Lasley, not between the company and Lasley. Wells did not agree, either on his own behalf or on behalf of the company, to pay \$10,000 for the land. In the compromise and settlement between them Lasley's interest in the land cut little figure, and no definite part of the \$10,000 was set apart for the payment thereof. The purchase money for the land was blended in the settlement and compromise with other items, and Lasley thereby waived his right to assert a vendor's lien for any part of the \$10,000 as the purchase price of the land. 2 Jones on Liens (2d Ed.) p. 14, § 1072.

There will be a decree in favor of the complainant.

BIRCH v. STEELE.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1908.)

No. 1.869.

1. Judges (§ 2*)—Federal Judge—Creation of Office—Construction of Statute.

By Act Feb. 25, 1907, c. 1198, 34 Stat. 931 (U. S. Comp. St. Supp. 1907, p. 187), the President was authorized to appoint "a District Judge for the Northern judicial district of Alabama, * * * who shall possess the same powers and perform the same duties within the said Northern judicial district of Alabama as are now possessed by and performed by the District Judge of the United States in any of the judicial districts established by law." At the time of the passage of such act, by virtue of Act Aug. 2, 1886, c. 842, § 2, 24 Stat. 213 (U. S. Comp. St. 1901, p. 449), there was one District Judge for the Middle and Northern districts of Alabama. Held, that such act, in so far as it gave the existing judge and his successors jurisdiction within the Northern district, was not repealed by implication by the later act, the effect of which was merely to create an additional judge for said district.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. Bankruptcy (§ 221*)—Powers of Courts of Bankruptcy—Appointment and Removal of Referees.

Under Bankr. Act July 1, 1898, c. 541, § 34a, 30 Stat. 555 (U. S. Comp. St. 1901, p. 3435), which confers upon "courts of bankruptcy" the power to appoint and remove referees within the territorial limits of which they have jurisdiction, a District Court sitting as a court of bankruptcy, which is a court held by one judge, has power to appoint or remove a referee, although there may be another judge who is also authorized to hold the same court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 381; Dec. Dig. § 221.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes $165 \text{ F.}{-37}$

3. BANKRUPTCY (§ 441*)—SUPERINTENDENCE AND REVISION-JURISDICTION OF CIRCUIT COURT OF APPEALS.

Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), giving Circuit Courts of Appeals jurisdiction to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy, confers no power on such courts to control the discretion of a District Court in the appointment or removal of referees. [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 914; Dec.

Dig. § 441.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Alabama.

The averments of the petition are as follows:

"(1) Your petitioner avers that on, to wit, the 20th day of December, 1901, the Honorable Thomas G. Jones was appointed, and shortly thereafter was commissioned and confirmed as a United States District Judge for the Northern and Middle districts of Alabama, and duly qualified as such, and ever since has continued to discharge the duties of such office in both of said districts.

"Your petitioner further shows unto the court that on, to wit, the 10th day of April, 1907, the Honorable Oscar R. Hundley, while the Senate of the United States was not in session, was given a recess appointment as a judge of the Northern district of Alabama, and was duly commissioned as such judge by the President of the United States under the power and authority given him by an act of Congress providing for the appointment of a judge of the Northern district of Alabama, which act of Congress, in substance, provides that the President, by and with the advice of the Senate, shall appoint a judge for the Northern district of Alabama, who shall have all the qualifications of other federal judges, and all the power and authority of such judges in the Northern district of Alabama, and who shall receive the same remuneration, and who shall reside at Birmingham, Ala.

"Your petitioner further shows that the name of the Honorable Oscar R. Hundley was sent to the Senate of the United States for confirmation as United States District Judge when Congress convened in December, 1907, but that the Senate adjourned sine die on May 30, 1908, without action on the confirmation of such nomination; and that Honorable Oscar R. Hundley is now serving as District Judge under the provisions of the act above referred to, under a second recess appointment, which was made by the President, as petitioner is informed and believes, on the 1st day of June, 1908.

"Your petitioner avers that, as a matter of law, the legal effect of the act of Congress heretofore mentioned was to provide extra judicial force in the Northern district of Alabama by placing in said district a judge with equal and coordinate powers and authority with the then judge of the district, and did not otherwise change the authority and jurisdiction of Honorable Thomas G. Jones as judge of said Northern district of Alabama. Your petitioner avers as matter of law that the said act of Congress does not interfere with the jurisdiction of the District Judge of the Northern district who was serving at the time of its enactment, and that at the present time said District Judge is as much a judge in said Northern district as he was at the time of his qualification as such judge.

"(2) Your petitioner further represents and shows unto this honorable court that on the 30th day of May, 1908, he was duly and regularly appointed by the court of bankruptcy for the Northern district of Alabama as a referee in bankruptcy for the following counties, to wit, Jefferson, Walker, Bibb, Blount, Shelby, Fayette, Lamar, and St. Clair, in said Northern district; which order of appointment was made by the Honorable Thomas G. Jones, United States District Judge for the Northern and Middle districts of Alabama, while sitting as the court of bankruptcy for the Northern district of Alabama, at Mont-

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r indexes

gomery, Ala. Your petitioner avers that said order of appointment was made on Saturday and was mailed to the clerk of the United States District Court at Birmingham, Ala., and was by said clerk filed on Sunday, May 31, 1908. Petitioner has hereto attached a certified copy of said order of appointment, and prays that the same, as 'Exhibit A,' may be considered as a part of this petition for review, with leave to refer thereto as often as may be necessary.

"Your petitioner avers that at the time said order of appointment was made, the Senate of the United States had adjourned sine die without having confirmed the nomination of the said Honorable Oscar R. Hundley, who, as heretofore shown, was serving as a United States District Judge in the Northern district of Alabama under a recess appointment, and petitioner avers that as matter of law the said Honorable Oscar R. Hundley ceased to be a judge on the adjournment of the Senate without having confirmed his nomination, and that he could not again exercise the functions of his office until he qualified under a second recess appointment, and that the said Honorable Oscar R. Hundley did not qualify under his second recess appointment until June 1, 1908, all of which appears as matter of record in said District Court. Your petitioner avers that his said appointment as referee in bankruptcy was made by the Honorable Thomas G. Jones, United States District Judge for the Northern and Middle districts of Alabama, between the adjournment of Congress on the night of May 30, 1908, and the qualification of Honorable Oscar R. Hundley on June 1, 1908, under his second recess appointment, and that in said interim the Honorable Thomas G. Jones was the sole judge of both the Northern and Middle districts of Alabama, and as such was authorized to hold the court of bankruptcy to make administrative orders to be entered therein anywhere within the bounds of either district. Petitioner avers that courts of bankruptcy do not, under the act of bankruptcy, have any regular terms, and that it is not necessary, in order to give validity to an order made by a judge, that a clerk and marshal be present, or that the same be made in open court, but that the judge may convene the court at any time and anywhere within the territorial bounds of his jurisdiction. Petitioner avers that it has been the unchallenged custom and practice for the judge of the Northern and Middle districts to try and determine any case which could be disposed of without the intervention of a jury, or to make any order irrespective of the fact whether he happened to be in the district in which the litigation arose, provided he was at the time within the bounds of one of the districts. Petitioner avers that this practice has prevailed ever since the creation of the Northern and Middle districts, and that hundreds of thousands of dollars have been involved in cases which have been disposed of under this practice, and that such rule of practice has by long custom and usage become a rule of property.

"(3) Your petitioner further represents and shows unto this honorable court that on, to wit, the 1st day of June, 1908, the said Honorable Thomas G. Jones, being personally present and sitting as the court of bankruptcy of the Northern district of Alabama, at Birmingham, Ala., the court having been formally opened, made and entered an order reaffirming the appointment of your petitioner as a referee in bankruptcy made on the 30th day of May, 1908. said order above referred to likewise directed the clerk of the District Court for the Northern district of Alabama to refer each odd-numbered case in bankruptcy, filed in the counties in which your petitioner was given jurisdiction, to your petitioner as a referee in bankruptcy. The intent and purpose of said order was to give to your petitioner every other case filed in bankruptcy, the even-numbered cases going to N. L. Steele, who is serving as a referee in bankruptcy in said jurisdiction under an order of appointment made by Honorable Oscar R. Hundley, a District Judge, which order was revoked shortly after the same was made by Honorable Thomas G. Jones, a District Judge, because made without his consent, which order of revocation was afterwards set aside by Honorable Oscar R. Hundley. A copy of the order referring the odd-numbered cases to your petitioner and reaffirming petitioner's appointment is hereto attached, and marked 'Exhibit B,' and prayed to be taken as a part hereof. Petitioner avers that he qualified as a referee in bankruptcy under said appointment by taking the oath of office as required by law, as appears from Exhibit C, and by filing bond in the sum of \$2,000, as provided for in said order, which bond was duly approved by the said Honorable Thomas G.

Jones, as District Judge, as appears from Exhibit D.

"(4) Your petitioner further represents and shows unto this honorable court that on, to wit, the 8th day of June, 1908, N. L. Steele, who is the respondent to this petition for review, filed a petition in the District Court of the United States for the Northern district of Alabama, in bankruptcy, alleging, in substance, that he is a referee in bankruptcy in the same jurisdiction covered by your petitioner's approintment, and that he holds such office under an appointment by Honorable Oscar R. Hundley, United States District Judge, Northern district of Alabama; and that one-half of the cases in bankruptcy filed in said jurisdiction, which otherwise would be referred to him as referee in bankruptcy under a general order of the court, were about to be referred as they were filed to your petitioner by the clerk of the United States District Court, and that such references were to be made to your petitioner under an order of Honorable Thomas G. Jones, 'claiming to be a United States judge in the Northern district of Alabama,' and that the order made by the said Honorable Thomas G. Jones appointing your petitioner a referee in bankruptcy was improvidently made, in that the said Honorable Thomas G. Jones was in the Middle district of Alabama when such order of appointment was made; and that the order reaffirming such appointment and ordering a reference to your petitioner of one-half of the cases to be filed was likewise improvidently made, and that the said Honorable Thomas G. Jones did not have the authority or power to make such order. A certified copy of the petition filed by the said Steele, marked 'Exhibit E,' is attached to this petition for review and prayed to be taken as a part thereof, with leave to refer thereto as often as may be necessary for a proper presentation of said petition for review.

"Your petitioner further shows unto this honorable court that on the said 8th day of June, 1908, being the same day that the petition of the said Steele was filed in the office of the District Court clerk, but before the said petition was ever filed in said clerk's office, the same having been marked 'filed' by Honorable Oscar R. Hundley, Judge, the said Honorable Oscar R. Hundley, claiming to act as the court of bankruptcy for the Northern district of Alabama, on an ex parte hearing, made and entered an order which purports to revoke and annul the appointment of your petitioner as a referee in bankruptcy, and which likewise purports to set aside and hold for naught the order of Judge Thomas G. Jones, sitting as the court of bankruptcy in the same jurisdiction, ordering the reference of the odd-numbered cases filed in bank-

ruptcy to your petitioner as a referee in bankruptcy.

"Your petitioner avers that the said order of Honorable Oscar R. Hundley, Judge, was made and entered before petitioner had any knowledge of the filing of the petition on which the same is based, although petitioner should have been made a party respondent to said petition. Petitioner further avers and shows to this court that he did not know that the petition to remove him from the office which he held had been filed until after final action had been taken by Judge Hundley thereon, and that although your petitioner had a vital interest in said proceeding, which proceeding was commenced by a petition containing statements purporting to be facts and verified by the said Steele, and signed and presented by counsel for said Steele, and although petitioner was in the federal building when action was taken on said petition, he had no knowledge or notice of the same, and was thus deprived of the right to file an answer to said petition by himself or by counsel, or defend the same. Hundley, which copy is marked 'Exhibit F,' and is prayed to be taken as a part of this petition for review. Your petitioner likewise attaches a copy of an opinion subsequently rendered by Judge Hundley in support of said order, and prays leave to refer thereto. Petitioner likewise attaches as Exhibit G the oral opinion delivered by Judge Hundley in support of such order, and, as Exhibit H, the written opinion referred to in the oral opinion.

"Your petitioner avers that the order made and entered by Judge Hundley which purports to revoke and annul the appointment of your petitioner as referee in bankruptcy by Judge Jones, and the order which sets aside and holds for naught the order of Judge Jones referring the odd-numbered cases in bank-

ruptcy to your petitioner, were made without the knowledge, consent, or sanction of Judge Jones and against his will.

"Your petitioner avers as matter of law that Judge Hundley violated the law, abused his authority, and exceeded his power in making the order which purports to remove your petitioner from office, and likewise to vacate the order made by Judge Jones referring the odd-numbered cases filed in bankruptcy to your petitioner as referee in bankruptcy, and that such order should not have been made and is illegal without the consent of the other District Judge who gave life to the revoked orders. Your petitioner further avers that when there are two judges of a court, either associate or coördinate, the one cannot, without the sanction or consent of the other, remove an officer of the court who has been appointed by the judge who does not concur in the order of removal. Your petitioner further avers that, under the provisions of the bankruptcy act, the referees whose appointment provided for therein must be appointed by the court of bankruptcy, and that neither the power of appointment nor removal is in the judge, and where more than one judge constitutes the court of bankruptcy, neither alone, against the will of the other, can appoint or remove such referee. Your petitioner further avers that the legal effect of the order of Judge Hundley in revoking without notice the order of Judge Jones was to constitute Judge Hundley an appellate court to which the order of Judge Jones was taken, and deny your petitioner the right to be heard on the appeal or review in such court of appeal.

"Your petitioner avers that a question of great public interest is involved in this petition for review; that the confusion which will naturally follow the revocation by one judge of the orders made by a judge of equal power, authority, and jurisdiction will seriously embarrass the litigants of the district, and will likewise tend to bring the administration of law and justice in the district into confusion, and impair confidence in the legality of the acts of the officers of the bankrupt court; and that, if the practice continues of one judge setting aside the order of the other, the litigants of the district can never determine their rights until both of the District Judges have passed on the question involved and reached the same conclusion. Your petitioner herewith exhibits a correct transcript of the record of all proceedings of said District Court relating to the matter hereinabove set forth, duly certified to by the clerk of said court, and prays that the same be taken and considered by this

court in connection with and as a part of this petition as Exhibit I.

"The premises considered, your petitioner prays that N. L. Steele be made a party respondent to this petition for review, and that he be required by an order of this court either to defend or default the case. Your petitioner further prays that this honorable court assume original jurisdiction of this petition, and that a mandate issue from this court suspending the operation of the order made by the Honorable Oscar R. Hundley, a District Judge of the Northern district of Alabama, annulling the order of Honorable Thomas G. Jones, a United States District Judge for the Northern and Middle districts of Alabama, appointing Alexander C. Birch a referee in bankruptcy at Birmingham, Ala., pending a hearing of this petition for review on the merits of the case. Your petitioner likewise prays that the order of the said Judge Hundley vacating and holding for naught the order of Judge Jones requiring the clerk of the District Court for the Northern district of Alabama to refer the odd-numbered cases in bankruptcy to your petitioner, as referee in the jurisdiction for which petitioner was appointed, he suspended pending the hearing by this honorable court of this petition for review on the merits of the case.

"On a final hearing of this petition for review, your petitioner prays that this honorable court will enter an order revoking and annulling the order made by the Honorable Oscar R. Hundley, a United States District Judge for the Northern district of Alabama, which order revoked and annulled the order of Honorable Thomas G. Jones, a United States District Judge for the Northern and Middle districts of Alabama, appointing your petitioner to the office of referee in bankruptcy. Your petitioner further prays that on a final hearing of this petition in this honorable court that an order be made revoking and annulling the order of the said Judge Hundley which set aside and held for naught the order of Judge Jones requiring the reference of the odd-

numbered cases filed in bankruptcy in the jurisdiction to which petitioner was

appointed as a referee in bankruptcy.

"If in any wise the petitioner is mistaken in the relief herein prayed for, petitioner hereby prays for any other, further, general, or different relief as the premises may entitle him to receive, and as in equity and good conscience may seem meet and right unto this honorable court, and as in duty bound petitioner will ever pray, etc.

Alex. C. Birch, Petitioner."

Nenian L. Steele appeared and moved that the petition be dismissed for want of jurisdiction in this court. The cause was submitted on both the motion and the merits, and was argued by counsel. The several exhibits referred to in the petition, but not copied in this statement, were submitted to the court as parts of the petition.

For opinions delivered in the court below relating to this case, see In re Steele (D. C.) 156 Fed. 853; In re Steele (D. C.) 161 Fed. 886;

Ex parte Steele (D. C.) 162 Fed. 694.

James Weatherly, Jno. P. Tillman, E. H. Cabaniss, and Sydney J. Bowie (Tillman, Grubb, Bradley & Morrow, of counsel), for petitioner.

Samuel D. Weakley, Edmund H. Dryer, A. Leo Oberdorfer, and Sterling A. Wood (J. B. Weakley, of counsel), for respondent.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

SHELBY, Circuit Judge (after stating the facts as above). A great many questions are directly or indirectly raised by the allegations of the petition and the arguments of counsel, oral and written, but they can all, so far as they are material, be disposed of by the decision of three questions: (1) Is the statute making the judge of the Middle district also judge of the Northern district still in force? (2) Does the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) require the concurrent action of both the judges to make valid orders appointing and removing referees? And, (3) on the facts stated in the petition, should this court superintend and revise the action of the court of bankruptcy in the appointment and removal of referees?

1. By the act of August 7, 1848, Alabama was divided into three districts, called the Southern, Middle, and Northern districts. Rev. St. § 532 (U. S. Comp. St. 1901, p. 317). The statutes at first allowed the appointment of only "one District Judge, who shall be District Judge for each of the districts included in the state." Id. § 552 (U. S. Comp. St. 1901, p. 447). This condition continued until August 2, 1886, when an act was passed for the appointment of a District Judge for the Southern district, which act provided "that the jurisdiction of the present District Judge for the several districts of Alabama, and his successors, shall hereafter be confined to the Northern and Middle districts of said state." Act Aug. 2, 1886, c. 842, § 2, 24 Stat. 213 (U. S. Comp. St. 1901, p. 449). Prior to the passage of this act, the Alabama District Judge's jurisdiction had extended to all three districts. The effect of this act was only to relieve him, and his successors, of jurisdiction in the Southern district. At the time of the passage of this act providing for the appointment of a judge for

the Southern district, Judge John Bruce was the District Judge for the Alabama districts. He continued to exercise jurisdiction in the Middle and Northern districts till his death, when Hon. Thomas G. Jones was, on December 20, 1901, appointed his successor. For brevity, he will be referred to as the first judge. He was appointed and commissioned judge of the Middle and Northern districts of Alabama. and, by the letter of the statute quoted, had jurisdiction in both districts. On February 25, 1907, an act was passed (Act Feb. 25, 1907, c. 1198, 34 Stat. 931 [U. S. Comp. St. Supp. 1907, p. 187]) providing for the appointment of "a District Judge for the Northern judicial district of Alabama." On April 10, 1907, Hon. Oscar R. Hundley was appointed District Judge under this act. He will be referred to as the second judge. The act of February 25, 1907, contains no express repeal of the prior act giving the first judge jurisdiction in the Middle and Northern districts. It contains, in fact, no repealing clause of any kind. The question, therefore, is, whether the act last passed repeals the prior act by necessary implication.

It has been often held by the Supreme Court that repeals by implication are not favored, and it is the unquestioned rule that, "if it be possible to reconcile two statutes, one will not be held to repeal the other." The later statute does not repeal the former, "unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the Legislature to repeal must be clear and manifest." Red Rock v. Henry, 106 U. S. 596, 601, 1

Sup. Ct. 434, 27 L. Ed. 251.

A repeal by necessary implication does not occur when the provisions of both statute can stand together. The first judge, by a plain statute, is given jurisdiction in the Northern district. The later statute authorizes the appointment of a judge for the Northern district. The two statutes may stand together, and are not in irreconcilable conflict, we think, because the first statute causes the first judge to remain the sole judge of the Middle district and to remain a judge of the Northern district, and the second statute makes the second judge a judge of the Northern district. They each have a field of operation, without conflict. The statutes do not become irreconcilable unless we assume what is not true—that there cannot be two judges of one Dis-

¹An act providing for a United States judge for the Northern judicial district of Alabama.

[&]quot;Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the President of the United States, by and with the advice and consent of the Senate, shall appoint a District Judge for the Northern judicial district of Alabama, who shall possess and exercise all the powers conferred by existing law upon the judges of the District Courts of the United States, and who shall possess the same powers and perform the same duties within the said Northern judicial district of Alabama as are now possessed by and performed by the District Judge of the United States in any judicial districts established by law, and he shall receive the same compensation now or hereafter prescribed by law in respect to other District Judges of the United States: And provided, that after appointment the judge appointed under this act shall reside at Birmingham, in said district.

[&]quot;Approved, February 25, 1907."

trict Court. When Congress provided for the appointment of a judge of the Southern district, the act provided that the jurisdiction of the judge of the several districts should be confined to the Northern and Middle districts, thereby making it plain that the judge of the Southern district should be the sole judge of that district. But there is nothing of the kind in the act in question. There is no word or phrase that shows an intention to confine the judge of the Middle and Northern districts to the former district. We cannot interpolate such words by construction. If the last act had provided for the appointment of a judge of the Middle and Northern districts, could it be claimed that Congress had deprived the first judge entirely of jurisdiction? Or, if the first judge had been judge only of the Northern district, and the last act had provided for a judge of the Middle and Northern districts. could it be held that there was a repeal by necessary implication? If there was irreconcilable conflict in the one case, there would be in the other.

There are other considerations besides the letter of the act that lead to the same conclusion. No provision is made for cases already submitted to the first judge, as would probably have been done if his authority was to cease. Congress, on April 14, 1906, passed an act requiring terms of the courts to be held at Birmingham, in the Northern district, twice each year, on the first Mondays in March and September, and "that said courts shall remain in open session for the transaction of business at least six months in each calendar year." Act April 14, 1906, c. 1625, 34 Stat. 114 (U. S. Comp. St. Supp. 1907, p. 105). There are three other places where courts are required to be held twice a year in the Northern district. It will probably be difficult for the second judge to hold all these terms unaided by the first judge. This act requiring six months' open session, and specially providing for the assignment of other judges, shows that Congress was informed as to the fact that additional judicial force was needed in the Northern district. Under the circumstances, it is quite probable that it was its intention, in providing a judge for the Northern district, not to dispense with the services of the first judge, whose entire time would probably not be required by the work in the Middle district.

The fact that the exercise of authority by each of the two judges, as shown by the record, may have caused a condition unusual and one likely to be detrimental to the public interest, cannot influence our decision or extend the authority of this court. Nor does the condition indicate that Congress would not have intended to confer jurisdiction on two District Judges in one district. We know that it is usual in the federal judicial system to have in a district several judges of concurrent authority in the several Circuit Courts, and that one of them has the power and authority to vacate the orders of another, but such authority causes no embarrassing conflict, and is usually exercised in the public interest and under settled rules controlled by law and judicial courtesy. Ide v. Crosby (C. C.) 104 Fed. 582, and cases there cited.

Our attention is called to the course of legislation in providing for the appointment of judges, and it is argued that the failure of Congress to use the words, "an additional judge," shows the intention that the second judge should be the only judge of the Northern district. Several of such statutes are cited, and the following is quoted as a sample of such legislation:

"Be it enacted, etc., that there shall be in the district of Minnesota an additional District Judge, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall possess the same qualifications and have the same power and jurisdiction now prescribed by law in respect to the present District Judge therein." Act Feb. 4, 1903, c. 402, 32 Stat. 795 (U. S. Comp. St. 1907, p. 183).

It is apparent that the statutes referred to were not intended to meet a case like the one provided for by the act in question here. The judge to be appointed under the act here in question was to be a judge of a named district only, when the existing judge in that district was judge also of another district. That fact may account for the phraseology of the bill, and show why the form of the acts referred to could not be well followed. To provide that a second judge was to "possess the same qualifications and have the same power and jurisdiction now prescribed by law in respect to the present District Judge therein" might be construed to extend the jurisdiction of the second judge to both the districts in which the first judge had jurisdiction. Instead, therefore, of referring to the jurisdiction of the first judge as the measure of the authority of the second judge, there is a general reference to the powers of District Judges in their districts. We cannot assent to the view that the peculiar language of the bill was used with the studied purpose of excluding the first judge from the Northern district when that could have been otherwise accomplished with more brevity and clearness. The formula of the act of August 2, 1886, could have been used, confining the first judge and his successors. to the Middle district, or, the second judge could have been named as the sole judge of the Northern district. It is true, on the other hand, that the use of the words, "an additional judge," would have made the meaning plainer. But we must remember that the burden of showing the repeal is on the respondent. There was existing a statute giving the first judge jurisdiction in the Northern district, and words of exclusion are required to effect the repeal or withdrawal of that jurisdiction. As no such words are used, and as there is no irreconcilable conflict, there can be no repeal unless the later statute covers the whole ground occupied by the earlier statute and is clearly intended as a substitute for it. As was said in New London N. R. R. Co. v. B. & A. R. R. Co., 102 Mass. 386, "a later statute, containing provisions, though merely affirmative in form, plainly repugnant to those of a former statute, repeals it as absolutely as by a negative clause." If it were the law that there could be but one District Judge of a judicial district, it might be successfully contended that the lawful appointment of a second judge excluded the first judge. In that case, only one judge being possible, two statutes, each providing for one judge, would be in conflict, and the last statute would repeal the first. It would cover the whole ground, for only one judge could stand on it. But when it is conceded that a second judge may be, and frequently is, provided for, it follows that the statute merely providing for the appointment of

the second judge is not necessarily a substitute for the statute which provided for the appointment of the first. As there may lawfully be two judges, it takes something more than a provision for the appointment of the second to displace the first.

Applying the rule announced in Red Rock v. Henry, supra, we hold

that the later act does not repeal the former.

2. It is contended by the learned counsel for the petitioner that it requires the "concurrent action of both judges to exercise the administrative power of appointment of a referee to hold office for a stated period"; and that the same concurrent action of the two judges is required to effect the removal of a referee. The solution of the question raised by this contention depends on the construction and meaning of the bankruptcy act of 1898. The relevant language of the statute is:

"Courts of bankruptcy shall * * appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause." Bankruptcy Act (Act July 1, 1898, c. 541, § 34a, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435]).

Courts of bankruptcy include the District Courts of the United States. Id. § 1, subd. 8. The Constitution confers the power on Congress to vest in the courts the authority to appoint referees. Const. art. 2, § 2; article 1, § 8. It must be kept in mind that Congress has not attempted to confer the power to appoint referees on the judge or judges, but it is conferred on the courts of bankruptcy. If the statute conferred the power of appointment on the two judges, a different question would be presented. A United States District Court, which is, under the act, a court of bankruptcy, is a court held by one judge. There may be by statute, or by assignment of a Circuit Judge, two District Judges with authority to hold the District Court at the same time and in different places in the district designated by law, but at each place where the court is held it is a court held by one judge. No provision is made for two District Judges to sit together and hold the District Court. This is conceded to be true, and is not questioned when the court sits in the discharge of its ordinary judicial duties as a District Court or as a court of bankruptcy. We find no word in the statute indicating a different plan of court organization or mode of procedure when the court of bankruptcy sits to appoint or remove a referee. A District Court or a court of bankruptcy may be held for all purposes by one lawful and authorized judge. Where a court is composed of a number of judges, and the power of appointment of an officer is conferred on such court, the appointment may be made by the court when held by the number of judges required by law to hold the court. Warner v. People, 2 Denio (N. Y.) 272, 43 Am. Dec. 740. When the power of appointment or removal of an officer is conferred on a court which may be held by one judge, the power may be exercised by the court so held, although there may be another judge who is also authorized to hold the same court. This follows, we think, from the fact that the power is conferred on the court, and not on the judge or judges. When a lawful District Court convenes or sits, it can proceed to make the appointment or the removal of a referee just as it proceeds to make other orders.

We have carefully examined the several cases cited on this point by the learned counsel for the petitioner, and we do not deem them controlling. Where authority is conferred by statute on a board of magistrates by a vote of each magistrate to elect a treasurer (Smyth v. Darley, 2 H. L. Cas. 789), or on two overseers of the poor to exercise jointly a designated power (Downing v. Rugar, 21 Wend. [N. Y.] 178, 34 Am. Dec. 223), or on judges, or a majority of them, to fix, at a meeting of the judges, special terms of court (Merchant v. North et al., 10 Ohio St. 262), and in similar cases, a different rule from the one we have announced would obtain. The statute in each case must control. Those cases have no application to the case at bar, for, in them, authority conferred on certain individuals or officers collectively is considered. Here, the power and authority in question is conferred on the court, and the requirement of the statute is met when the court exercises the authority.

3. The authority to superintend and revise in matters of law proceedings of the court of bankruptcy is conferred on this court by section 24b of the bankruptcy act. The material order sought to be revised in this proceeding is an order removing the petitioner from the office of referee. We have already quoted the statute which authorizes the court of bankruptcy to appoint and remove referees. By the express terms of the act, the bankruptcy courts "may, in their discretion, remove them because their services are not needed or for other cause." If the position of the petitioner could be sustained, that the order removing him could not be legally made without the concurrent action of both the judges, a case might be presented authorizing the interference of this court. But we have held that position not well taken, and that a valid order of appointment or removal of a referee may be made by the court of bankruptcy held by one judge. Our conclusion on that question is fatal to the petitioner's right to relief. The right and power to remove is in the court of bankruptcy, to be exercised at its discretion. We find neither in the statute nor in the adjudged cases any authority conferred on this court to control the court of bankruptcy, on the facts alleged in the petition, in the exercise of its discretion in making the order of removal.

Congress, exercising an authority conferred by the Constitution, has vested the power to appoint referees exclusively in the courts of bankruptcy, and, when appointed, the referee holds the office at the discretion of the court that appointed him. It follows, we think, that this court can have no control over the appointment or removal, nor can it make inquiry into the grounds of removal. As was said by the Supreme Court in a case involving a similar question:

"If the judge is chargeable with any abuse of his power, this is not the tribunal to which he is amenable; and as we have no right to judge upon this matter, or power to afford redress, if any is required, we abstain from expressing any opinion upon that part of the case." In re Hennen, 13 Pet. 230, 260, 10 L. Ed. 138.

The petition to superintend and revise is disallowed and dismissed.

HARDIE v. SWAFFORD BROS. DRY GOODS CO.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1908.)

No. 1,620.

1. BANKRUPTCY (§ 414*)—CONSTRUCTION OF BANKRUPTCY ACT—RIGHT OF BANKRUPTCY TO DISCHARGE.

One of the main objects, if not the most important, of Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), is to release the honest but insolvent debtor from the burden of his debts, in the interest of his family and the general public, and the burden rests upon one opposing a bankrupt's discharge to bring the case clearly within some one of the exceptions enumerated in the act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720; Dec. Dig. § 414.*]

2. BANKRUPTCY (§ 407*)—GROUNDS FOR REFUSAL OF DISCHARGE—FALSE STATE-MENTS BY PARTNER.

A materially false statement in writing made by a partner in the ordinary course of business of the partnership in buying merchandise for the purpose of obtaining goods on credit, and by means of which they were so obtained by the firm, is not ground for refusing a discharge in bank-ruptcy, under Bankr. Act July 1, 1898, c. 541, § 14b, cl. 3, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), to another partner who did not participate in the wrongful act and had no knowledge of it.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

Shelby, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Texas.

For opinion below, see 143 Fed. 607.

Mason Williams, for appellant. M. L. Crawford, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is an appeal from a judgment in bankruptcy refusing a discharge. The facts of the case are undis-

puted and as follows:

On May 15, 1905, the firm of A. F. Hardie & Co. and the individual members thereof, to wit, Alva Finley Hardie, his son, James Mallory Hardie, and Max Kaliski, were, upon the petition of creditors, adjudged bankrupt. An application of discharge was filed by the members of the firm on the 27th of October following. Opposition to the discharge having been filed by the Swafford Bros. Dry Goods Company, two of the partners, A. F. Hardie and Kaliski, withdrew their prayer for discharge, leaving the application to stand in behalf of J. M. Hardie alone. The principal ground of opposition urged by the Swafford Bros. Dry Goods Company was the following:

"That on, to wit, the 13th day of February, 1905, the said firm made and delivered to the said Swafford Bros. Dry Goods Company a statement in writing, materially false, respecting the condition of the business of the said firm. By the said statement it appears that the said firm had assets of the value of \$115,116. Said statement further shows that the said A. F. Hardie had, in real

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

estate and real estate notes, \$60,000. The said Swafford Bros. Dry Goods Company shows that the said statement was absolutely false, in this: that the said A. F. Hardie did not have real estate or real estate notes of the value of \$60,000, or anything approximating that amount; that the value of the assets of the firm did not exceed \$60,000, and that the liabilities of the said firm were approximately \$100,000; that while the said statement shows the firm to be worth, over and above all liabilities, the sum of \$90,000, still, in truth and in fact, the said firm was then insolvent. The said statement was made by the said firm to the Swafford Bros. Dry Goods Company for the purpose of inducing the said Swafford Bros. to sell to the said A. F. Hardie & Co. goods, wares, and merchandise on credit, and that they relied upon the truth of the said statement and did sell to the said A. F. Hardie & Co. goods, wares, and merchandise, aggregating the sum of \$1,500 and upward, which said goods, wares and merchandise have never been paid for."

After taking proofs, the referee found the facts substantially as set forth in the specification of opposition referred to, and made this additional finding:

"I find that said statement was made by Alva Finley Hardie, and without the knowledge of said James Mallory Hardie; but at that time James Mallory Hardie was a member of the aforesaid partnership, and bound by its statements issued as aforesaid."

It is clearly shown by the record that, after A. F. Hardie made the statement, the Swafford Bros. Dry Goods Company shipped merchandise to the firm of A. F. Hardie & Co. at San Antonio, amounting in value to about \$1,300, and that the merchandise was received by the firm and commingled with the stock on hand.

The matter to be decided upon this appeal is correctly stated by the

trial judge as follows:

"The only question of law to be determined is whether the fraud thus committed by A. F. Hardie may be interposed as a bar to the discharge of J. M. Hardie, who, it is conceded, did not participate in the wrongful act and had no knowledge of its perpetration."

The trial judge in his opinion, found in the record, cites Parsons on Part. (3d Ed.) 163; Story on Part. 166; Collier on Part. §§ 445, 447; and Strang v. Bradner, 114 U. S. 561, 562, 5 Sup. Ct. 1038, 29 L. Ed. 248, and cases there cited, all to the effect, as summed up in Strang v. Bradner, that each partner is the agent and representative of the firm with reference to all business within the scope of the partnership. And if, in the course of the partnership business and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility upon the ground that such misrepresentations were without their knowledge. The trial judge then proceeds to say as follows:

"While the cases cited do not decide the very question involved in the present controversy, they nevertheless distinctly hold that a fraud committed by one partner in the course of the partnership business renders the firm pecuniarily liable to the aggrieved party for the wrongful act of the offending member. In the case before the court, it is shown by the record that A. F. Hardie was the financial agent of the firm and one of its buyers; that the false statement was made by him in the course of the partnership business, and for the benefit of the firm, and that the firm actually received and appropriated the fruits of the fraudulent transaction. If so, under the facts

stated, the law would impute the fraud of the delinquent partner to innocent members of the partnership to the extent of imposing upon the firm a pecuniary liability, no sound reason is perceived why the principle should not be applied to the present proceeding by refusing a discharge to a member not assenting to the fraud. The court is of the opinion that the principle is applicable to both cases, and hence, that the prayer of J. M. Hardie for a discharge should be denied."

The authorities cited above are indisputably correct as to the propositions declared, but we doubt if they should be permitted to control the case. So far as they go, the liability of the innocent partner for the torts of the wicked partner committed within the scope of the partnership is based on the application of the principles of agency, and is restricted to pecuniary liability alone. In this country, since the abolition of imprisonment for debt, the punishment of the innocent principal or the innocent partner for the wrong committed by the agent or partner has not been pushed further than to affect business reputation and to impose pecuniary liability. It is said that the discharge of a bankrupt under the present bankruptcy law is an act of grace, merely incidental to the general purpose, and in fact could be refused entirely; and it is argued from this that the provisions of the law relating to the discharge of bankrupts should be construed against the bankrupt, and all implications and doubts should be resolved against him.

Since the days of Queen Anne (4 & 5 Anne, c. 17, § 19) the discharge of the prima facie honest bankrupt and his future estate and effects has been provided for in every bankruptcy law; at first with many restrictions, even requiring the consent of creditors; and it is provided in our last act that the bankrupt, whether voluntary or involuntary, applying for a discharge, shall receive it, unless—

"he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed or concealed any of his property with intent to hinder, delay or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

All of these exceptions, except the fifth, are based on criminal conduct, or actual dishonesty quasi criminal in nature, and this great advance from the early days when insolvency was treated as a crime goes to show that the discharge of the honest bankrupt is favored, and the opposition to a discharge under the present law is burdened with the necessity of bringing the inculpatory facts alleged strictly within the exceptions enumerated in the law.

Originally, in bankrupt laws, the discharge of the bankrupt may have been incidental, and the main purpose the equal distribution of his goods among creditors; but to say it now, and of the present law, we must shut our eyes to the actual practice in our courts. In nearly all and every voluntary bankruptcy brought under the present law the administration or distribution of the bankrupt's property has been practically concluded before filing petition, and the sole object of the petitioner is to be relieved of his debts, and in number the voluntary cases are about four to one of the involuntary. See Report, Dept. of Justice, 1907. And the same may be said of the voluntary cases under the act of March 2, 1867, c. 176, 14 Stat. 517, which was passed mainly to relieve the unfortunate debtors ruined by and through the vicissitudes of the great Civil War.

For these considerations, we are disposed to deny that in the present bankruptcy law the discharge of the honest debtor is a mere incident which could have been omitted without impairing its symmetry and efficiency; and, on the contrary, to assert that the release of the honest, unfortunate, and insolvent debtor from the burden of his debts and restore him to business activity, in the interest of his family and the general public, is one of the main, if not the most important, objects of the law.

The adjudged cases called to our attention and bearing on the question herein, favor a liberal construction of section 14 of the bankruptcy law in the matter of the discharge of honest bankrupts. Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427). In Boyd v. Arnold Loucheim & Co., 149 Fed. 187, 79 C. C. A. 135, this court ordered a discharge under circumstances as follows:

"The referee specifies the four grounds of objection that were made by the creditors to the application for discharge, and distinctly finds that the mistake, if any, that was made in the verified schedules, was not made willfully and fraudulently, nor with the intention of concealing any interests from his creditors; that the 1,579 acres of land was not transferred to his wife, nor procured to be transferred to her, for the purpose of defrauding, hindering, or delaying his creditors; that the indefinite interest which the bankrupt (in the opinion of the referee) had in the 1,579 acres of land was not willfully and fraudulently concealed from his trustee; that the \$85 referred to in the fourth objection, which the bankrupt drew from the Boyd Mercantile Company, another bankrupt, and had same charged to his personal account, was not done by him for the purpose of defeating the bankruptcy act; that the bankrupt has fully complied with the requirements of Congress and the orders of court touching his bankruptcy; and that all notices, wherever required, have been given in the manner and length of time required by the bankruptcy act and the rules of court. These findings of the referee, so far as they are disputed by the appellees, are, in our opinion, amply supported by the testimony.'

And see In re Blalock (D. C.) 118 Fed. 679.

In Hyman's Case (D. C.) 97 Fed. 195, the wife was held not to be liable for the fault of her agent (her husband) in not keeping true books of account, and to the same effect see In re Meyers (D. C.) 105 Fed. 353.

In Schultz' Case (D. C.) 109 Fed. 264, the innocent partner was held not to be liable for the neglect of his copartner in not keeping true books of account.

In re Dresser (D. C.) 13 Am. Bankr. Rep. 637, 144 Fed. 318, is well reasoned and is directly in point. The referee reported:

"The bankrupt Riess seems to have had no share in making the later 'short statement' relied upon by the objecting creditors, and they do not claim that he was personally concerned in the alleged fraud other than as a partner of Dresser. It is true that, on principles of agency, Riess is liable civiliter for

the fraudulent acts of Dresser which were clearly within the scope of the partnership business and for the firm's benefit. Schroeder v. Frey, 60 Hun, 58, 14 N. Y. Supp. 71; Bradner v. Strang, 89 N. Y. 299, affirmed in Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248.

"The discharge in bankruptcy would not therefore affect a debt so created. The present act specifies, among nondischargeable debts, 'liabilities for obtaining property by false pretenses or false representations.' Act July 1, 1898,

c. 541, § 17a, cl. 2, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428).

"But these considerations do not affect the right of an innocent partner to a discharge under section 14b, cl. 3, of the amended bankruptcy act of Fabruary 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026). The right to a discharge is distinct from the effect of a discharge. In re McCarty (D. C.) 7 Am. Bankr. Rep. 40, 111 Fed. 151; In re Marshall Paper Co., 4 Am. Bankr. Rep. 468, 102 Fed. 872, 43 C. C. A. 38.

"It was held under the act of 1867, which in section 33 provided that 'no debt created by fraud or embezzlement of the bankrupt shall be discharged,' that 'fraud' as used in that section meant 'positive fraud in fact involving moral turpitude or intentional wrong as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankruptcy system.' Neal v. Scruggs, 95 U. S. 704, 24 L. Ed. 586 (by Mr. Justice Harlan).

"Therefore, although, on principles of agency and partnership, a discharge may not relieve Riess from liabilities for obtaining property by false representations' (a question not to be decided here), it is considered that, not having himself participated in the making of the short statement relied on by the banks, the fraud of his partner cannot under these circumstances be imputed to him, and his discharge cannot therefore be refused. Matter of Hyman (D. C.) 3 Am. Bankr. Rep. 169, 97 Fed. 195; Matter of Meyers (D. C.) 5 Am. Bankr. Rep. 4, 105 Fed. 353."

This report and recommendation were confirmed by the court.

As we find no reason in the law (and, certainly, none in business or morals) why an honest bankrupt should not be discharged, we answer the question, stated by the trial judge in this case, in the nega-

It is therefore ordered that the decree of the District Court be reversed, and the decree now rendered here that the petition of James Mallory Hardie for a discharge in bankruptcy be, and the same is hereby, granted.

SHELBY, Circuit Judge (dissenting). After the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3418]) had been in force nearly five years, Congress discovered that section 14 was too liberal in permitting discharges. It was found that the bankrupt could obtain a discharge when it seemed inequitable and unjust for him to have it. There were in the act only two grounds named on which the granting of the discharge could be opposed: When he has (1) committed an offense punishable by imprisonment as herein provided; or (2) when he has, with intent to conceal his true financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained. Section 14b. Clause 1 relates only to criminal offenses, and clause 2 involves intentional wrong. On February 5, 1903, the act was amended by adding four additional grounds upon which the right to a discharge might be contested. This case involves the construction of the third ground added by the amendment, which provides that the court must discharge the applicant, unless he has (3) "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." Section 14b, as amended (chapter 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026]). This clause involves no specific intent, nor offense punishable under the act. The court below held that it was applicable to a partnership and to the members thereof, and refused a discharge to a member because the firm, without the knowledge of the applicant, acting by another member, had obtained property on a false written statement, contrary to the terms of the clause. The question, when the principle involved is considered, is whether a person is barred of his discharge by clause 3 when he obtains the property by a materially false statement made by an agent acting within the

scope of his authority. Section 14 is applicable to "any person" who may be adjudged a bankrupt, including corporations and partnerships. Section 1 (19), and sections 4 and 5. Clause 3 of the amendment is therefore, by the words of the act, made applicable to partnerships and corporations. A partnership, by the terms of the act, "during the continuation of the partnership business, or after its dissolution and before final settlement thereof, may be adjudged a bankrupt." Section 5. The partnership is made a separate entity, and, as such, subject to the terms of the act. Under the act before its amendment, a discharge did not release the bankrupt from a debt for property "obtained by false pretenses or false representations." Section 17. The amendment, therefore, was not to prevent a discharge from the liability for property obtained by the materially false statement, and the discharge, neither before nor since the amendment, releases the bankrupt from such liability. But it releases him from his general debts, and it was to prevent this release in the cases covered by the amendment that the several grounds of opposition to the discharge were enacted. The evil and wrong to be corrected by clause 3 was the obtaining property on credit by false written statements. Before its enactment, the bankrupt might add largely to his estate by making false written statements, and yet obtain a discharge as to all of his debts (with the few statutory exceptions), except the debt to the person to whom he made the false representations. The purpose of the amendment was to prevent this, and to deprive the bankrupt who made such statement of his discharge. The evil is the same whether the bankrupt acts himself or by an agent. The creditor loses his property because of his reliance upon a materially false written statement. And it appears to me wrong to permit the bankrupt to take shelter behind his agent's act while he profits by the fraud committed in his name.

The construction placed on the statute by the opinion just read tends, I think, to defeat the purpose of the amendment. Mercantile business is to a large extent conducted by firms and corporations, and, if the doctrine of agency is to have no application in the enforcement of clause 3, the false written statement made to obtain credit can be made without risk as to obtaining the discharge. A firm may

be composed of ten members, and only one, as managing partner, may make the false statement and obtain property for the firm, and nine members may be discharged, although the firm has reaped the benefit of the fraud. And every member can secure his discharge if the firm has an agent, who is not a member thereof, to make a false statement. The assets of the firm being distributed, and it dissolved and out of business, its failure to obtain a discharge as a partnership would not matter to the discharged members. Firm debts are provable debts also against each member as an individual bankrupt, and the partnership debts are discharged, so far as they are individual liabilities, by the discharge of the partner in individual proceedings. 2 Remington on Bankruptcy, § 2796. While a partnership is a separate entity, the substantial thing that makes it is the individual members, and to discharge them is to emasculate clause 3 so far as it is applicable to partnerships. A single person engaged in business may make a materially false statement in writing through his managing clerk or agent, and thereby obtain credit and property. Yet, on the principle announced, he would be entitled to his discharge on his denial of guilty knowledge of the false statement, although he had received the fruits of the fraud, unless his knowledge of his clerk's action could be affirmatively proved—which, in practice, would usually be impos-

And is clause 3 not to be applied to bankrupt corporations? If so, it can only be done by holding the principal, when he or it applies for a discharge, bound by the materially false written statement made by the agent within the scope of his authority. If the idea is to prevail that the discharge is not to be barred by the false written statement made by an agent acting within the scope of his authority, clause 3 of the amendment cannot be applied to partnerships at all, nor to corporations, for both must act by agents. And that view is in conflict with several provisions of the act. It seems to me that the only way to give effect to the intention of Congress, as shown by clause 3, is to hold that it is applicable to partnerships and corporations (In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38) which become bankrupts, and that when the former, or the individual partners, seek a discharge from the partnership debts, neither can be discharged if the partnership, acting by a duly authorized agent, has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit.

The cases cited in the opinion of the court, with one exception, relate to instances where the discharge of the bankrupt was opposed on a ground involving an "offense punishable by imprisonment" (clause 1), or where a forbidden act was done with a wrongful or fraudulent "intent." Such cases are distinguishable from a case arising under clause 3, where no question of punishable offense is involved, and where Congress has not used the word "intent," nor its equivalent, but has made a described act, done for the purpose of obtaining property, a bar to a discharge.

The only case cited that relates to the amendment in question is In re Dresser & Co. (D. C.) 13 Am. Bankr. Rep. 637, 144 Fed. 318.

The excerpt from that case quoted in the opinion of the majority appears in the report of the referee. No exception was taken to this conclusion of the referee, and the court, in deciding the case, makes no allusion to that part of the referee's report (144 Fed. 318), nor was that part of the report mentioned when the same case reached the appellate court (145 Fed. 1021, 74 C. C. A. 680). The fact that this report of the referee was acquiesced in by the parties, and not sustained by the opinion of either court, is mentioned in Re Gilpin (D. C.) 160 Fed. 171, 182, a well-considered and learned opinion which clearly shows that the referee's report is not sound in principle.

I have found no case directly in point construing clause 3, but the general principle that each partner is the agent of the firm as to all business within the scope of the partnership, and that, if one partner makes false or fraudulent representations of fact, the other partners are bound by such statements, although made without their knowledge, is recognized in the construction of the bankruptcy acts both in this country and in England. Strang v. Bradner, 114 U. S. 561, 5 Sup. Ct. 1038, 29 L. Ed. 248; Cooper v. Prichard, 11 L. R. Q B. Div. 351

With all my deference for the opinion of my Brethren, I cannot concur in their view that there is no reason in "law, business, or morals" for the construction the learned District Court placed on the statute. In re A. F. Hardie (D. C.) 143 Fed. 607. The construction, I think, is good in law, because it is based on the apparent intention of Congress; in business, because it will tend to prevent false written statements to secure credit; and in morals, because it makes for fair dealing and righteousness.

EQUITABLE LIFE ASSUR. SOCIETY OF UNITED STATES v. KEIPER.

(Circuit Court of Appeals, Third Circuit. November 24, 1908.)

No. 10.

1. Insurance (§ 291*)—Life Insurance—Warranty.

Where an application for life insurance provided that all the statements and answers therein were warranted to be true, the insured warranted the truth of the statements therein contained concerning his history, as to whether he had previously suffered any serious diseases except diseases incident to childhood.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690; Dec. Dig. § 291.*]

2. Insurance (§ 291*)—Warranties—Breach—"Serious Illness." Insured applied for insurance October 10, 1906, and in his a

Insured applied for insurance October 10, 1906, and in his application warranted that he had not had any serious illness or disease, except diseases incident to childhood. It was proved that in 1901 he fell violently ill, so that for a time his physicians expected him to die with what they then diagnosed as hemorrhagic pancreatitis. He suffered from acute pains in the abdomen, and was for some time in a state of collapse; was attended by two physicians and a trained nurse, and recovered after five or six weeks. This sickness followed a chronic stomach trouble with

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which on several occasions he had been ill. Held, that such sickness was a "serious illness," and constituted a breach of warranty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 689–690; Dec. Dig. § 291.*

For other definitions, see Words and Phrases, vol. 7, pp. 6421, 6422.1

8. Insurance (§ 291*) — Life Insurance — Misstatements — "Matebial to Risk."

Act Pa. June 27, 1885 (P. L. 134), provides that, whenever an application for life insurance contains a clause of warranty of the truth of the matters therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant shall work a forfeiture or defense, unless it relates to some matter material to the risk. Held, that a misstatement as to insured's previous history is material to the risk, if a disclosure is necessary and material to the investigation made by the insurer as to the nature of the risk at the time of the application.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 291.*]

4. Insurance (§ 291*)—Misrepresentations—Materiality.

Where insured warranted that he had never had any serious illness or disease except diseases incident to childhood, when in fact, some five years before, he had been ill for five or six weeks, during which time his life was despaired of, such misrepresentation was material to the risk within Act Pa. June 23, 1885 (P. L. 134), providing that a misrepresentation or untrue statement constituting a warranty shall not be a defense unless it relates to a matter material to the risk.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 291.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. For opinion below, see 159 Fed. 206.

George D. Hay, B. Gordon Bromley, and Thomas De Witt Cuyler, for plaintiff in error.

J. Claude Bedford, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

GRAY, Circuit Judge. This is a writ of error to the court below, in respect of a judgment in a suit brought by the defendant in error, as administratrix of the estate of one John F. Finney, a citizen of the state of Pennsylvania, against the plaintiff in error, the Equitable Life Assurance Society of the United States, a corporation of the state of New York. The suit was brought to recover the sum of \$32,500 on a policy of life insurance issued to the said John F. Finney in his lifetime, dated December 28, 1906.

The insurance was effected in pursuance of an application by the said Finney, dated October 10, 1906, which was signed by him and a copy thereof attached to the policy, so that under the act of the Legislature of the state of Pennsylvania, of May 11, 1881, it was not precluded from becoming a part of the contract between the parties in accordance with any agreement between them to that effect, or otherwise. This application contained the following stipulation:

"I hereby agree that this subscription, and the contract of sale hereby applied for, taken together, shall constitute the entire contract between the parties hereto; that all the statements and answers herein are warranted to be true; that this contract shall not take effect until the first installment has

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been paid during my good health. I have not been declined or postponed by any life company or received a policy different in form from the one originally applied for, nor have I been intemperate or had any serious illness or disease except diseases incident to childhood, and there is no history of consumption or insanity in my family, i. e. among parents, brothers or sisters, uncles or aunts."

The following was also added:

"Note.—If applicant has ever been declined or postponed by any life company, or received a policy different from the form originally applied for, or been intemperate, or had any serious illness or disease other than childhood diseases, or if there is any history of insanity or consumption in applicant's family—among parents, brothers, sisters, uncles or aunts—state particulars here."

To this there was no answer. This stipulation became a part of the policy and of the contract between the company and the insured, clause 8 of the policy providing that:

"The entire agreement between the society and the purchaser is embodied in the contract of sale and the subscription (or application) therefor, taken together, which cannot be varied except in writing by one of the following executive officers of the society," etc.

The above recited agreement in the application, was a warranty of the truth of the statements therein contained, one of said statements being that the applicant had not had any serious illness or disease, except diseases incident to childhood. This court has already, as to an exactly similar clause in the application for a policy, incorporated by stipulation in the policy itself, used this language:—

"There can be no question that the statements made by the deceased in his application for insurance were warranties, and not mere representations or statements of belief, there being nothing in the language used in the whole instrument to indicate that the question between the insurer and insured as one merely of good faith and honest dealing, or of belief on the part of the insured in the truth of his statements." Doll v. Equit. Life Assur. Soc., 138 Fed. 705, 71 C. C. A. 121.

The defendant in the case just cited was the same as the defendant here, and the form of the application and policy were identical. Here, as in that case, there was an unqualified undertaking on the part of the insured, that the facts alleged by him were as he represented them to be, and the truth of such allegation was held to be a condition precedent to the performance of the obligation undertaken by the insurer.

At the conclusion of the evidence, the defendant moved the court to instruct the jury that, under all the evidence in the case, the verdict must be for the defendant, and the refusal to grant this motion is assigned as error. This assignment of error, and the argument of counsel in support of it, make it incumbent upon us to examine with care the evidence in the case, as sent up with the record, and consider whether it so clearly and unequivocally established, as a matter of law, the breach of the warranty made by the insured, as a condition precedent to the performance of the obligation undertaken by the other party to the contract, as to render the same invalid.

The evidence bearing on this question seems unusually clear. The warranty of the truth of the statement, that he had never had any illness or disease, except diseases incident to childhood, was made Octo-

ber 10, 1906, yet it is uncontrovertibly established by the evidence, that the insured, five years before, to wit, in October, 1901, had an illness which it is impossible to consider or describe as other than a serious one. It is not denied that the insured, Mr. Finney, was very ill during that month, but it is contended on behalf of the defendant in error, that it was not a serious illness within the meaning of those words in the warranty. There is no test or definition by which we can determine what those words in such a warranty may signify in a given case, other than the plain and ordinary meaning of the words themselves, and we must turn to the testimony and ascertain from it whether the illness of 1901 was serious, within the ordinary meaning of that word, as used in the warranty. On the 24th and 28th of October of that year, Dr. Hughes was called in consultation by Dr. Brown, the family physician. The following are extracts from his testimony:

"Q. Will you kindly describe what you observed when you called? A. Mr. Finney was partially conscious only, almost unconscious, and in an exceedingly weak state, and he had been complaining of a great deal of pain in the abdomen. Q. What was his condition when you saw him on this first visit? A. He was exceedingly ill. I thought he was going to die. Q. What were his symptoms? A. * * * Pain in the abdomen, collapse, which is extreme weakness, and almost complete unconsciousness. * * * Q. I would like if possible to hear some more comprehensive statements? A. When I saw him first, he was lying in bed unable to do anything for himself, unable to assist himself practically at all, lying prone, unable to sit up, unable I think, if I remember correctly, even to turn without assistance. He could scarcely be roused. When he was aroused, he could not be aroused to the point of making intelligible replies to questions. The pulse was weak. He was rather white, a litle yellowish. There was a suspicion of a possibility of jaundice. The whites of his eyes were colored a little yellow. He was probably jaundiced a very little. Q. Did you arrive at any conclusion as to what was the cause of his trouble? A. I thought the first time I saw him that it was probably hemorrhagic pancreatitis. Hemorrhagic pancreatitis is a condition in which you find after death that the pancreas, which is an organ lying back of the stomach in the upper part of the abdomen, is infiltrated everywhere with blood. The condition very usually causes death. When I saw him the second time, I doubted the correctness of the original diagnosis, largely because he had improved. At that second examination I still thought there probably was some obscure disease of the pancreas, but probably not of a hemorrhagic type. * * * Q. Was his condition at the time of your first visit such as to indicate to your mind a possible fatal termination? A. I thought that there would be a fatal termination. Q. In other words, speaking from the standpoint of your general experience and knowledge, was his condition such that it might be denominated a severe sickness? A. A severe sickness, yes, sir. Q. A serious illness? A. Yes, surely. Anything that would apparently threaten life definitely would be a serious illness. Q. In hemorrhagic pancreatitis-which, as you have described, I believe is a suffusion of blood in the organ termed the pancreas? A. Yes. Q. What manifestations are there of that in the human anatomy? A. Those which I have detailed, sudden pain in the abdomen, with collapse, occurring without any other assignable cause. By the Court: Q. As I understand you, he did not have this? A. I presumed he did not have it, because he recovered. There have been reported cases in which recovery has ensued following the disease. That may be the result of faulty observation or there may be possibly a recovery from it. Q. Your judgment is there is no recovery from it? A. I have never seen a case that I knew to recover. The Court:—Why inquire into it, if Mr. Finney was not afflicted with it? The Counsel:—I want the symptoms of this disease, because the doctor did diagnose it, apparently, as that complaint in the first place. As the diagnosis has not shown that it was not that, except in so far as the doctor says he thought subsequently it was not by reason.

of the man's recovery, I was getting the symptoms to see if it might not have been that disease in some stage of it. The Court:—You will have to assume it was not, if the doctor says it is his judgment it was not. The Witness:—I am not certain it was not. It might have been and there might have been a recovery. By the Counsel: Q. In other words, you are not sure at the present time it was not that in some form? A. I am not sure. Q. All that you are sure of is that the man was an exceptionally dangerously ill man? A. Yes. Q. And he was suffering from what you would call a serious illness or disease? A. Yes, sir. * * * X. Q. And the nearest you could come to it was that it came from the pancreas? A. Yes, sir. * * * Q. From the examination which you made of him at that time either the first or second time, can you say whether or not the illness, whatever it was. was functional or organic? A. It must have been organic. I doubt very much if any functional illness could have caused such decided symptoms. Q. Why do you say it must have been organic? A. A functional illness does not seriously threaten life. I say it was organic simply because he was too ill a man for any functional derangement to account for his condition."

Dr. Brown, in giving a history of the case, said:

"His pain was so acute that I gave him morphine, which had very little tendency to stop the pain. It did not stop it as I would like and I believe in four hours or so he had another one. He was slightly under the influence of morphine, but his condition was semi-conscious. He could be aroused, but did not talk intelligently, did not answer questions intelligently. When forced to take nutrition, he took it readily. If you opened his mouth and poured liquid in his throat he would swallow it, but you could see by the expression on the man's face that he was in acute pain, anxious. Coming out from the influence of the morphine a little bit, the first thing he would do was to put his hand on his abdomen and complain of pain again. That condition kept on until the evening Doctor Hughes saw him, when we did consider that night that Mr. Finney was in a serious condition. However, he improved. That night was a very anxious night. The next morning his condition seemed somewhat improved.. Following that return temporarily of consciousness in which he recognized me, very promptly following that recognition, he had a chill and another collapse. Just what that was caused by I never could tell. It looked then that the man was still seriously ill, but from that time on Major Finney made slow but sure, uninterrupted recovery, as I say, recovering without really a true diagnosis being made of his condition."

Dr. Brown further testified that Mr. Finney was, roughly speaking, ill five or six weeks. It will be observed that Dr. Hughes, the consulting physician whose opinion is deferred to by Dr. Brown, the family physician, diagnosed the case as "hemorrhagic pancreatitis," a disease so serious that Dr. Hughes says that it usually causes death, and his only reason for doubting the correctness of his diagnosis, was that the patient afterwards improved and finally recovered. He was ill for five or six weeks, and was attended by two physicians and a trained nurse. Whether this illness was correctly diagnosed as "hemorrhagic pancreatitis," or not, it would seem to have been beyond all question a serious illness, and one the recollection of which would have been impressed upon any man of the presumed intelligence and condition in life of Mr. Finney, who had been at one time United States Subtreasurer, and president of a banking institution. The serious character of such an illness is only emphasized by the fact that, though the attending physicians were apprehensive of a fatal result, they were unable to diagnose it to their satisfaction. Those to pass upon the risk proposed upon the life of the insured, had a right under their contract to know of such an illness, and if they had been properly informed, might well

have paused before accepting it. The medical history of the insured is also interesting in this connection. The testimony discloses the fact, and it is not denied or disputed, that the insured was, from 1888 to 1907, a sufferer from a diseased condition of the stomach, manifesting itself at various times in attacks of indigestion, nervous dyspepsia, gastritis, and gastric neurosis, prior to the serious illness of 1901. Dr. Stein testified that he attended the insured in the winter of 1888, for about four weeks, when he was ill with an attack of acute gastritis, and he afterwards attended him for a diseased stomach. Dr. Robinson testified that, between July, 1895, and February, 1899, he treated the insured more than ten times, for stomach derangement. While it lasted, he was confined to bed a week at a time, and was seriously ill; that it was a neuralgic condition of the stomach. Dr. Brown testified that, between December 18, 1900, and the date of the insured's death, in 1907, he treated him at least 100 times. The insured died of acute gastritis.

We think the learned judge of the court below has mistakenly allowed this evidence to so connect itself with the illness of 1901 as to influence his judgment of its serious character. We think, however, it only tends to support the charge of bad faith on the part of the insured, in his statement that he had never had any serious illness or disease, other than the diseases incident to childhood. But there is no ground at all for treating the illness of 1901 as an incident of the insured's general ill health. It was a distinct and serious illness, so characterized by the three attending physicians, who were apprehensive of fatal results, and whose testimony is nowhere impugned or contradicted. It would have been none the less a serious illness if it were really an acute attack of the patient's chronic gastric trouble. The learned judge of the court below has, we think, following the example of some state tribunals, mistakenly said that "the true construction of the language must be, that the applicant has never been so seriously ill as to permanently impair his constitution and render the risk unusually hazardous." To indulge in such refinement, is to fritter away the substantial value of such a warranty, and to invite in every case where the insurer has sought to so protect itself, the exercise of an ingenious and subtle casuistry to defeat the ordinary and obvious meaning of the words employed. We think, therefore, that the serious character of the illness of the insured, in 1901, was established by such clear and uncontradicted testimony, that the jury should not have been permitted to find otherwise.

The second question to be determined, is, whether under the act of assembly of Pennsylvania, of June 23, 1885 (P. L. 134), the statement by the insured, that he had never had any serious illness, etc., if made in good faith, related to a matter material to the risk. This act provides as follows:

"Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relates to some matter material to the risk."

As the court has heretofore held in Doll v. Equit. Life Assur. Soc., supra, the language of the application here under consideration, constituted an absolute warranty as to the truth of the statements, irrespective of the mere opinion or honest belief of the applicant. But in discussing the required materiality of such statement under the provision of the statute, just quoted, we must assume the good faith and honest belief of the insured in making the statement in question. We have already said that, in our opinion, the warranted statement, that the insured had had no serious illness, was untrue, and there was a consequent breach of warranty on the part of the insured. This breach would render void the obligation of the insurer, and forfeit the rights of the insured under the policy, unless the warranted statement was not material to the risk. What constitutes materiality under this statute, is probably sufficiently answered by the terse statement of the learned judge of the court below, in saying that "the jury on this point were charged that if any of the ailments, including the illness of 1901, were serious, they were material." The test of materiality must be sought at the time the question is asked, and the truth of the answer is warranted by the insured. It is from the point of view of the insurer at that time, that the materiality of the answer or statement of the applicant must be judged, and common sense and experience in the conduct of men in the ordinary affairs of life preclude even the suggestion, that the fact that the applicant had previously had a serious illness, was not material to the risk about to be assumed.

In Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank, 72 Fed. 413, 428, 19 C. C. A. 286, 302, 38 L. R. A. 33, Judge Taft, speaking for the Circuit Court of Appeals, said:

"Materiality of a fact in insurance law is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event and at the time the insurance is effected, than the subsequent actual causal connection between the fact or the possible cause it evidences, and the event. Thus it is by no means conclusive upon the question of the materiality of a fact that it was actually one link in a chain of causes leading to the event. Watson v. Mainwaring, 4 Taunt. 763; Jones v. Insurance Co., 3 C. B. (N. S.) 65; Rose v. Insurance Co., 2 Ire. 206; Insurance Co. v. Schultz, 73 Ill. 586. And on the other hand, it does not disprove that a fact may have been material to the risk because it had no actual subsequent relation to the manner in which the event insured against did occur. A fair test of the materiality of a fact is found therefore in the answer to the question whether reasonably careful and intelligent men would have regarded the fact communicated at the time of effecting the insurance as substantially increasing the chances of the loss insured against."

We agree with the opinion expressed by the learned judge of the court below, that the disclosure of a serious illness is necessary and material to the investigation made by the insurer as to the nature of the risk at the time the application is made by the insured. Where, in answer to the inquiry whether he had ever had a serious illness, etc., the applicant for insurance answers in the negative, and warrants the truth of his answer; whether the insurer would or would not have accepted the risk had the answer been otherwise, can only be a matter of conjecture, and is not relevant to the question, whether the answer and warranty related to a matter material to the risk. It was absolutely im-

portant and material that the company, about to pass upon a risk, should know of any serious illness in the past life of the applicant.

Constrained to the conclusion by the clear and uncontradicted testimony in this case, that the illness of the insured in 1901 was a serious illness, within the meaning of those words as used in the warranty, and that as such it was material to the risk, there was a breach of the warranty in question which avoided the obligation of the policy here in suit, and the jury should have been instructed on all the evidence to find for the defendant.

The judgment below is therefore reversed.

NORTHERN ASSUR. CO. v. STANDARD LEATHER CO.

(Circuit Court of Appeals, Third Circuit. November 21, 1908.)

No. 1, March Term, 1908.

1. INSURANCE (§ 229*)—CANCELLATION OF POLICY—NOTICE TO AGENT.

Plaintiff gave a firm of insurance brokers general authority to procure for it insurance to the amount of \$75,000 on its manufacturing plant to replace prior insurance at better rates and terms. In pursuance of this employment the brokers applied to the local agents of a number of companies, some of whom, among them the agent of defendant, issued policies, each in the amount of \$2,500, the premiums being charged to the brokers to whom the policies were delivered. On receiving the report of the risk defendant instructed its agent to cancel the policy, and he gave the brokers, who still retained it, notice of cancellation in five days as required by its terms, and at the expiration of that time they surrendered it, as they did other policies similarly canceled, and proceded to obtain others in their stead. Before they had procured the requisite amount of insurance the property burned. Held, that in view of their general employment and its nature, and the fact that they were still acting in pursuance thereof, not having reported nor delivered the policies to plaintiff, the acceptance of defendant's notice of cancellation and the surrender of its policy were within the scope of their authority and terminated the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 500; Dec. Dig. § 229.*]

2. Insurance (§ 539*)—Notice of Loss-Excuse for Delay.

Where an insurance policy requiring "immediate" notice of loss to be given the insurer was delivered to the authorized agents of the insured, the fact that they did not deliver the policy to their principal before the loss, nor notify it of the contract, did not relieve it from the obligation to comply with such condition, and a failure to give notice of the loss for 30 days avoided the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. $\$ 1334; Dec. Dig. $\$ 539.*

Time for notice of loss, see note to Rorick v. Railway Officials & Employees' Acc. Ass'n, 55 C. C. A. 376.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 156 Fed. 689.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

- J. H. Harrison, for plaintiff in error.
- J. S. Ferguson, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

GRAY, Circuit Judge. This was a suit by the Standard Leather Company, the defendant in error and plaintiff below (hereinafter called the plaintiff), against the Northern Assurance Company, the plaintiff in error and defendant below (hereinafter called the defendant), upon a policy of insurance. The defendant interposed three grounds of defense, with only two of which we are here concerned, viz., first, that the policy was canceled by the assurance company before the fire; and second, that immediate notice of the fire was not given by the assured, in conformity with the stipulation in that behalf contained in the policy.

The facts of the case bearing upon the first ground are as follows:— Prior to May 31, 1904, the plaintiff employed the Negley & Clark Company, general insurance agents and brokers, to procure for it \$75,-000 insurance upon its plant at Cheswick, near Pittsburgh, in good companies, under a better form and at a lower rate than had previously been written. The instructions given by plaintiff to the brokers were general, and it sufficiently appears, both negatively and affirmatively, that the agents thus employed were clothed with discretion as to the companies to be selected, and with such authority as to the general conduct of the business as was necessary to accomplish the general purpose of their employment. Thereupon, in pursuance of this employment, they applied to the local agents of a number of companies for insurance upon the said property of the plaintiff. Some of these local agents "bound the risk" in their several companies early in June, 1904, and subsequently issued their respective policies thereon, all bearing date June 10, 1904. Among the policies so issued was the one here in question, issued by the defendant. The policies were identical in form, being what is known as the "New York Standard Policy," and each for the amount of \$2,500. No premium was paid on behalf of the plaintiff to the companies, or their agents, issuing the policies, but the same was charged to the brokers representing the plaintiff. Subsequently, some of these local agents, among them the local agent of the defendant, upon reporting the risk to the home offices, received directions to cancel the policies, and in compliance therewith, gave notice of cancellation of their several policies to the Negley & Clark Company, the brokers or agents of the plaintiff, who had the policies in their possession and who were still engaged in trying to secure the aggregate amount of insurance desired by their principal on its said property. The notice of cancellation on behalf of the defendant was as follows:

"The Northern Assurance Co. desires to cancel their policy No. 24141 covering on property of Standard Leather Co., situate

[&]quot;Negley & Clark Co., City:

[&]quot;Pittsburgh, June 25, '04.

[&]quot;I herewith give you five days' notice as per terms and conditions of your policy (line 51 to line 55 inclusive), and you are hereby notified to return said policy to this office on or before the 30th day of June, 1904, at

twelve o'clock noon, when all liability on the part of this company will

"By returning said policy to this office the pro rata unearned premium (if any) will be paid.

"Yours respectfully.

H. T. Norris. "Agent."

The stipulation of the policy referred to in the above notice, is as follows:

"This policy shall be cancelled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portions shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the pro rata premium."

It is admitted that the notice of cancellation given to Negley & Clark Company, as brokers or agents of the plaintiff, was the only notice giv-The policy in question was never delivered to the plaintiff by the Negley & Clark Company, but, after the expiration of the five days mentioned in the notice, and some time before the fire, which occurred on July 12, 1904, it was surrendered to the defendant by the Negley & Clark Company, as were the policies issued by other companies from whom like notices had been received.

The learned judge of the court below, after stating in his charge to the jury that there was no dispute as to the facts substantially as above stated, said that the question "whether the insurance companies could cancel these policies by giving the notice to the brokers, and not to the insured, is a question of such importance * * * that the court does not feel warranted now in expressing any opinion upon its conclusions," and therefore reserved the said question, instructing the jury, that for the present, the policies were in full force and that the jury were to consider them, in determining their verdict, as if no cancellation had been made, or attempted to be made.

In considering this question, after the verdict in favor of the plaintiff and upon a motion, non obstante veredicto, under the Pennsylvania statute, the learned judge of the court below denied the motion of the defendant for judgment non obstante veredicto and directed judgment for the plaintiff on the verdict. In the course of his opinion, and as

a ground for denying the motion, the court said:

"It is clear that in point of fact, the Negley & Clark Company were agents of the plaintiff, solely for the purpose of procuring insurance, for no express authority, verbal or written, authorizing any other act, is shown. When they procured such insurance, and the defendant's policy was delivered to them as the plaintiff's agent, they had, as between the plaintiff and defendant, carried out their agency."

In view of the situation disclosed by the undisputed evidence in this case, we think the learned judge of the court below erred in the position thus taken. It is true that no precise letter of instructions, or other written authority from the plaintiff to the Negley & Clark Company is shown, but there is no dispute as to the fact that the Negley & Clark Company were general insurance brokers, that they were employed by the plaintiff as its agents in the general line of their business, to procure new insurance to an aggregate amount of \$75,000 on its manufacturing plant near Cheswick,—an employment which admittedly involved the surrender of over \$30,000 of old insurance to be replaced by other policies, in better form and at less expense to the plaintiff. The scope of the authority thus conferred upon its agents was undoubtedly large enough to embrace all purposes connected with the business of placing the amount of insurance stated. Manifestly, as stated by Clark of the brokerage company, the whole business could not be transacted at one time, and the whole amount placed as desired, where the allotment to each company, of the aggregate amount of \$75,000 was not more than \$2,500. It necessarily involved a negotiation with the agents of the different companies, as testified to, the tentative binding of the risks and the contingency of the rejection by a company of the risk, when reported by its agent, and the substitution of other risks for those displaced, while the purpose of securing the aggregate amount was still unaccomplished. There is no suggestion that there was unreasonable delay on the part of the Negley & Clark Company in distributing this large amount of insurance. Clark testifies, and his testimony is nowhere contradicted, in answer to the question, "Did you succeed in placing the desired amount of \$75,000?"

"I can't say that we had \$75,000 at any one time; we had policies on and policies off, and I couldn't say as to just how much we had at any one particular time. We would get a policy, for instance, to-day, and maybe to-morrow, or a few days afterwards, we would get a notice of cancellation from the agent, or a letter or telephone message, or some other request for a return of that policy, and after holding the policy five days, because the policy provides five days, we would return it."

It plainly appears, then, that when the notice of cancellation was sent by the defendant to the Negley & Clark Company, the whole business committed to them by the plaintiff was in fieri, and the reception of such a notice seems to us, under the circumstances of this case, clearly within the scope of their authority, as representing the plaintiff. Whether they neglected their duty as to reporting such cancellations and other matters to their principal, does not in this case concern the defendant. The policies issued were, by the permission of the plaintiffs, in the possession of their agents, and it would seem that it was necessary for them to receive and act upon notices of cancellation, in order that other insurance might be obtained to replace that canceled. At all events, it appears as a fact that, when the fire occurred, there was only \$39,500 of insurance in force, for which no cancellation had been given, although they had, from first to last, placed something over \$100,000 insurance. There is no evidence to show that plaintiffs, by word or conduct, evidenced any other construction of the scope of the authority granted to their agent, than that above stated. We think, therefore, the power to receive and act on the notice of cancellation, sent to them by the defendant company, was, under the circumstances, within the scope of the authority conferred upon the Negley & Clark Company, by their employment as agents of the plaintiff.

Though not directly bearing upon the question of the scope of the agency in the case before us, it may be well to remark that under the situation, so far as it was admittedly created by the plaintiffs, the

policies were left in the possession of Negley & Clark Company, while the general purpose of procuring the amount of insurance required was being transacted, and that no notice of cancellation from the defendant company, directly to the plaintiffs, would have been of as much advantage to the latter, as was the notice actually given to the brokers who were transacting the business, and upon whom the duty devolved

to procure other insurance in lieu of that canceled.

The point decided upon the peculiar facts of the case of Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932, apparently relied upon by the court below, does not seem applicable to the case before us. In the case referred to, a clerk of Grace & Co. was charged with the duty of effecting fire insurance upon their property. This clerk employed one Moyes, an insurance broker in the city of New York, to obtain the required insurance for his principals. Moyes instructed one Anthony, another insurance broker in Brooklyn, to procure this insurance. Anthony obtained the policy in suit from the general agents of the defendant company, in New York City, mailed and delivered the same to Moyes, by whom it was delivered to Grace & Co. not later than the day succeeding its date, September 26th. On the morning of October 6th, one Carroll, for the insurance company, verbally notified Anthony that the company refused to carry the risk, and required the policy to be returned. The property insured was destroyed by fire on the night of October 6th, or early in the morning of October 7th. At the trial, it was admitted that the contract between the parties was fully executed upon the delivery of the policy to the insured. In this state of facts, the Supreme Court refused to rule that, because of the stipulation in the policy, "that any person other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured," notice of the termination of the policy was properly given to Anthony, who personally procured the insurance. It is to be noted that Anthony's principal was the intermediate broker, Moyes, and that the policy in suit was delivered at once by Anthony to Moyes, who at once delivered it to the plaintiff. It would seem, therefore, that the court could not do otherwise than decide that Anthony's agency was at an end when the policy was procured and delivered to the plaintiff, under the circumstances and in the manner above stated.

Equally fatal to the plaintiff's case was the failure to give immediate notice of loss, as required by the policy. The fire occurred July 12, 1904, and the proofs of loss which were not sent in until August 11th, some 30 days afterwards, was the first attempt to comply with this requirement. This is an important provision, the obvious purpose of which is to enable the insurer, while the facts are fresh, to investigate the cause of the fire and the extent of the loss, and it is not to be frittered away by overindulgent construction favoring the assured, upon grounds which are purely personal. If, therefore, we were to agree with the plaintiff that the notice of cancellation given by the defendant to the Negley & Clark Company was not sufficient to accomplish its purpose, and that the policy in suit continued in force notwithstanding, yet Negley & Clark Company, being unquestionably authorized, as brokers and agents of the plaintiff, to procure the insurance and re-

ceive the policy on their behalf, the company having delivered the policy to one so authorized to receive it, had no further concern as to the manner in which such agent performed his duty, or whether he delivered the policy or not to the plaintiff, or kept him otherwise informed as to the execution of the contract between the plaintiff and defendant, all these being matters inter sese between the plaintiff and its agent. The performance of the stipulation of the policy, that the plaintiff should give immediate notice of any loss by fire, in writing, to the defendant, not having been waived by the defendant, could not therefore be excused by reason of any dereliction on the part of the Negley & Clark Company in delivering the policy to the plaintiff or in informing it of its existence. Such a reason alleged in excuse of the delay would be subjective as to the plaintiff and relate to matters for which the defendant was clearly in no way responsible. As the only excuse for not sending immediate notice of its loss to the defendant, urged by the plaintiff, is that the Negley & Clark Company had not informed them of the companies with whom insurance on plaintiff's behalf had been negotiated, we think that, as matter of law, the delay of more than 30 days in sending notice to the defendant, was violative of the condition precedent imposed upon the plaintiff, that immediate notice of loss should be sent. For this reason, we think that the prayer for peremptory instructions to the jury, in favor of the defendant, should have been granted.

The Pennsylvania act of assembly, of June 27, 1883 (P. L. 165), only makes more peremptory the conclusion at which we have arrived.

Section 1 of that act provides that the—

"conditions of insurance as to notice of loss * * * shall be deemed to have been complied with, if the assured or the assignee, or either of them, shall furnish the company at its general office * * * the notice of loss within ten days from the date of the fire."

The Supreme Court of Pennsylvania, in Welsh v. London Assur. Corp., 151 Pa. 616, 25 Atl. 142, 31 Am. St. Rep. 786, speaking through Mr. Justice Mitchell, after referring to the cases of Trask v. Insurance Co., 29 Pa. 198, 72 Am. Dec. 622, and Edwards v. Ins. Co., 75 Pa. 378, said:

"But since these decisions, the Act of June 27, 1883, has practically given a legislative definition of reasonable time, by fixing the period of 10 days for notice of the fire."

The judgment below is therefore reversed.

GILPIN v. MERCHANTS' NAT. BANK.

(Circuit Court of Appeals, Third Circuit. November 21, 1908.)

No. 9.

BANKRUPTCY (§ 407*)—DISCHARGE—GROUNDS FOR REFUSAL—MAKING "FALSE" STATEMENT.

The word "false" as used in Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026]), which

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

makes it a ground for denying a discharge to a bankrupt that he has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit," means more than merely erroneous or untrue, being used in its primary legal sense as importing an intention to deceive, and such a statement, in order to constitute a bar to a discharge, must have been knowingly and intentionally untrue.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 760; Dec. Dig. § 407.*

For other definitions, see Words and Phrases, vol. 3, pp. 2654, 2655.]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Pennsylvania, in Bankruptcy. For opinion below, see 160 Fed, 171.

J. W. Bayard, for petitioner. H. T. Dechert, for respondent.

Before GRAY and BUFFINGTON, Circuit Judges, and ARCH-BALD, District Judge.

GRAY, Circuit Judge. This is a petition by a bankrupt, to revise for error of law the decree of the United States District Court for the Eastern District of Pennsylvania, reversing the referee's report and sustaining one of the creditor-appellee's exceptions to his application for discharge. The sole exception thus sustained, was to the effect that the referee had erroneously held that the "materially false statement" in writing, mentioned in clause (3) of section 14b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026]), must, in order to constitute a bar to the discharge of the bankrupt, be intentionally or knowingly untrue. The facts of the case as summarized from the findings made by the referee, and elsewhere disclosed in the record, are as follows:

The bankrupt was engaged in the construction of buildings, at Baltimore, in places near New York City, and Philadelphia. His main office was in Philadelphia, where his books were kept by his bookkeeper. The bankrupt was chiefly engaged in the actual supervision of the building work he had in hand, and paid little or no attention to his books. He collected money, paid notes, and in a general way knew the condition and progress of each of his building contracts. He intrusted the keeping of his books to his bookkeeper, and in September, 1905, the posting of his books was some months behind. During that month, the bankrupt went to the Merchants' National Bank, at Philadelphia, (the excepting creditor and appellee) and stated that he wished to open an account, and would require accommodations not to exceed \$10,000. The bank informed him that they would like to have a statement, and gave him one of their blank forms, to be filled out and signed by him. This form the bankrupt took to his office, and there signed the same in blank, instructing his bookkeeper to fill it out and send it to the bank. He signed it in blank before it was filled out, for the reason that he was obliged to return to Baltimore without delay. He says he instructed the bookkeeper to make an exact statement for the bank, to

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which the bookkeeper replied that he could not, but that he would make an approximate statement and send it to the bank. The statement was made by the bookkeeper, and upon it was written the word "approximate," and it was sent by the bookkeeper to the bank. Upon this statement, and upon a note which the bankrupt was to obtain from one Stokes, of Baltimore, as collateral, the bank extended the accommodation desired. This note was never obtained for the bank from Stokes. About October 3, 1905, and after the said statement of September 28th had been filed by the bank, the note of the bankrupt for \$7,500, due 30 days after date, was discounted. After two renewals and a payment of \$1,000 on account, and the further discount of a 10 days' note of \$2,500, the bank, on the 9th day of February, 1906, renewed the entire amount then due, viz., \$9,000, for 30 days, which is still unpaid.

The adjudication of bankruptcy was entered February 26, 1906. The approximate statement sent by the bookkeeper to the bank was materially inconsistent with the bankrupt's books, as they stood at the time the bankruptcy occurred. There is nothing in the referee's report to show how the books actually stood at the time the statement was prepared by the bookkeeper. There is no evidence that the bankrupt ever saw this statement after it was filled out, that the bank ever showed it to him, or interrogated him in regard to it, or that he ever asked to see it. This statement showed a net worth of \$43,569.27. The bankrupt himself made up from his books, during the course of his examination, a statement showing that his net worth at that time was \$45,698.09. This statement, however, in all its items fails to coincide with the statement made up by the bookkeeper and delivered to the bank.

The referee finds that, although the falsity of the statement sent to the bank has been proved, the fact that the bankrupt knew it to be false, or did not know it to be true, was not proved, and says:

"There is no evidence to support the contention that the bankrupt knew or had any reason to believe that the statement sent to the bank by the book-keeper was false, or that the bankrupt intended in any way to deceive the bank."

The referee, therefore, reported that a decree of discharge of the bankrupt should be entered. To the finding of the referee, as stated, the appellee filed its exception, and the court below, after considering the same, reversed the finding of the referee and directed that an order be entered, sustaining the said objection to the bankrupt's discharge.

Section 14 of the bankrupt act prescribed the conditions upon which a discharge may be granted to the bankrupt by the court of bankruptcy in which the proceedings are depending, and provides that the court shall hear and investigate the merit of the application and discharge the bankrupt, unless he has—

"(1) committed an offense punishable by imprisonment, as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or, (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of ob-

taining such property on credit; or (4), at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6), in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

The single question of law presented for our consideration is clearly defined in the following extracts from the opinion of the court below:

"I accept and shall act upon the finding of the referee that the bankrupt either did not actually know what the statement contained, or did not know that it was materially false, and that he did not have a conscious intention to deceive the bank."

In concluding, the court said as follows:

"The other matter that may properly need a moment's consideration is the effect that should be given to the word 'false' in clause 3. In my opinion the argument for the bankrupt must rest wholly upon the conclusion that this word should bear. It is unquestionably a flexible word. Sometimes it means incorrect, or not true; sometimes it includes the idea of wickedness or fraud—as in section 29, where a false oath is evidently a corruptly false oath, such as would subject the affiant to a prosecution for perjury. That 'false' means no more in clause 3 than 'not true,' I have tried to establish in the preceding pages of this opinion, and if I have failed hitherto to give good reasons to my belief I am sure that I shall not strengthen the argument by stating them again in somewhat different words.

"The decision of the referee is reversed and the celrk is directed to enter an order sustaining the first objection of the Merchants' National Bank to the bankrupt's discharge."

Addressing ourselves to the question thus distinctly raised, it is to be remarked that of the six reasons for refusing a discharge to the bankrupt, as set forth in section 14b of the bankrupt act, the five that relate to the conduct of the bankrupt, unless we exclude the third, with which we are here concerned, all imply a willful and fraudulent act on the part of the bankrupt, or, as in the case of the sixth, a willful and intentional defiance of a lawful order of the court. And they all imply conduct that is immoral, or at least unworthy in one seeking the reward of honesty that is intended to be conferred by a discharge. In the recent case, In re A. B. Carton & Co. (D. C.) 148 Fed. 63, 66, Judge Hough in the District Court for the Southern District of New York, adopts as a terse statement of his views, the following language:

"The policy of the bankruptcy act is founded on equal rights and privileges to all creditors; it is not intended as a means to punish the bankrupt at the option of the defrauded creditor only. Discharge from debts is a matter of favor and not a matter of right. Honesty on the part of a bankrupt is rewarded by a discharge. Fraud and dishonesty are stamped with disapproval of a discharge. Contumacy on the witness stand, a previous discharge within six years, obtaining money upon false statements, and the commission of an offense punishable by imprisonment under the act, are all valid objections to a discharge, and are not limited to the defrauded creditors alone, but may be urged by any and all creditors. It is the fraudulent conduct that is aimed at, and not retaliation for the individual loss."

We fail to perceive any sufficient ground for denying to the third reason for refusing a descharge to the bankrupt, the general characteristic of personal misconduct that attaches to all the others, as set forth in the said section of the bankrupt act. It would indeed be a harsh construction, and at variance with the general policy of the bankruptcy act, that would make the conduct described in clause 3 an exception in this respect to the whole category of acts which may severally deprive the bankrupt of his privilege of discharge. It is a

construction which should not unnecessarily be made.

But apart from the incongruity imported into this section of the bankruptcy act by such construction, it seems to us clear that the plain language of this third clause of section 14b requires that the written statement made by the bankrupt, for the purpose of obtaining credit, etc., should be knowingly and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, "false statement" connotes a guilty scienter on the part of the bankrupt. This primary and ordinary meaning of the word "false" cannot be ignored. It is the primary meaning given in the ordinary lexicons of the English language. Webster gives as its primary meaning:—"Uttering falsehood; unveracious; given to deceit; dishonest." As an adjective, it is correlative with the noun "falsehood." To charge a person with making a false statement, is equivalent to charging him with uttering a falsehood, and imputes moral delinquency to the person so charged. It is true that the word may have a secondary meaning in certain collocations, and be merely equivalent to "untrue" or "incorrect." But this is not the ordinary or usual signification attached to the word. To charge a person with making false entries in books of account, means something more than that incorrect or untrue entries have been made, and it has been so held by the courts in the consideration of offenses of that character. The last edition of Bouvier's Law Dictionary says of the word "false," that when "applied to the intentional act of a responsible being, it implies a purpose to deceive." In Black's Law Dictionary, under the title "false," it is said: "In law, this word means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud." In a recent and well accepted publication called "Words and Phrases," the word "false" is thus defined: "False means that which is not true, coupled with a lying intent." Wood v. The State, 48 Ga. 192, 297, 15 Am. Rep. 664. "False in jurisprudence usually imports something more than the vernacular sense of 'erroneous' or 'untrue.' "

This and other citations in the petitioner's brief, establish a jurisprudential meaning to the word "false" at variance with that adopted

by the learned judge of the court below.

No good reason has been suggested why Congress should have made such an exception to the character of the acts enumerated, as severally barring the discharge of the bankrupt, by using the word "false" in some other than its primary and obvious meaning.

But it is not without significance to inquire why an incorrect statement, innocently made to one creditor, should bar the discharge of the bankrupt as to all his other debts, whatever be its effect as to the debt of that particular creditor. In re Carton & Co., supra, the court

says:

"It is the act of issuing a materially false statement and the fraudulent intent of the man who issues it, that the statute seeks to punish by refusing a discharge. It should not depend upon the whim or good nature of any particular creditor to whom the false statement was made, whether the offending bankrupt should be given or refused his discharge. Any 'party in interest' who chooses to bring the wrongful act to the attention of the court, and proves that it was wrong within the meaning of the statute, is entitled so to do."

We fully concur in the meaning thus attributed to the clause in question. The bankrupt who has made to a creditor, for the purpose of obtaining credit, a false statement,—that is, one intentionally and knowingly untrue, is unworthy of the privilege of a discharge under the act, and the court will act upon information brought to it of such an act by any party in interest. It will be at once conceded on all hands, that such a bankrupt is unworthy, and should not receive the favor accorded by the law to the honest but unfortunate debtor. Some of the cases cited by the appellee conflict with the view here stated, but the weight of authority, as of reason, supports it.

We think that the court below erred in finding that the word "false" means no more in clause 3 than "not true," and the order of the said court is hereby revised in matter of law, by directing that the first specification of grounds of opposition to the discharge of the bankrupt, filed by the Merchants' National Bank, be dismissed, and that the bankrupt receive his discharge in accordance with the recommodation of

the referee in that behalf.

KRETSINGER v. BROWN et al.

(Circuit Court of Appeals, Eighth Circuit. December 17, 1908.)
No. 2,526.

EXECUTORS AND ADMINISTRATORS (§ 375*)—SALE OF REALTY—DECREE—COL-LATERAL ATTACK.

In a proceeding under the Colorado statute (Mills' Ann. St. § 4750 et seq.) to sell real property to pay debts allowed against the estate of a decedent, the jurisdiction of the county court attaches when there are before it the necessary parties under the statute and a petition substantially conforming to the statute, and where its jurisdiction has so attached its decrees directing and afterward confirming a sale are not subject to collateral attack because it treated unpaid taxes upon the realty, levied after the decedent's death, as debts within the meaning of the statute, or because the decrees were rendered without awaiting the next succeeding terms as provided by the statute, or because notice of the sale was not directed or given as required by the statute; each of these matters being at most a mere error or irregularity in the exercise of a lawful jurisdiction, and subject to correction only upon a direct proceeding for that purpose, such as an appeal or writ of error.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1535; Dec. Dig. § 375.*]
(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Lucius M. Cuthbert (Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, Pierpont Fuller, and George A. H. Fraser, on the brief), for appellant.

John A. Martin (D. A. Highberger, on the brief), for appellee city

of Pueblo.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. The facts necessary to an understanding of the controversy presented in this case are these: At her death Jane C. Brown, of Arapahoe county, Colo., was the owner in fee of a large amount of real property in that and other counties, all of which by her will was devised to her husband, Henry C. Brown, part in fee and part for the term of his life with a power to appoint those who should take the estate in remainder. The will also named him as executor. Included in the property devised in fee were all of block 24, and lots 15 to 24, both inclusive, in block 17, in H. C. Brown's First addition to the city of Pueblo, in Pueblo county. After the probate of the will, Brown, in his individual capacity and for individual purposes, mortgaged this specific property to the appellant, and thereafter, in his capacity as executor, sold and conveyed the lots in block 17 to the city of Pueblo, one of the appellees. The sale and conveyance were made under decrees of the county court in which the testatrix's estate was being administered, and the immediate purpose for which they were made was that of raising money to pay taxes upon the other real property, levied after the testatrix's death, so that it could ultimately be subjected to the payment of the just debts allowed against the estate. In a suit by the appellant to foreclose the mortgage, the validity of the decrees directing the sale and conveyance to the city was drawn in question; the appellant insisting, and the city denying, that they were void. The Circuit Court held with the city, and refused to include in the foreclosure decree the lots in block 17. It is the purpose of this appeal to obtain a modification of the decree, so as to include them.

The controversy is somewhat simplified by these concessions on the part of counsel: (1) When the will was admitted to probate, the title to the lots in question vested in Brown, subject to the right to resort to it, as provided by law, for the payment of the just debts allowed against the estate. (2) The mortgage to the appellant gave him a valid lien upon the title, but subject to the right so to resort to it for the payment of such debts. (3) The conveyance to the city divested Brown of the title and the appellant of the mortgage lien, unless the decrees of the county court were void. (4) The validity of those decrees is here drawn in question collaterally, and must be sustained, unless they are shown to have been absolutely void; no mere irregularity being of any avail.

Some of the objections to the decrees are so plainly untenable, or so clearly in opposition to controlling decisions of the Supreme Court of the state, that particular mention of them is not necessary. Those upon which greater reliance is placed are as follows: (1) A sale to

pay taxes levied after the testatrix's death was wholly unauthorized, even though its purpose was that of keeping other real property required for the payment of the just debts allowed against the estate available for that purpose. (2) The decrees directing the sale and conveyance were premature, and thereby shortened the appellant's opportunity to be heard in opposition to them. (3) Notice of the sale

was not given as required by law.

Before taking up these objections separately, it is important to notice some matters which bear equally upon all of them. The executor's petition, upon which the subsequent proceedings were founded, did not stop with a statement of the unpaid taxes and the necessity for their immediate payment, but set forth substantially everything required to be shown in a petition for leave to sell real property to pay debts. The heirs at law were made parties defendant, and they, with the sole devisee, voluntarily appeared and consented to the Nothing more was required to confer upon the county court jurisdiction to proceed in the premises. Nichols v. Lee, 16 Colo. 147, 26 Pac. 157. The appellant was not made a defendant, but that was not essential under the statute (Mills' Ann. St. §§ 4751, 4760; Nichols v. Lee, supra; New York Life Ins. Co. v. Brown, 32 Colo. 365, 374, 76 Pac. 799), or independently of the statute (Beauregard v. New Orleans, 18 How. 497, 503, 15 L. Ed. 469; Florentine v. Barton, 2 Wall. 210, 216, 17 L. Ed. 783).

In support of the first objection attention is directed to section 4750, Mills' Ann. St., which provides that, if the personal estate be insufficient, resort may be had to the real estate of a decedent "to discharge the just debts allowed against his or her estate"; and it is contended that the term "debts," as there used, includes only such obligations as may have been contracted or incurred by the decedent and cannot be held to embrace taxes levied after his death. parts of the same statute, however, make against the contention. Section 4761 provides that if, upon the hearing, it shall appear that the personal estate will be insufficient "to discharge the just debts and claims allowed against the estate, * * * and expenses of administration," the court shall determine, as nearly as may be, the amount of such deficiency, and may thereupon direct that resort be had to the real estate; and section 4780, which classifies demands against an estate, includes therein "all expenses of administration and settlement of the estate," and then provides "that wherever it may be necessary so to do, in order to preserve the estate, real or personal, for the benefit of the heirs, devisees and creditors, the executor or administrator may pay any taxes due thereon to the state, or any city, county or town, and shall be allowed such payment in his account." It is an admissible inference from these provisions that the term "debts" in section 4750 is intended to embrace expenses of administration (Personette v. Johnson, 40 N. J. Eq. 173, 178) and "any taxes" the payment of which by the estate is essential to the preservation of the realty for the benefit of creditors; and this inference is strengthened when it is reflected that the preservation of the realty can be of benefit to creditors only by keeping it available for the payment of their

demands, that it is sometimes impossible to keep it available for that purpose, save by selling part of it to pay taxes on the remainder, and that in this respect there is no difference between taxes levied before and those levied after the decedent's death.

Not unreasonably, therefore, it might be held that taxes, whether levied before or after the decedent's death, may be regarded as debts, within the meaning of section 4750, when their payment by the estate is essential to the preservation of the property for the benefit of creditors. But, be that as it may, the question of whether or not such taxes may be regarded as debts, within the meaning of the statute, was presented to the county court, and decided by it, when it directed the sale and conveyance in question. Being a court of general jurisdiction, and being particularly charged with the decision of all questions arising in the administration and settlement of decedents' estates and in proceedings by administrators or executors to sell real estate to pay debts (Bateman v. Reitler, 19 Colo. 547, 550, 36 Pac. 548; New York Life Ins. Co. v. Brown, 32 Colo. 365, 373, 76 Pac. 799), its decision, whether correct or otherwise, is conclusive upon all other courts in which it is collaterally drawn in question (Florentine v. Barton, 2 Wall. 210, 17 L. Ed. 783; McNitt v. Turner, 16 Wall. 352, 364, 21 L. Ed. 341; Manson v. Duncanson, 166 U. S. 533, 545, 17 Sup. Ct. 647, 41 L. Ed. 1105; Mellen v. Moline Iron Works, 131 U. S. 352, 367, 9 Sup. Ct. 781, 33 L. Ed. 178; Hatcher v. Hendrie & Bolthoff Mfg. Co., 133 Fed. 267, 68 C. C. A. 19, 24; Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 330, 9 L. R. A. [N. S.] 236).

As was said by this court in Foltz v. St. Louis, etc., Co., 60 Fed. 316, 8 C. C. A. 635, and repeated in Board of Com'rs of Lake County

v. Platt, 79 Fed. 567, 25 C. C. A. 87:

"Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud."

It may be that the decrees in question were premature; that is, were rendered without awaiting the succeeding terms of the county court. Mills' Ann. St. §§ 4752, 4753, 4757, 4768. But, if so, that was merely an error in the exercise of jurisdiction, and did not render the decrees void so as to open them to collateral attack. Murray v. Purdy, 66 Mo. 606; Sims v. Gray, 66 Mo. 613; Henry v. McKerlie, 78 Mo. 416, 429; Salter v. Hilgen, 40 Wis. 363; Snyder v. Markel, 8 Watts (Pa.) 416.

As respects the failure to give notice of the sale, the facts are these: In the executor's petition it was asserted, the subordinate facts being set forth with considerable detail, that it was necessary to resort to the realty for the payment of the just debts allowed against the es-

tate, that much or all of the realty was about to be lost because of the nonpayment of taxes levied thereon after the testatrix's death, that the estate was without means to prevent such a loss save by a sale of part of the realty to obtain money to pay taxes upon and thereby to preserve the remainder, and that to that end the interests of all persons interested in the estate required that the lots here in question, with others, be sold at private sale, without notice. The petition prayed that such a sale be authorized, and the heirs at law, with the sole devisee, filed an answer wherein they joined in the representations and prayer of the petition and expressly consented that the sale be without notice. A hearing was had and a decree was passed directing a private sale, without notice, according to the prayer of the petition. A month or so thereafter the executor reported that a sale had been made to the city in conformity to the court's direction, and thereupon a second decree was passed approving the report and directing a con-

vevance.

The provision relating to the giving of notice is found in section 4766, Mills' Ann. St., as amended April 10, 1891 (Laws Colo. 1891, p. 405, § 2), and is that every private sale shall be made upon such notice, "of not less than twenty days," as the court may direct, save where, upon good cause shown, "a less notice than twenty days" may be directed "by order duly entered" of record. Whether the county court regarded this provision as authorizing it to dispense entirely with the notice upon good cause shown, or as being merely directory, or as being only for the benefit of the heirs at law and devisee, who had waived compliance therewith, is not disclosed; but it is obvious that, in passing the decrees in question, it did necessarily decide that notice of the sale was not indispensable. In so deciding it may have misconstrued the statute, and for that reason its decrees may have been open to reversal upon a direct proceeding, such as an appeal or writ of error; but the error, if there was such, does not detract in any degree from the faith and credit to which they are entitled when collaterally drawn in question. They were passed in the exercise of a jurisdiction which attached when the petition was filed and the necessary parties defendant voluntarily appeared, and that jurisdiction was not lost or impaired by the failure to give notice of the sale, because it was a mere irregularity in the subsequent proceedings. Simmons v. Saul, 138 U. S. 439, 453, 11 Sup. Ct. 369, 34 I., Ed. 1054; Grignon's Lessee v. Astor, 2 How. 319, 340, et seq., 11 L. Ed. 283; Cooper v. Reynolds, 10 Wall. 308, 319, 19 L. Ed. 931; Mohr v. Manierre, 101 U. S. 417, 25 L. Ed. 1052; Jackson v. Magruder, 51 Mo. 55, 58; Hanks v. Neal, 44 Miss. 212, 226; Schaale v. Wasey, 70 Mich. 414, 420, 38 N. W. 317; Beidler v. Friedell, 44 Ark. 411, 414; Cadwallader v. Evans, 1 Disn. (Ohio) 585, 592; Wyant v. Tuthill, 17 Neb. 495, 23 N. W. 342; Salisbury v. Chadbourne, 45 Wis. 74, 77. As was said in Comstock v. Crawford, 3 Wall. 396, 401, 18 L. Ed. 34:

"When by the presentation of a case within the statute the jurisdiction of the court has once attached, the regularity or irregularity of subsequent steps can only be questioned in some direct mode prescribed by law. They are not matters for which the decrees of the court can be collaterally assailed."

As the Circuit Court rightly held that none of the objections was of any avail in a collateral proceeding, its decree is affirmed.

THAMES TOWBOAT CO. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 51.

COLLISION (§ 66*)-VESSELS IN TOW-FAULT OF TUG.

A finding of the trial court that a collision between the hawser tows of two meeting tugs in the Kills, opposite Elizabethport, N. J., was due solely to the fault of the tug, which was proceeding eastward with the tide, having a tow of 19 barges about 1,000 feet in length, affirmed; it appearing that she initiated the passing agreement without being able to properly handle her unwieldy tow, and in view of the rule that, where the fault of one vessel is clearly established, it is not enough for her to raise a doubt with regard to the management of the other.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 84; Dec. Dig. § 66.*]

Appeal from the District Court of the United States for the Southern District of New York.

The court held the respondent solely in fault for a collision which occurred between the scow Busy and the barge Ray, the former being the tail boat of a hawser tow in charge of the respondent's tug, No. 32, and the latter being the port boat in the hawser tow of the tug Aries. The opinion below is reported in 157 Fed. 305.

Robinson, Biddle & Benedict (W. S. Montgomery, of counsel), for appellant.

Carpenter, Park & Symmers, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. We have no doubt of the negligence of tug No. 32 for the reasons stated by the District Judge, and deem it unnecessary to add to what he has said in this regard. As to the Aries being free from fault we entertain some doubt but, after full consideration, we think the testimony is not sufficiently clear to warrant us in directing a division of the damages.

It is charged that the Aries was negligent: (1) In not answering the first signal of one whistle from No. 32. (2) In not stopping and waiting for No. 32 and her tow to pass. (3) In attempting to pass between the steamship moored at the long wharf and No. 32's loaded tow at a time when the Aries must have seen that there was danger of collision.

In overruling these defenses, all of them involving questions of fact, it must be remembered that the District Judge had the advantage of seeing and hearing the witnesses and we have repeatedly held that his findings should not be disturbed unless manifestly against the weight of evidence. As to the first fault charged the District Judge says:

"The fault of the Aries in not hearing and answering the first signal of the No. 32 was obviously not contributory to the collision and may be disregarded."

It is true that the Aries did not hear the first signal but a second signal of one blast was given and was answered by the Aries. So that

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the initiative of No. 32 there was an understanding between the approaching tugs that they were to pass port to port. We are unable to see how the situation would have been altered had the first signal been heard; the second followed almost immediately and there is nothing to indicate that the navigation of the Aries would or could have been changed had her master heard the signal a few moments sooner.

The absence of a lookout is not alleged in the answer or alluded to by the judge, probably because he thought, as we think, that the col-

lision was in no way attributable to the absence of a lookout.

The District Judge found that there was no proof of a general custom requiring the Aries to stop before reaching the narrow point in the channel where the flood tide sets strongly against the bulkhead at Elizabethport and we think this finding is amply sustained by the proof. There was testimony to show that a tacit understanding existed among the railroad tugs that the tow breasting the tide should wait below the turn until the tow proceeding with the tide had passed the point of danger; but there was nothing which compelled the

Aries to stop at this point.

No. 32 had a large unwieldy tow, about 1000 feet in length, consisting of 18 loaded barges in six tiers of 3 each and a light scow tailed onto the port boat of the last tier. The scow was so fastened that in rounding the turn she swung 4 or 5 feet farther than the rest of the tow towards the northerly side of the channel and caused the damage to the libelant's boat. The master of No. 32 knew all the details of the make up of his tow—the length of the hawser, the number of barges and the swinging scow in the rear. It was for him to say whether the flotilla could safely round the turn and pass at that point a tug towing 4 barges on short hawsers. If danger threatened he should have given an alarm signal, but instead of doing so he gave the usual passing signal, which was a clear intimation to the Aries that no danger of collision was to be apprehended. When the danger signal was finally given it was too late to avert disaster.

We cannot agree with the counsel for appellant in his contention that the signal of No. 32 was a bend whistle and not one initiating a maneuver. The District Judge finds that the master of No. 32 "first blew a signal blast of his whistle to the Aries, which indicated a passing to the right." We are unable to find anything in the record in conflict with this finding. Furthermore, the signal was not "one long blast of the steam whistle" and the bend was not such a one as is de-

scribed in rule 5 (U. S. Comp. St. vol. 3, p. 2882).

The navigation of the Aries was without fault contributing to the disaster; she could not have gone closer to the northerly side of the channel without danger of collision with a steamer lying at the wharf, and, in the absence of proof of a custom requiring her to stop, we cannot find that her failure to do so was negligence. The fault of No. 32 in proceeding around the bend without a helper to keep the tail of her tow in line and with no warning signal to the Aries so clearly accounts for the accident that we think we are not called upon to speculate further as to its cause.

In The Livingstone, 113 Fed. 879, 51 C. C. A. 560, this court said:

"We understand the rule as laid down by the Supreme Court to be that where fault on the part of one vessel is established by uncontradictory testimoney, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

See, also, The Oueen Elizabeth, 122 Fed. 409, 59 C. C. A. 345, and cases cited.

The decree is affirmed with interest and costs.

EL CAJON PORTLAND CEMENT CO. et al. v. ROBERT F. WENTZ EN-GINEERING CO.

(Circuit Court of Appeals, Sixth Circuit. December 23, 1908.) No. 1.825.

1. Corporations (§ 298*)—Conveyances—Validity—Attack by Creditors.

Where a conveyance by a corporation was made in good faith and was acquiesced in by the stockholders, corporate creditors could not question its validity because authorized by less than a majority of the board of directors, pursuant to a by-law that no member of the board should vote on questions in which he was interested otherwise than as a stockholder, and that, if the retirement of an interested member of the board reduced the number below a quorum, the question might be decided by those

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1303: Dec. Dig. § 298.*]

2. Corporations (§ 545*)—Insolvency—Conveyance to Director—Prefer-

A conveyance by an insolvent corporation to a creditor, who was a director, was not invalid under the law of Michigan because it constituted a preference.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170-2175; Dec. Dig. § 545.*]

3. Corporations (§ 545*)-Insolvency-Conveyance to Director-Good FAITH.

Where an insolvent corporation conveyed certain real estate to a bona fide creditor, who was also a director, and it did not appear that the land was of greater value than the debt, the conveyance was valid, though the bona fides of such a transaction must be subjected to the closest scrutiny.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170-2175; Dec. Dig. § 545.*]

4. Corporations (§ 30*)—Promoters—Liability to Creditors.

The personal liability of a director of a corporation to creditors for misconduct as a promoter in loading the corporation with land at an exaggerated value and as the holder of unpaid shares is to be considered only in a proceeding on behalf of the corporation's creditors generally, and not in a suit by one creditor to set aside a conveyance of certain of the corporation's property to him in payment of his indebtedness.

[Ed. Note.-For other cases, see Corporations, Cent. Dig. § 99; Dec. Dig. 30.*

Acts of corporators and promoters, see note to Yeiser v. United States Board & Paper Co., 46 C. C. A. 576.]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

William Lucking and Alfred Lucking, for appellants. J. C. Spaulding, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The appellant El Cajon Portland Cement Company is a Michigan corporation organized for the purpose of the manufacture and sale of Portland cement. On February 14, 1906, this company was indebted to H. Kimball Loud, its secretary and treasurer, in the sum of \$1,922.82, money advanced to defray current expenses and to meet construction accounts. The appellee, the Robert F. Wentz Engineering Company, was on February 14, 1906, a general creditor of the same company. The engineering company had a contract with the cement company to construct its plant, and on February 20, 1906, secured a judgment for \$3,916.25 damages against the cement company for the failure to carry out its contract with the engineering company for the construction of the cement plant and the loss of profits which resulted.

Previous to this, on February 14, 1906, the cement company, by a resolution of its board of directors, at a regular meeting held in the office at Au Sable, authorized the conveyance of 395 acres of its 435 acres, on which is situated the partially constructed walls of its plant, to H. Kimball Loud, in full payment of its indebtedness to him. The deeds were executed by the proper officers of the cement company and recorded on February 15, 1906. There were present at the meeting of the cement company's board of directors the following: George B. Loud, R. A. Richards, Selig Solomon, H. Kimball Loud, and John McKenney, constituting a quorum. Upon the question of the payment of the cement company's indebtedness to H. Kimball Loud coming up for consideration, Loud retired to an adjoining room, pursuant to provision No. 14 of the by-laws of the company, as follows:

"No member of the board shall vote on questions in which he is interested, otherwise than as a stockholder, except the election of officers, or be present at the board meeting while the same is being considered. But if his retiring from the board in such cases reduces the number below a quorum, the question may be decided by those who remain."

That the cement company owed H. Kimball Loud the sum of \$1,922.82 at the time the conveyances to him were authorized is not seriously questioned. On June 20, 1906, the engineering company, having a judgment against the cement company for \$3,916.25 damages under its contract, filed a bill in aid of execution, making the cement company and H. Kimball Loud, grantee under the conveyances, parties defendant. On July 15, 1907, the court below entered a decree setting aside the deeds to H. Kimball Loud, for the alleged reason that they were executed without lawful authority, and were therefore void. The decree authorized it to proceed on its writ of fieri facias, and the United States marshal, to sell the 395 acres, according to law, to satisfy the creditor's judgment. The cause is here for review.

The bill of complaint sets up two grounds of relief: First, that the

deeds are void from want of authority from the defendant corporation, or its legally organized board of directors, for their execution; second, that they were made in fraud of creditors, and therefore void as against the complainant's execution levy. The court below granted the relief prayed on the ground that the deeds were unauthorized, not passing upon the question as to whether there was or was not any fraud committed.

We are not prepared to hold that the by-law which constituted a quorum of less than a majority of the board, where the number was reduced by the withdrawal of a director expressly interested in a proposed action, is not binding upon the corporation and its stockholders. But this we need not decide, for the conveyance made in pursuance of that action of the board has not been attacked by the corporation or its stockholders, but has been acquiesced in and the conveyance upheld by the answer of the corporation herein. Under such circumstances it is not open to a creditor to question the conveyance, if in fact it was made in good faith. Neither does the fact that the creditor preferred was a director and the corporation insolvent make the preference void under the well-settled law of Michigan, which this court is obligated to follow. Brown v. Grand Rapids Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817, and cases therein cited.

The fact that the corporation was insolvent and that the creditor preferred was a director requires that the circumstances of the conveyance and the bona fides of the transaction shall be subjected to the closest scrutiny, for in all such preferences the utmost good faith is required. But even under this rule we find no sufficient reason for holding that a case of bad faith is made out. The bona fides of the indebtedness of the corporation to Loud is not seriously challenged. That the value of the land upon which the plant was to be situated had been much overestimated by the promoters, including Loud, who had received an exaggerated stock valuation for his interest, is undoubtedly a circumstance tending to show that he had received the land back in payment of his debt at less than its actual value. But this is overcome by the great weight of evidence as to the present market value. The enterprise had proved a failure. Little of value had been added to the land, which appears to have been worth not more than Loud took it for in the then condition of the affairs of the company.

The questions, suggested by counsel, of Loud's liability to creditors for his conduct as a promoter in loading the corporation down with the land at an exaggerated and unreal value, as well as his liability as the holder of unpaid shares, are all questions which are foreign to the proceeding, and proper for a proceeding in behalf of creditors generally.

The decree of the Circuit Court is reversed, and the cause remanded,

with direction to dismiss the bill.

SWIFT & CO. v. SANDY et ux.

(Circuit Court of Appeals, Third Circuit. November 24, 1908.)

No. 16.

1. Negligence (§ 4*)-"Ordinary Care"-"Reasonable Prudence."

The terms, "ordinary care" and "reasonable prudence," as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be "ordinary care" in one case may, under different surroundings and circumstances, be gross negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. 4.*

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740; vol. 7, p. 5976.]

2. NEGLIGENCE (§ 136*)—QUESTIONS FOR COURT OR JURY.

When, under a given state of facts, reasonable men may fairly differ on the question as to whether there was negligence or not, the determination of the matter is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 298; Dec. Dig. § 136.*]

8. MUNICIPAL CORPORATIONS (§ 62*)—STREETS—NEGLIGENT USE—INJURIES—FRIGHT.

Where plaintiff fell in the street and was injured in endeavoring to save herself from imminent bodily harm by collision with defendant's team, negligently driven around a corner, and approaching her as she was crossing the street, and the fright which preceded and accompanied plaintiff's fall was only such as would usually be associated with the hurried effort to avoid impending danger, a contention that plaintiff was so frightened or bewildered that she collapsed, and that her fall resulted from fright caused by defendant's negligence, for which she could not recover, was unsustainable.

[Fd. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 62.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 159 Fed. 271.

H. S. Sparhawk, for plaintiff in error. Paul Reilly, for defendants in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

DALLAS, Circuit Judge. This writ of error has brought up the record in an action by Samuel B. Sandy and Mary A. Sandy, his wife, to recover for personal injury to Mrs. Sandy, caused, as alleged, by negligence for which the defendant below, the plaintiff here, was averred to be responsible. The specifications of error relied upon are, in substance, the denial of binding instructions for the defendant, and the refusal to enter judgment in its favor, non obstante veredicto; and the only question they present is whether or not the evidence as a whole justified the submission of the case to the jury. The material facts as shown by the proofs are incontrovertible. One James Mattern, in the pursuit of his employment by the defendant, was driving a team hauling a heavy wagon northwardly on the left-hand side of Germantown avenue, Philadelphia, and had about reached Duval street when

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mr. and Mrs. Sandy were about two-thirds of the distance across that street in course of crossing from its northerly to its southerly side, on the westerly side of Germantown avenue. Under these circumstances, and without notice or warning, the team referred to was abruptly turned westwardly to Duval street, so that, as Mrs. Sandy testified, she knew nothing of it until she saw the horses "loom up in front" of her, and the next thing she realized was that she was being picked up out of the street. Mr. Sandy testified that the team swung around the corner into Duval street so quickly that if he had not "switched back" the end of the pole would have struck him, and that, though Mrs. Sandy was not actually struck either by the pole or the horses, she would have been if the driver had not pulled up just as both Mr. and Mrs. Sandy "stepped back a little bit," and she fell.

If this testimony was true, and it seems that the jury believed it, it certainly warranted a finding that Mrs. Sandy's mishap resulted from an effort on her part to escape being struck or run over, and whether this situation of danger was or was not due to lack of ordinary prudence on the part of the driver was for determination by the jury. There was no serious dispute about the primary facts, it is true, but the ultimate fact—the existence or nonexistence of negligence—was for deduction from the former, and the making of such deductions is peculiarly within the province of the appointed triors of all issues of

fact.

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 682 36 L. Ed. 485.

It has been argued with much zeal and ingenuity that Mrs. Sandy was "so frightened or bewildered as simply to collapse," and that therefore, her fall, though it resulted from "fright caused by the negligence of another," could not entitle her to damages. But it must suffice to say of this contention that we have not been convinced of its relevancy. While, of course, Mrs. Sandy was startled and alarmed, the evidence shows that she fell in endeavoring to save herself from imminent bodily harm, and that the fright which preceded and accompanied her fall was merely such as usually is associated with a hurried effort to avoid an impending danger.

The judgment is affirmed.

CHANCE et al. v. GULDEN.

(Circuit Court of Appeals, Third Circuit. November 25, 1908.)

No. 51.

TRADE-MARKS AND TRADE-NAMES (§ 59*)-INFRINGEMENT.

The use of the name "Don Cæsar," in connection with the sale of defendants' olives, was not an infringement of complainant's trade-mark. "Don Carlos," used in the same trade.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 71; Dec. Dig. § 59.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 163 Fed. 447.

Frank P. Prichard, for appellants. Timothy D. Mervine, for appellee.

Before GRAY, Circuit Judge, and BRADFORD and LANNING, District Judges.

GRAY, Circuit Judge. This is an appeal by the defendants below from an interlocutory decree granting a preliminary injunction, in a suit wherein the appellee was complainant, which restrained the defendants from using the words "Don Cæsar" in connection with olives sold and packed by defendants, and adjudged that the same was an infringement of complainant's trade-mark, consisting of the words "Don Carlos." Both the appellee (hereinafter called the complainant) and the appellants (hereinafter called the defendants) were wholesale packers of olives, which were imported in bulk and packed by them in bottles for sale to the trade. Both houses had been in business for more than a generation, the complainant in New York City and the defendants in the city of Philadelphia.

In the court below, answer had been filed by the defendants to the bill of complaint. Replication thereto was filed by the complainant, and testimony taken and closed in his behalf before an examiner. Shortly after the close of complainant's testimony, and before any testimony had been taken on behalf of the defendants, a motion was made by complainant for a preliminary injunction, upon the evidence taken before the examiner and the affidavit of the complainant. Affidavits were filed on behalf of the defendants and, after hearing, the preliminary injunction moved for was granted by the court below, restraining the defendants—

"from using the name 'Don Cæsar,' or any equivalent thereof, upon or in connection with, or as a designation of, olives packed and sold, or offered for sale, by defendants, and from putting up, packing, offering for sale or selling olives in glass bottles, or other packages, or otherwise, with the name 'Don Cæsar,' or any equivalent thereof, attached or fixed thereto or in connection therewith, as a designation or identification thereof."

This is clearly an injunction against the use of a common-law or technical trade-mark, and is entirely dissociated from any assimilations

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or colorable imitations of the complainant's label upon which the trademark is placed. In the opinion of the court below, the use of the trademark "Don Cæsar" was a clear infringement of the trade-mark "Don Carlos," used by complainant. So that, whether the name "Don Cæsar" was used on a label in colorable imitation of complainant's, or upon any label, or in any way affixed to any bottle, keg box or package, it was held to have infringed the property right of the complainant to his trade-mark "Don Carlos," even though there were no fraudulent attempt to imitate or otherwise appropriate the same. Indeed the decree, by its express language, precludes, as the opinion of the court disavows, any idea or suggestion of unfair competition by reason of the size, color, or general appearance of any label on which the name "Don Cæsar" appears. It is a bald injunction against the use by the defendants of the name "Don Cæsar." by whatever devices accompanied or however affixed to any package of olives packed by All question of unfair competition, therefore, is eliminated from consideration in this appeal, the sole question being whether the use of the words "Don Cæsar," however placed, upon any package of defendants' olives was an infringement of the property right of complainant in his trade mark of "Don Carlos." This property right related to the words "Don Carlos" alone, unaccompanied by any label, device, figure or coloring. As stated by the complainant in his application for registration under the act of Congress, the trade-mark "consists of the words 'Don Carlos.' "

The court below has distinctly said that the facts are not enough to make out a charge of unfair competition, and its decree rests solely upon similarity of the historical name used by defendants to that used by the complainant, irrespective of any question as to the intent of the defendants and of any evidence in regard thereto. As was said by counsel for defendants, defendants might on the same grounds be restrained from using the words "General Sheridan" on their packages, because complainant had previously used the words "General Sherman," even though defendants had never known of such prior use and were guiltless of any fraudulent intent. We think the preliminary injunction in this case was improvidently granted, and that in the absence of fraud, there was nothing in the use of the words "Don Cæsar" alone. by defendants, that was in derogation of any property right of the complainant in the words "Don Carlos" as a trade-mark. If there were any fraud or unfair competition on the part of the defendants, in the manner of using the words "Don Cæsar" on their packages of olives, as alleged by complainant in his bill, the court will have an opportunity to deal with that charge at the final hearing, upon the testimony adduced by the complainant and upon that which may hereafter be adduced by the defendants relevant thereto.

We think the decree of the court below, granting a preliminary injunction, should be reversed, and it is so ordered.

GRIFFIN v. DUTTON et al.

(Circuit Court of Appeals, First Circuit. December 16, 1908)

No. 789.

1. BANKRUPTCY (§ 60*)—ACT OF BANKRUPTCY—ASSIGNMENT FOR CREDITORS.

Where a bankrupt intended to make, and in fact executed, a general assignment for the benefit of creditors in the usual form, and the assignee, by sending a notice of a meeting of creditors, stating that the assignment had been made to him, and by other acts acknowledged and ratified his appointment thereunder, such facts were sufficient to establish a general assignment for the benefit of creditors, constituting an act of bankruptcy, though the original assignment was lost, and the evidence failed to show with certainty the form in which it was signed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

2. BANKRUPTCY (§ 60*) — ACTS OF BANKRUPTCY—ASSIGNMENT FOR CREDITORS—VALIDITY.

Where a bankrupt executed an instrument intended for, and which purported to be, a general assignment for the benefit of creditors, she committed an act of bankruptcy, whether the assignment was valid or not.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

Appeal from the District Court of the United States for the District of Massachusetts.

William R. Bigelow (William B. Sprout and Thayer & Perry, on the brief), for appellant.

Charles M. Thayer (J. Otis Sibley, on the brief), for appellees. Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This appeal involves the question whether Jennie M. Griffin, the appellant, committed an act of bankruptcy by making a general assignment for the benefit of creditors within four months from the filing of the creditors' petition. Bankr. Act July 1, 1898, c. 541, § 3 (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).

The material facts, as found by the referee, are as follows:

"Mrs. Griffin carried on the business formerly carried on by her husband, in the name of Estate of John J. Griffin. * * * Business was carried on until some time in April, 1907, when attachments were placed on the property. On April 26, 1907, an assignment for the benefit of creditors to James Early was signed by Mrs. Griffin and delivered to Mr. Early. This assignment was not produced in evidence, and all parties who had had it at any time in their possession testified that they had made diligent search therefor, and that it could not be found. A printed blank form is forwarded herewith, marked 'Exhibit C,' and it is agreed that this form, so far as the printed matter is concerned, is the form in which the assignment was made. It did not clearly appear exactly how this assignment was signed. Mrs. Griffin testified that she thinks she probably signed it 'Jennie M. Griffin, Executrix,' but could not say positively. It was, however, signed by Mrs. Griffin in some form, either with or without reference to the estate or to her executorship. Subsequent to the making of the assignment a notice was sent to the creditors of John J. Griffin Estate. * * * Pursuant to that notice a meeting was held at which Mrs. Griffin was present, and she testified that a statement was made to the creditors at that time. * * * The deputy sheriff and his keeper remained in

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charge of the property from the date of the attachment in April, 1907, until long after the assignment was signed, and long after these proceedings were begun. * * * Mr. Early could not remember whether he ever signed the document accepting the assignment as assignee. Mr. Vaughan, one of the counsel for Florence M. Griffin, testified that, when he last saw it, it was not signed by Mr. Early. Mr. Early consulted Mr. Vaughan, who then acted as one of the counsel for Mrs. Griffin, about what he should do under the assignment, and Mr. Early also applied to Charles M. Thayer, counsel for the petitioners, and to Henry F. Harris, Esq., an attorney in Worcester, who represented other creditors, and asked them to assent to the assignment on behalf of their clients, but did not obtain the assents. Mr. Early had the property appraised by three competent appraisers. He visited the place of business, but did not formally take charge, nor interfere with the keeper who was in charge under the deputy sheriff. He caused the notices to creditors to be sent out, and attended the meeting. As a result of the meeting a committee of the creditors was chosen, and from that time Mr. Early has done nothing with regard to the property."

The following is the form of the notice sent by Early:

"A meeting of the creditors of the John J. Griffin Estate will be held at the factory, No. 105 Shrewsbury street, Worcester, Massachusetts, on Monday, May 6, 1907, at 2:30 p. m., to see what action will be taken in regard to an assignment for the benefit of its creditors made to me April 26, 1907, and in regard to any other matters which may arise.

James Early, Assignee."

Upon this state of facts the referee found:

"The first allegation of an act of bankruptcy in the petition is established, to wit, the making within four months of the date of filing the petition of a general assignment for the benefit of creditors."

The District Court affirmed this finding, and on June 9, 1908, ad-

judged the appellant a bankrupt.

The original assignment having been lost, the evidence fails to show with certainty the form in which the bankrupt signed the instrument. For the same reason it is not shown with absolute certainty that the assignee signed it, although the evidence strongly points to the conclusion that it was in fact signed by him. It does, however, clearly, appear that in April, 1907, the bankrupt intended to make, and in fact executed, a general assignment for the benefit of creditors in the usual form of such assignment; and it also appears that the assignee by his acts, and especially by sending out a notice of a meeting of the creditors in which it is stated that the assignment was "made to me," acknowledged and ratified his appointment as trustee under that instrument. In our opinion, these facts are sufficient to establish a general assignment for the benefit of creditors within the meaning of the bankruptcy act.

Such an assignment is sufficient in form, and constitutes an act of bankruptcy, if it purports to be a general assignment for the benefit of creditors, signed by the bankrupt and duly ratified by the trustee named therein. Nor is it necessary that the assignment should be valid for all purposes, as, for instance, that the creditors should assent thereto. The language of the bankruptcy act is general. It makes no distinction between strictly valid instruments and those which may be invalid for certain purposes. To limit its operation to those assignments which are in all respects valid would be contrary to the intent and purpose of

the act.

This provision of the bankruptcy act came before the Court of Appeals for the Second Circuit in the case of In re Meyer, 98 Fed. 976, 980, 39 C. C. A. 368, 371. In that case the assignment was made by only one partner, and Judge Wallace, in the opinion of the court said:

"Apparently the partner who did not join has ratified, by acquiescence, the act of the partner who executed it. However this may be, in denominating the making of a general assignment for the benefit of creditors an act of bankruptcy, Congress did not make any distinction between valid or invalid instruments, but used terms which would reach the execution of any instrument which is, or purports to be, a general assignment."

See, also, In re Lawrence, 10 Ben. 4, Fed. Cas. No. 8,133; In re Mendelsohn, 3 Sawy. 342, Fed. Cas. No. 9,420.

The decree of the District Court is affirmed, and the appellees recover costs in this court.

ROSS et al. v. STROH.

(Circuit Court of Appeals, Third Circuit. December 1, 1908.,

1. Bankruptcy (§ 114*)—Receivership—Collateral Attack.

Where claimants instituted proceedings, in the nature of a replevin suit, against a bankrupt's receiver to recover personal property, their only claim to relief depending on their ownership or right of possession of the property which the receiver had seized, they could not in such proceeding collaterally attack the official status of the receiver or the regularity of the proceedings leading to his appointment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 165; Dec. Dig. § 114.*]

2. Bankruptcy (§ 444*)—Petition for Review—Record.

While neither the bankruptcy act nor the general bankruptcy orders prescribe the practice in proceedings on revisory petitions, the matters of law of which revision is sought must be in some manner clearly presented.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 922; Dec. Dig. § 444.*]

3. Bankruptcy (§ 446*)—Appeal—Petition for Review—Scope of Review.

Where an appeal is taken in bankruptcy, as authorized by Bankr. Act (Act July 1, 1898, c. 541, 30 Stat 553 [U. S. Comp. St. 1901, p. 3431]), § 24a, it is the duty of the appellate court to review the facts as well as the law, on proper assignments of error, as required by Gen. Bankr. Order 36 (18 Sup. Ct. ix) and Court of Appeals Rule 11 (150 Fed. xvii, 79 C. C. A. xvii), but if the matter is brought up on a petition for review, authorized by Bankr. Act, § 24b (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), only questions of law, fairly presented by the petition and record, can be considered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

4. Bankbuptoy (§ 447*) — Petition for Review — Dismissal Without Prejunce

Where, on a petition for review in bankruptcy, there were no sufficient specifications of legal error presenting the questions sought to be reviewed, but the evidence was such as to raise a doubt as to the merits of pe-

titioner's claim, the revisory petition would be dismissed without prejudice to such further proceedings as the District Court might consider proper. [Ed Note.—For other cases, see Bankruptcy, Cent. Dig. § 930; Dec. Dig. § 447.*]

Petition for Revision of Proceedings of the District Court of the United States for the Middle District of Pennsylvania, in Bankruptcy.

C. A. Van Wormer, for petitioners.

W. W. Hall, for respondent.

Before GRAY, Circuit Judge, and BRADFORD and LANNING, District Judges.

LANNING, District Judge. The record of this case shows:

That on July 10, 1908, K. J. Ross and five other persons filed in the District Court their joint petition, alleging: (1) That they were the "absolute owners" of certain personal property therein described, and that that property "is now remaining and being in the plant of the Pittston Cut Glass Company, in West Pittston aforesaid, which said plant was until to-day, and has been since prior to the acquisition of title to the property aforesaid by the petitioners herein, in the possession of the People's Savings Bank of Pittston, mortgagee"; (2) that a petition in bankruptcy had been filed against the Pittston Cut Glass Company; (3) that George D. Stroh had been appointed receiver of the alleged bankrupt's property, and "claims the right of possession and has actually taken possession of the aforesaid property of your petitioners"; and (4) that "the complete title and right of possession of said property is in your petitioners." The prayer is "for an order upon said receiver to release and surrender said property to your petitioners."

That, on July 15th, Stroh, as receiver, answered the petition, denying the absolute ownership asserted in its first paragraph, and declaring that "the statement with reference to People's Savings Bank of Pittston having been in possession of said property is also denied"; admitting the allegations of the second and third paragraphs of the petition; and, as to the fourth paragraph, saying:

"The fourth paragraph of said petition is denied; that the sale under which the petitioners aforesaid claim title was null and void and in fraud of creditors, the same being made through the connivance and understanding of the Pittston Cut Glass Company, bankrupt, and the People's Savings Bank of Pittston."

That between July 15th and 22d proofs were taken, and that on July 22d the District Court made the following order:

"Now, July 22, 1908, the petition of K. J. Ross, Esq., and others for the reclamation of certain property coming on to be heard on notice to the receiver and to the petitioning creditors, upon due consideration of the testimony taken upon the same and the argument of counsel, it is thereupon adjudged and decreed that the petition be dismissed, exception being noted in favor of the petitioners."

This order is now brought before us by Ross and his associates on a petition for revision, founded on clause "b" of section 24 of the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]). The petitioners specify nine alleged errors of law relating to supposed defects in the original petition in bankruptcy and in the proceedings for the appointment of a receiver. In none of these matters, however, are they interested. They are not creditors. They are claimants of property seized by the receiver which they seek to have delivered to them. Their only title to relief depends on their ownership or right of possession of the property which the receiver has seized. The proceeding which they have instituted is in the nature of a replevin suit, and they are not at liberty to attack, collaterally, the official status of the receiver or the regularity of the proceedings leading up to his appointment.

There are two other specifications of error in the petition for revision: First, that the receiver "had no right to take the property found in the possession of K. J. Ross et al., who claimed title thereto as bona fide purchasers for value, without a hearing"; and, second, that "after a hearing had upon the petition of K. J. Ross et al. for the return to them of such property, it being shown that they were in possession thereof before bankruptcy proceedings were instituted, claiming title in good faith, an order refusing to direct the receiver to return to

them said property was erroneous."

Each of these specifications is based on the supposition that there has been a finding of fact that the property which Ross and his associates now claim was in their possession when the receiver seized it. They did not so declare in their petition of reclamation. What they said there was that the property was "in the plant" of the Pittston Cut Glass Company, and that the plant was "in the possession of the People's Savings Bank." The receiver, evidently assuming that the petitioners intended to aver that the property claimed by them was in the possession of the savings bank, denied such possession. What the District Court actually found as the fact on this point we do not know, for no opinion or findings of facts accompany the record. We have before us, concerning the matters which we may properly consider, only the petition of reclamation, the answer, the testimony, and the order dismissing the petition. While neither the bankruptcy act nor the general orders in bankruptcy prescribe the practice to be adopted in proceedings on revisory petitions, the matters of law of which revision is sought should in some manner be clearly presented. Such was the view expressed by the Circuit Court of Appeals of the First Circuit in the cases of In re Boston Dry Goods Company, 125 Fed. 226, 60 C. C. A. 118, In re O'Connell (C. C.) 137 Fed. 838, and In re Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338. In that view we concur. Had this case been brought before us by appeal, under the provision of section 24a of the bankruptcy act, as it might have been (see Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986), it would have been our duty to review the facts as well as the law, provided proper assignments of error had been filed, in accordance with the thirty-sixth general order in bankruptcy (18 Sup. Ct. xvii) and the eleventh rule of this court (150 Fed. vxii, 79 C. C. A. xvii). Having been brought by revisory petition, under the provision of section 24b, we can consider only those questions of law that are fairly presented

by the petition and the record.

Whether the mortgage, though not recorded until a few days before the sale, and though the property remained in the possession of the mortgagor until after the mortgage was recorded, was not, under the law of the state of Pennsylvania, a valid security in the hands of the savings bank (see Christ v. Zehner, 212 Pa. 188, 61 Atl. 822), whether, if it was, it was not also a valid security in its hands under the bankruptcy law (see York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Hiscock v Varick Bank of New York, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945; Thomas v. Taggart, 209 U. S. 386, 28 Sup. Ct. 519, 52 L. Ed. 845), whether the sale by the People's Savings Bank was one that conveyed a good title to Ross and his associates, whether they were in possession of the property at the time of its seizure by the receiver, and whether, if they were in such possession, the receiver erred in seizing the property without the authority of a judgment or order in some form of plenary suit, are questions which we cannot now consider. There are no findings of fact by the District Court, and no specifications of legal error in the revisory petition, which enable us to do so. It does not appear, even, that they were argued before the District Court.

We are compelled, therefore, to dismiss the revisory petition. Inasmuch, however, as the parties have taken evidence bearing on these questions, notwithstanding the meager averments of the petition of reclamation and of the answer thereto, and inasmuch as that evidence leaves us in doubt as to the merits of the claim of Ross and his associates, our order will be that the revisory petition be dismissed without prejudice to such further proceedings in the District Court as that court may consider to be proper.

DELAWARE, L. & W. R. CO. v. CITY OF SYRACUSE et al

(Circuit Court of Appeals, Second Circuit. September 16, 1908.)

No. 255

RAILROADS (§ 75*)—RIGHT TO BUILD TRESTLE ON STREET—CONSENT OF MUNICIPALITY.

Under the railroad law of New York (Laws 1890, p. 1087, c. 565, § 11), which authorizes a railroad company to cross a street in a city with its track only with the "assent of the corporation of such city," which under the statutory provisions governing cities of the second class can only be given by the common council, an ordinance giving a railroad company the "right to construct and operate a switch or switches, track or tracks," across a certain street, under which the company built a number of switch tracks across at grade, does not authorize it to build another upon a trestle resting on abutments of concrete located in the street and 10 feet apart, nor can the ordinance be enlarged to cover such a structure by any action of the administrative officers, as by the granting of a building permit.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 185; Dec. Dig. § 75.*]

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Northern District of New York.

For opinion below, see 157 Fed. 700.

John G. Milburn and Alexander D. Jenney (Louis L. Waters, of counsel), for appellant.

Walter W. Magee, Corp. Counsel, for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The opinion of the judge at circuit sets forth the facts and discusses the evidence at great length, and it seems unnecessary to review them here, since on the fundamental questions we agree with his conclusions that Schuyler street, extended, became one of the public streets of the city of Syracuse when the village of Geddes was incorporated into that city as a part thereof, and has not been abandoned and has not ceased to be one of such streets.

That being so, the authority of the complainant railroad to cross it is to be sought in some "assent of the corporation of such city." Railroad Law N. Y. § 11 (Laws 1890, p. 1087, c. 565). The only such assent is found in the ordinance of December 28, 1903; the building permit issued by the fire marshal and other acts of city officers do not constitute such an "assent of the corporation." That ordinance granted the right and consent "to construct and operate a switch or switches, track or tracks, across the extension of Schuyler street." No one denies that this was abundant authority for the various tracks which complainant has already built across such extension at grade. It is not necessary to decide whether or not under the terms of the consent the railroad could also construct tracks across the extension above grade, if the same were carried at a sufficient height and ran between abutments located outside of the boundary lines of the extension. We are concerned only with the structure the railroad company has undertaken to build, interference with which it seeks by this bill to enjoin. That structure is a trestle supported on several abutments of concrete located on the street, each abutment 30 feet in length, with the top of the surface thereof 22 inches in width and projecting above the ground 2 feet or more; the distance between any two abutments being 10 feet 2 inches, and all the abutments being placed more or less quartering in the street. We are clearly of the opinion that the ordinance, even if unrepealed, conveyed no consent to erect and maintain such a structure, and that the bill was properly dismissed.

The decree is in an unusual form, embodying at great length the recital of many evidential facts and several findings upon which, in the view we take of the case, it is not necessary now to express any opinion. It should be modified so as to express merely the findings that the land in question is a public street, and that there was no authority for the erection of the trestle except the ordinance of 1903, with the conclusions that such authority is not sufficient to justify the erection of such a structure, and that the bill be dismissed, with costs.

As thus modified, the decree is affirmed, with costs of this appeal.

EARN LINE S. S. CO. v. ENNIS.

(Circuit Court of Appeals, Third Circuit. December 2, 1908.)

No. 250.

ADMIRALTY (§ 118*)-APPEAL-REVIEW-FINDINGS OF FACT.

The time when a vessel was ready to load or discharge cargo, and consequently when the lay days commenced under a charter party, is a question of fact, and the finding of the trial court thereon, based on conflicting evidence, will not be disturbed by an appellate court, unless clearly erroneous.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. $\$ 770; Dec. Dig. $\$ 118.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 157 Fed. 941.

Henry R. Edmunds, for appellant.

Ira J. Williams, for appellee.

Before GRAY, Circuit Judge, and BRADFORD and LANNING, District Judges.

GRAY, Circuit Judge. This was a libel by the appellant, chartered owner of the steamship Dania, to recover from the appellee, charterer thereof, a balance of freight alleged to have been improperly withheld from the chartered owner. According to the charter party, the vessel was to proceed to Santiago, Cuba, and there load a cargo of ore. By one of its provisions, the charterer had the option of loading and discharging the vessel. Amongst its other provisions, were the following:

"The cargo to be loaded at the rate of 250 tons and discharged at the rate of 250 tons, per running day of 24 hours (Sunday and holidays excepted), and charterers to have the liberty to load and discharge on Sundays and holidays, such time not to count as lay days. * * *

"Dispatch money at the rate of fifteen pounds per day of 24 hours, to be paid by the steamer for any time saved in loading and discharging. * * * "Lay days to commence at 12 o'clock noon after steamer is entered at the custom house (Sundays and holidays excepted), and is in every respect ready to load and discharge, respectively, and in free pratique," etc.

There is no dispute as to the amount of freight earned by the vessel under the charter party. The only question was, whether, under the facts of the case, the dispatch money charged by the charterer and deducted from the freight was earned by him under the charter party. The court below disallowed the claim of libelant for deduction of \$72.04, from freight for 23¾ hours dispatch in loading at Santiago, and also for deduction of \$102.35 for 33¾ hours alleged dispatch in unloading at Hoboken, less the sum of \$30.52 for an excess of deduction at the latter place. The libelant has appealed from this decree, and makes the following assignments of error:

"1. The learned judge of the District Court erred in finding as a fact (that the steamer was) not ready to load at Santiago until after 12 o'clock of June 11, 1902.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"2. The learned judge also erred in deciding that lay days did not commence

at Santiago until 12 o'clock of June 12, 1902.

"3. The learned judge also erred in deciding that the retention by respondent of the sum of \$72.04 as dispatch money at Santiago for time saved in loading was properly deducted from the freight due by the respondent.

"4. The learned judge also erred in finding that the ship (the Dania) was not in free pratique and ready to discharge her cargo at the port of New

York until after 12 o'clock noon of the 20th day of June, 1902.

"5. The learned judge also erred in deciding that lay days did not commence at New York until 12 o'clock noon on Monday, June 22, 1902; and that the retention by respondent of the dispatch money at the rate of fifteen pounds per day was properly deducted for seventeen days and four hours."

The first assignment of error relates only to a finding of fact by the court below. There was conflicting evidence as to the question of fact involved. In such case, unless there was a clear and manifest error in the finding of the court, the reviewing court will not disturb the same. Pursuant to this well settled practice, this court does not feel that the first assignment of error should be allowed.

The second assignment of error, of course, as also the third, falls

with the first.

The fourth assignment of error is amenable to the criticism which

we have made as to the first assignment.

As to the fifth assignment, it is only necessary to say that, the court having found as a fact that the ship was not in free pratique and ready to discharge her cargo at the port of New York until after 12 o'clock, noon, of Saturday the 20th day of June, 1902, the question raised as to whether Saturday afternoons were holidays in the port of New York, or at Hoboken, within the meaning of the exception of such days in the charter party, cannot arise. This assignment, therefore, is disallowed.

The decree of the court below is hereby affirmed.

THE DEVEAUX POWELL.

THE LACKAWANNA.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

Nos. 28, 29.

Collision (§ 38*)—Steam Vessels Crossing—Duty of Privileged Vessel.

The privileged one of two crossing steam vessels has a right to rely on the performance by the other of her duty to keep out of the way so long as it is possible for her to do so, and such privileged vessel is not in fault for a collision caused by a failure in such duty, merely because she kept her course and speed notwithstanding the failure of the burdened vessel to answer her signals.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 37, 38; Dec. Dig. § 38.*]

Appeals from the District Court of the United States for the Eastern District of New York.

^{&#}x27;or other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This cause comes here upon appeal from a decree holding steam tug and ferryboat both in fault for a collision between said vessels in the Hudson river. The opinion below is reported in 120 Fed. 522. The ferryboat is the sole appellant.

De Laguel Berier and James J. Macklin, for appellant. Wallace, Butler & Brown, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The collision took place on July 18, 1899, a few minutes before 6 a. m. The ferryboat was bound from her slip at Fourteenth street, New York, to her slip at Fourteenth street, Hoboken, which lies about opposite Twenty-Third street, New York. The tug, with an empty barge in tow, was coming up the river about 1,000 feet off shore. It is not necessary to detail the manœuvers of the vessels. They are set forth in the opinion of the District Judge. The fundamental question in the case is which vessel was privileged. The District Judge found that they were on crossing courses and that the starboard hand rule applied. For the tug it is contended that the ferryboat was an overtaking vessel and that after straightening up the river she paralleled the tug's course, until at Twenty-First street she circled around the latter's bow, whereupon the collision occurred. Of this contention the District Judge says:

"This statement is incredible, and illustrates the culpable inattention of the Powell's pilot."

There is some conflict of testimony as to the relative positions of the vessels at different times; but we are not satisfied that the ferryboat was abaft the beam of the tug when she laid her course for her Hoboken slip, and see no reason to reverse the finding of the District Judge, who heard most of the important witnesses on this point. As the burdened vessel, having the ferry boat on her starboard hand, it was the duty of the tug to keep out of the way, which she certainly failed to do, running into the port quarter of the Lackawanna about 60 feet from the stern.

In imputing contributing fault to the ferryboat the District Judge said:

"[The] situation must have appeared plain to the pilot of the Lackawanna. He twice claimed the right of way and understood that it was not accorded. He knew of the continued inattention or misapprehension of the pilot of the tug, as the vessels converged over a considerable distance on crossing courses, and yet kept on his way to the menaced collision. This cannot be excused in view of any explanation given, and it follows that the costs and damages must be divided."

The case at bar was disposed of before the decisions of this court were rendered in The Chicago, 125 Fed. 712, 60 C. C. A. 480, and The Cygnus, 142 Fed. 88, 73 C. C. A. 309. Had it been tried after those decisions, it may be presumed that the Lackawanna would not have been held at fault. Her pilot did not know that the tug had no lookout, nor that the tug's master was unobservant of the movements of the ferryboat. All that he knew was that the tug had twice failed to answer his signals and that the vessels were approaching

on crossing courses; but it was the first of the ebb, and a stopping or a slackening by the tug or a trifling change of her helm to port would have set her in safety under the stern of the ferryboat. We think the case is substantially the same as that presented in those two causes, and that the Lackawanna should not be held in fault.

Decree is reversed as to Lackawanna, with costs of this appeal, and cause remanded, with instructions to decree in conformity with this

opinion.

CARPENTER et al. v. WINN.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 19.

DISCOVERY (§ 86*)—BOOKS AND PAPERS—PRODUCTION BEFORE TRIAL.
Under Rev. St. § 724 (U. S. Comp. St. 1901, p. 583), declaring that in actions at law United States courts may require defendants to disclose books or writings in their possession or power which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery, a federal court, in an action against certain brokers to recover damages for improperly closing certain cotton contracts belonging to plaintiff, had jurisdiction to require defendants to exhibit their books before trial, and permit plaintiff to investigate, copy, and make abstracts from the same, and to give judgment to plaintiff by default for defendant's refusal to comply with such order.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 110-112; Dec. Dig. § 86.*1

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment entered against plaintiffs in error, who were defendants below. The action was brought at law to recover damages claimed to have been sustained on contracts for the purchase of cotton on the floor of the New York Cotton Exchange, which contracts plaintiff below alleged he employed defendants to make in their own names but in his behalf. It was alleged that they sold out the same without calling on him for margin and without his consent. After the cause was at issue plaintiff made a motion under section 724, Rev. St. (U. S. Comp. St. 1901, p. 583), for an order directing defendants to exhibit their books before trial and permit plaintiff to investigate, copy, and make abstracts of the same. The motion was granted, and order to that effect made and served. Defendants refused to comply with such order on the ground that the court had not authority to make it. Thereupon, motion being duly made, the court gave judgment against defendants by default, as prescribed in the section above cited.

John R. Abney, for plaintiffs in error Boothby & Baldwin, for defendant in error. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The question whether under section 724 (U. S. Comp. St. 1901, p. 583), a party could be required to produce his books and papers before trial, is one which has been frequently considered.

^{*}For ether cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The decisions rendered in different districts are not harmonious. A very full review of these decisions will be found in Bloede v. Bancroft (C. C.) 98 Fed. 175, where it was held that production of the books in advance of trial could be required. Since that decision, however, the Circuit Court of Appeals in the Third Circuit has held the other way. Cassatt v. Mitchell Coal & Coke Co., 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99. A majority of us are in accord with the reasoning and conclusion in Bloede v. Bancroft, and since the practice there approved has been the practice in this circuit for several years, and is in harmony with the provisions of the state Code of Procedure, we are all unwilling to adopt the conclusions of the Circuit Court of Appeals of the Third Circuit. Moreover, the weight of decisions in the different circuits seems to be in accord with Bloede v. Bancroft. It is unfortunate, perhaps, that there should be diversity in the practice in different circuits; but the remedy for that would be an application for certiorari to the Supreme Court.

The judgment is affirmed.

In re FALCONER WORSTED MILLS.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 56.

MORTGAGES (§ 245*)—ASSIGNMENT AS SECURITY.

Where a bankrupt executed a collateral note to a trust company to secure it for all advances and liabilities, not exceeding the amount of the note, which the bankrupt thereafter withdrew to purchase a mortgage, which was thereupon assigned by the mortgagee to the trust company, the latter thereby acquired a valid pledge of the mortgage to secure its claim against the bankrupt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. 605; Dec. Dig. § 245.*]

Appeal from the District Court of the United States for the Western District of New York.

The following is the opinion filed by Hazel, District Judge, in the court below:

The bankrupt corporation in fact owned the mortgage assigned to the Union Trust Company of Jamestown, N. Y.; it having purchased the same with its money. The contention of the trustee seems to entirely ignore the intention of the trust. company and the bankrupt at the time of the execution and delivery of the collateral note, as is evidenced by its terms. Moreover, the referee found as a fact that on the day the collateral note was executed and turned over to the trust company the proceeds thereof were deposited to the credit of the bankrupt and thereafter withdrawn to pay for the mortgage, and that the mortgage executed and delivered an assignment thereof to the trust company pursuant to understanding with the bankrupt. Under the circumstances the bankrupt manifestly could pledge the mortgage to secure its loans and liabilities to the trust company. Dougherty v. Remington Paper Co., 81 N. Y. 498; Barber v. Hathaway, 47 App. Div. 165, 62 N. Y. Supp. 329. The legal effect of the broad terms of the collateral note was to secure the bank for all advances and liabilities, not exceeding the amount of the note. See Gillett v. Bank, 160 N. Y. 549, 55 N. E. 292. The case cited is also authority for holding that the subsequently discounted note of \$3,500, which

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was indorsed by the bankrupt, came under the pledge of the mortgage, and was acquired by the claimant from the payee in due course of business. The cases cited by the trustee in his brief do not seem to apply to the facts under consideration.

The report of the referee directing payment by the trustee of the balance, to wit, \$2,000, as secured claim is affirmed.

C. A. Pickard, for appellant.

H. R. Lewis, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Order affirmed, with costs, on opinion of Judge Hazel in District Court.

LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE v. PERSAGLIO.

(Circuit Court of Appeals, Second Circuit, November 16, 1908.)

No. 16.

EVIDENCE (§ 474*)—OPINION EVIDENCE—COMPETENCY—MEANS OF KNOWLEDGE OF FACTS.

Upon an issue as to the value of the contents of certain trunks, in an action against a carrier for its loss, the fact that it consisted largely of clothing bought by plaintiff's wife for the family, and that he did not know the prices paid, did not render him incompetent to testify as to such value, approximately; it being a matter not capable of exact ascertainment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2215-2218; Dec. Dig. § 474.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

J. P. Nolan (John M. Nolan, of counsel), for plaintiff in error. A. C. Jopling (J. Frank Ball, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The plaintiff purchased of the defendant transportation for his wife and four children, with two trunks, from New York to Havre on the steamship La Champagne. The verdict of the jury establishes that they were wrongfully refused passage on that steamship, and that the trunks were taken forward to Havre and returned in about a year, with the contents entirely ruined.

The only exceptions which we regard as having any merit are connected with the proof of the value of the contents of the trunks. The plaintiff, an Italian employed in the Dupont Powder Works at Wilmington, Del., and very unfamiliar with English, supplied the only testimony on this subject. Over a general objection by defendant, he was permitted to testify, the defendant taking no exception, that the contents of the trunks were worth \$400. After cross-examination, which certainly went to diminish the worth of his testimony very considerably, defendant's counsel moved to strike out his testimony "be-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cause the witness does not know the value of them and his wife purchased them," which motion was denied, and an exception taken. The witness had said that his wife had bought the clothes; that he could not tell the prices she paid, but gave her the money for them. This does not prove that he was unable, independently as a father of a family, to give a fair estimate of the value of the wearing apparel, and therefore the trial judge was justified in refusing to strike out his testimony for the reasons assigned. The value of the clothing of a family of steerage passengers does not admit of very accurate proof, and as the jury and the trial judge were both satisfied, and we think the verdict reasonable, we are not astute to amplify the defendant's exceptions.

The judgment is affirmed.

RICE-STIX DRY GOODS CO. v. J. A. SCRIVEN CO.

PREMIUM MFG. CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. November 19, 1908.) Nos. 2781, 2782.

1. Trade-Marks and Trade-Names (§ 18*)—Color of Patented Article— Effect of Expiration of Patent.

Complainant made and sold men's drawers under a patent which covered the insertion in the seams of a strip of elastic material, such strip as made by complainant being of knitted fabric made of Egyptian yarn, the natural color of which is yellow or buff, while the body of the garment was white. Complainant was not the first to use buff color in combination with white in such garments. Held, that on the expiration of the patent complainant not only ceased to have a monopoly in the elastic strip, but that it had no exclusive right to the use of buff-colored material for such strip, whether it was the natural color of the yarn or dyed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. \S 21; Dec. Dig. \S 18.*]

2. Trade-Marks and Trade-Names (§ 3*)—Names Subjects of Ownership—Descriptive Character of Names.

The name "elastic seam," as applied to drawers having a strip of elastic material inserted in the seams, is descriptive merely, and cannot be monopolized as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 6; Dec. Dig. § 3.*

Arbitrary, descriptive, or fictitious character of trade-marks or tradenames, see note to Searle & Hereth Co. v. Warner, 50 C. C. A. 323.]

3. Trade-Marks and Trade-Names (§ 11*)—Names Subjects of Ownership
—Names of Patented Articles.

Where the manufacturer of drawers under a patent designated them by the name "elastic seam," by which name they become known to the public, such name became a term descriptive of the garment, and on the expiration of the patent others who thereby acquired the right to make the garment became also free to designate it by such name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 15; Dec. Dig. § 11.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. PATENTS (§ 129*)—NAMES OF PATENTED ARTICLES—ESTOPPEL TO DENY VALIDITY OF PATENT.

The owner of a patent who has had the benefit of its protection, and manufactured thereunder during its full life, cannot thereafter assert its invalidity in support of his claim to a trade-mark in the name by which he designated the patented article and by which it became generally known.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § $182\frac{1}{2}$; Dec. Dig. § 129.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—IMITATION OF MARKS AND PACKAGES.

A stamp used by defendant on drawers of its manufacture and the boxes in which they were sold *held* not so similar to those in use by complainant as to deceive purchasers or to constitute unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

S. L. Swarts and Fred W. Lehmann, for appellants.

Arthur v. Briesen (George W. Case, Jr., on the brief), for appellee. Before SANBORN and VAN DEVANTER, Circuit Judges, and

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

W. H. MUNGER, District Judge. These two cases involve the same questions, and were submitted together upon the same evidence. They differ in this, that the Premium Manufacturing Company manufacture the articles, and the Rice-Stix Dry Goods Company are the distributers or sellers of the articles.

The bills filed allege, in substance, the incorporation of complainant in the year 1891, its engaging in the manufacture of men's drawers, the body of the drawers being usually manufactured of white cotton material, with a buff or salmon colored strip down each side and the back thereof, and being so conspicuous as to distinguish such drawers from all others. It is alleged that the buff strip was adopted arbitrarily and solely for the purpose of identifying complainant's product. The bills further allege that complainant adopted as distinguishing marks for said goods the arbitrary and fanciful name "Elastic Seam," and certain peculiarly marked boxes, and a curved form of stamp, all of which were used in the manufacture and sale of said drawers. The bills also allege the expenditure of large sums of money by complainant in advertising and creating a market for its drawers, and allege that the term "Elastic Seam," and the curved form of stamp, and said boxes, as applied to and used with men's drawers, came to be recognized by the public and dealers as indicating and distinguishing the drawers of complainant. The bills allege the exclusive right of complainant to use said buff-colored strip, curved form of stamp, marked boxes, and the term "Elastic Seam." The bills also charge the defendants with

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

violating the rights of the complainant in that they are manufacturing and selling drawers, the body of which is of white material, with a buff or salmon colored strip down the sides, and are designating such drawers with the term "Elastic Seam," and further charging that they are using boxes in the sale of such drawers with markings similar to those upon complainant's boxes, and marking said drawers with a curved form of stamp in the similitude of complainant's. The prayer of the bills is in the usual form for an injunction and an accounting.

Defendants' answers deny that the complainant is entitled to the exclusive use of said buff or salmon colored strip, and deny that it is entitled to the exclusive use of the words "elastic seam"; that the said words "elastic seam" and the buff-colored strip are descriptive of the drawers; deny that its stamp is in the similitude of complainant's, and deny generally all the allegations of the bills. They further allege that on June 28, 1881, the United States issued to one C. A. Brown a patent covering the right to manufacture drawers with an elastic strip down the back and the sides of the legs, which patent was acquired by complainant; that complainant and its predecessors owning said patent manufactured its drawers under said patent; that said patent expired in June, 1898, and that since the expiration of said patent the right to manufacture drawers with such colored strips has been open to the public; that defendants did not engage in the manufacture or sale of such drawers until after the expiration of the patent.

A large amount of testimony was taken in support of the issues, and the Circuit Court entered a decree in each case in conformity with the

prayer of the bill. Defendants have appealed.

From the pleadings and the evidence, three questions are presented for our consideration: (1) Has complainant a trade-mark in, and exclusive right to use, such buff or salmon colored strip, as a distinguishing feature from the color of the body of the drawers? (2) Has the complainant a trade-mark in, and therefore an exclusive right to, the use of the words "elastic seam," as applied to men's drawers? (3) Has the defendants' action in the manufacture and sale of men's drawers been such as to violate the rights of complainant and constitute unfair trade?

It is shown by the evidence that on June 28, 1881, one Charles A. Brown obtained letters patent from the United States for the combination in men's drawers of the woven body fabric and knitted insertions at the points of the seams and knitted bands at the bottom of the legs, these knitted insertions being a narrow strip down the side of the garment at the point of the seam, and to be either knitted or sewed to the body fabric, the purpose being to give elasticity to the garment. This patent was assigned to J. A. Scriven, and a partnership of which he was a member manufactured men's drawers under said patent until 1891, when the complainant corporation was organized by said Scriven, and it continued such manufacture during the life of the patent, which expired in 1898. During the life of the patent complainant and its predecessors enjoyed the full monopoly of the patent by being the sole and exclusive manufacturers of such drawers.

Complainant claims that it adopted the buff-colored strip in connection with the light-colored body of the garment as a distinguishing 165 F.—41

feature of its manufacture, and thus has a trade-mark in the buff color when used as a feature distinctive from the color of the body of the garment. The combination of a buff color with the elastic strip, as distinguished from the color of the body of the garment, did not of itself, during the life of the patent, distinguish the article from those of other manufacturers, for the simple reason that drawers with an elastic strip could only be made, and were only made, by complainant and its predecessors. We think from the evidence that the use of the buff-colored strip was not arbitrary and for the purpose of giving the drawers a distinguishing feature in this respect. The evidence shows that a knitted cotton cloth known as "balbriggan," made of Egyptian yarn, the natural color of which was buff, possessed greater elasticity than similar cloth knit from American cotton, the natural color of which was between a white and buff, and for commercial use was either bleached white or dyed buff, the bleaching and coloring of which took from it some of its elastic properties. For this reason the Egyptian cotton was used. The right to use the elastic knitted strip in combination with the woven body of the garment became public property, open to the use of all, upon the expiration of the patent, and we do not think complainant thereafter could have the exclusive right to the use of the color. This question was fully considered in the case of this complainant, J. A. Scriven Company v. Morris (C. C.) 154 Fed. 914, and it was held that complainant did not have, offer the expiration of the patent, the exclusive right to the use of the combination of the light-colored body with the buff-colored strip. In the course of the opinion it was said:

"The complainant is now seeking to have the court rule that although, by the expiration of the patent, the use of the strip of insertion is free to all, the defendants are to be enjoined from using it because they use it of the same color as complainant and the patentee did when they were operating under the patent. To so decide would be in many cases to extend indefinitely the monopoly of the patent."

In this case the evidence does not show that the complainant was the first to use the buff color in combination with the light. The testimony affirmatively shows that prior to that use by complainant men's drawers were made of material the body of which was white and the bands at the ankles of which were elastic, buff-colored balbriggan.

The above case in 154 Fed. 914, was affirmed by the Court of Appeals of the Fourth Circuit, in 158 Fed. 1020, 85 C. C. A. 571, in the following opinion:

"We have carefully considered the questions raised by the appellant in appeal in this case, and are of opinion that the same are without merit. The learned judge who tried the case below wrote a carefully considered opinion, reported in 154 Fed. 914, in which we fully concur. The judgment of the lower court is therefore affirmed."

The reasons given in the opinion in that case by the trial judge are to our minds not only forceful but conclusive. The buff-colored strip, in combination with the light-colored body, became clearly descriptive of the article, and because complainant alone, during the life of the patent, manufactured the same, the color alone did not indicate to the public that such drawers were of complainant's make.

Complainant and its predecessor advertised said drawers as Scriven's elastic seam drawers, and such drawers became generally known as "Elastic Seam." For this reason complainant claims it is entitled to the trade-name "Elastic Seam," as applied to drawers of such description, claiming that the term "elastic seam," was not descriptive merely of the article, but was an arbitrary or fanciful term. The law, we think, well stated by the Court of Appeals in Bennett v. McKinley, 65 Fed. 505, 13 C. C. A. 25, as follows:

"No principle of the law of trade-mark is more familiar than that which denies protection to any word or name which is descriptive of the qualities, ingredients, or characteristics of the article to which it is applied. An exclusive right to the use of such a word as a trade-mark, when applied to a particular article or class of articles, cannot be acquired by the prior appropriation of it, because all persons who are entitled to produce and vend similar articles are entitled to describe them and to employ any appropriate terms for that purpose. Whether a word claimed as a trade-mark is available because it is a fanciful or arbitrary name, or whether it is obnoxious to the objection of being descriptive, must depend upon the circumstances of each case. The word which would be fanciful or arbitrary when applied to one article may be descriptive when applied to another. If it is so apt and legitimately significant of some quality of the article to which it is sought to be applied that its exclusive concession to one person would tend to restrict others from properly describing their own similar articles, it cannot be the subject of a monopoly. On the other hand, if it is merely suggestive, or is figurative only it may be a good trade-mark notwithstanding it is also indirectly or remotely descriptive."

We think the term "elastic seam" descriptive merely. By the use of that term one would naturally conclude that at the seam there was something of an elastic character. The term "elastic seam," we think, would, to a person of ordinary intelligence, indicate that at the point of the seam some material of an elastic nature was inserted, and hence that the term cannot be said to be an arbitrary or fanciful one. In Trinidad Asphalt Mfg. Co. v. Standard Paint Co. (decided by this court August 11, 1908) 163 Fed. 977, are collated many cases illustrative of descriptive terms, and supporting the "settled rule that no one can appropriate as a trade-mark a generic name or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth." Had complainant not been protected by its patent, and others, therefore, been entitled to manufacture such drawers, such others might with equal truth have described the drawers of their manufacture as "elastic seam." After the expiration of the patent, defendants and all others had the right to manufacture men's drawers with the elastic strip extending longitudinally along the drawer at the point of the seam, and were also entitled to describe them, and we are unable to perceive any more appropriate words or term for that purpose than the expression "elastic seam."

In Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 199, 16 Sup. Ct. 1002, 1014, 41 L. Ed. 118, Justice White, after an analysis of many cases, says:

"The result, then, of the American, the English, and the French doctrine universally applied is this: That where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become by his consent, either express or tacit, the identifying

and generic name of the thing patented, this name passes to the public with the cessation of the monpoly which the patent created."

This court, speaking by Justice Brewer, in Centaur v. Heinsfurter, 84 Fed. 955, 28 C. C. A. 581, said:

"The patent gave no right to any particular name, but simply to the exclusive manufacture and sale. All such rights expired in 1885, and from that time forth any party has had a right to manufacture and sell that particular compound, and also a right to manufacture and sell it under the name by which it has become generally known to the public; and if to the public the article has become generally known only by a single name, that name must be considered as descriptive of the thing manufactured, and not of the manufacturer. It is true that during the life of a patent the name of the thing may also be indicative of the manufacturer, because the thing can then be manufactured only by the single person; but when the right to manufacture and sell becomes universal, the right to the use of the name by which the thing is known becomes equally universal. It matters not that the inventor coined the word by which the thing has become known. It is enough that the public has accepted the word as the name of the thing, for thereby the word has become incorporated as a noun into the English language and the common property of all."

In Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co. (C. C. A.) 161 Fed. 318, complainant claimed a trade-mark to the words "vertical top," as applied to cigar molds. It was held by this court that the words "vertical top" became, during the life of the patent, associated with the manufactured article, as descriptive of its character and quality, and indicating the complainant's best grade of mold for making cigars, and hence could not be regarded as a trade-mark. Referring to and construing the rule as announced in the cases of Singer Mfg. Co. v. June Mfg. Co., and Centaur v. Heinsfurter, supra, Judge Philips, writing the opinion of this court, says:

"Counsel for complainant quite ingeniously attempts to differentiate the case at bar from the foregoing by the suggestion that the words 'Singer' and 'Castoria' describe the articles patented, and therefore necessarily became generic terms. But the essence of the ruling in the foregoing cases is that the patent conferred only the right of exclusion to manufacture and sell the article, and not the appropriation of any particular name, whether it was merely arbitrary or suggested by the thing itself, and that after the expiration of the patent, not only the right to manufacture and sell the patented article, but also to use the particular name by which the patentee had designated it, passed to the public."

It is clear, we think, from the foregoing authorities, that, even if the words "elastic seam" could, at the outset of their use by Scriven, have been regarded as fanciful or arbitrary, before the expiration of the patent under which complainant manufactured its drawers the words "elastic seam" had been given to such drawers by complainant and its predecessors under the patent, and had, to the mind of the public and to the trade, become the generic name of the article; in other words, the descriptive name thereof. Such being the case, upon the expiration of the patent, the use of such words was open to all, and we think there can be no doubt from the evidence that the words "elastic seam," as applied to drawers, came to be known and understood by the public to mean drawers having a strip of material at the place of the seam of an elastic nature. It is also true that such garments were

known as of complainant's make because, during the life of the patent, complainant was the sole manufacturer. But those words having become also a term descriptive of the garment, complainant's exclusive right, if any, to the same, expired with the exclusive right to manufacture. Wilcox Gibbs Sewing Machine Co. v. Gibbons Frame (C. C.) 17 Fed. 623; Coats v. Merrick Thread Co. (C. C.) 36 Fed. 324, 1 L. R. A. 616, affirmed in 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; Greene, Tweed & Co. v. Mfg. Belt Hook Co. (C. C.) 158 Fed. 640; Featherbone v. Featherbone (C. C. A.) 141 Fed. 513; G. & C. Merriam Co. v. Ogilvie (C. C. A.) 159 Fed. 638. Also Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co., and Singer Mfg. Co. v. June

Mfg. Co., and Centaur v. Heinsfurter, supra.

Complainant gave in evidence a United States patent, issued to one Philo H. Lee, dated July 11, 1876, for skin underwear, with pieces or strips of more porous material interposed where the seams of undergarments usually occur, and extending the entire length of the body of the undergarment. Said pieces or strips, being more porous, were for the purpose of admitting the passage of air outwardly through the garment, carrying off perspiration and other moisture and odors, and causing the garment to be more flexible. We need not consider the effect of the Lee patent upon the later Brown patent, because for the full life of the latter complainant and its predecessors industriously advertised that their elastic seam drawers were made under and protected by the Brown patent, and in that way they asserted a right to the monopoly apparently granted by that patent, secured the acquiescence of the public therein, and reaped the benefits thereof. In these circumstances the complainant will not now be permitted to say that the Brown patent was void as having been anticipated by the Lee patent, and hence that the buff-colored strip and words "elastic seam" became a valid trade-mark and were not dedicated to the public at the expiration of the Brown patent. Having derived, through the assertion of the validity of the Brown patent, all the advantages incident to the possession of a valid patent, it will not now be heard to assert the contrary. as a means of escaping consequences arising upon the termination of the monopoly secured through the patent. This is based upon the wellrecognized rule that:

"Equity will refuse to aid a complainant in cases of this character, who is himself guilty of making material false statements in connection with the property he seeks to protect." Hilson v. Foster (C. C.) 80 Fed. 896.

In Horlick's Food Co. v. Elgin Milkine Co., 56 C. C. A. 544, 120 Fed. 264, complainant sought the aid of the court to protect it against the claimed trade-mark of the term "malted milk." Complainant had obtained a process patent upon a granulated food for infants. The article which he in fact manufactured was not in accordance with the process, but the packages in which the articles were sold were marked as patented, and it was claimed that, as the product was not manufactured under the patent the trade-name "malted milk" did not become public property on the expiration of the patent. The court said:

"It matters not, in our judgment, that the patent may not have been in fact valid, nor that the product—malted milk—could not in fact have been cover-

ed by the description of the patent. The point is that appellant chose to make its product as if it were a monopoly, thereby obtaining, measurably at least, the benefit of a monopoly; and gave to it a name, that became the generic name of the supposed monopoly. The case is thus brought, in our judgment, within the principle, if not the exact facts, of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, and must be ruled accordingly."

In Leather Cloth Co. v. American Leather Cloth Co., 4 De Gex, J. & S. 137, 142, it is said:

"When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in the business connected with it, be himself guilty of any false or misleading representations; for, if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity."

On appeal in the House of Lords, 11 H. L. Cas. 523, Lord Kingsdown said:

"Nobody doubts that a trader may be guilty of such misrepresentations with respect to his goods as to amount to a fraud upon the public, and to disentitle him on that ground, as against a rival trader, to the relief of a court of equity which he might otherwise claim. * * * The general rule seems to be that the misstatement of any material fact calculated to deceive the public will be sufficient for that purpose. * * * If a trade-mark represents an article as protected by a patent when in fact it is not so protected, it seems to me that such a statement prima facie amounts to a misrepresentation of an important fact, which would disentitle the owner of the trade-mark to relief in a court of equity against one who pirated it."

To the same effect are the following cases: Consolidated Fruit Jar Co. v. Dorflinger, Fed. Cas. No. 3,129; Lorillard v. Pride (C. C.) 28 Fed. 434; Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; Prince's Mfg. Co. v. Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Preservaline Mfg. Co. v. Heller Chemical Co. (C. C.) 118 Fed. 103; Halzapfel's Co. v. Rahtjens Co., 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49.

It matters not that complainant may have supposed the Brown patent to have been a valid one, for, as said by the court in Dadirrian v. Yacubian, 39 C. C. A. 321, 98 Fed. 872–877:

"It is to be noted in this connection that the court is not bound to inquire whether or not the representations are false, in the obnoxious sense of the word, because it is sufficient that they are in their nature misleading, if they are also material, and do in fact mislead. Indeed, that the public are equally prejudiced by deceptive statements in a trade-mark, or in connection therewith, whether the purpose of its owner was fraudulent or not; that therefore the equity courts have no occasion to inquire into his secret intents; and that such courts will not protect a business built up as the result of deceptive representations, whatever were those secret intents—are such fundamental rules in the law of trade-marks that we have no occasion to elaborate them, or to cite authorities in reference to them."

The question remains, have the defendants been guilty of unfair trade; in other words, attempted to palm off on the trade and public the drawers manufactured by the Premium Manufacturing Company as and for the drawers of complainant's manufacture? The only evidence, we think, from which such conclusion can be drawn, is the

markings upon the drawers and packages or cartons. Defendants had the right, as we have seen, to use the buff-colored strip and the words "elastic seam." Those words and the buff-colored strip, however, during the life of the patent had become not only descriptive of the articles, but the public had come to know that they were manufactured by complainant. It then became and was the duty of defendants, in selling their drawers manufactured with the buff-colored strip, and described as "elastic seam" drawers, to indicate to the public that their articles were not those of complainant's manufacture. For, as held in Singer Mfg. Co. v. June Mfg. Co. and G. & C. Merriam Co. v. Ogilvie, supra:

"Where another avails himself of the principle of public dedication, he must in good faith fully identify his production and clearly disassociate his work from the work of one who has given significance to the name, and sufficiently direct the mind of the trading public to the fact that though the thing is of the same name that it is something produced and put upon the market by himself."

Complainant usually stamped upon the drawers of its manufacture words and figures in the following form:

On some of its drawers of more recent make, date of patents were given as February 28, 1888, and April 12, 1892, referring to subsequent patents not involved in this case, and on some of still more recent make no date of patent was given.

Defendants stamped upon their drawers the words and figures in form as follows:

FATENTED SA JUNE 28, 1881 3 4 50 50 32 29



As the numerals above given, 32 and 29 on complainant's stamp, and 28 and 31 on defendants', indicate the waist size and length of same, they are changed according to the respective sizes. The boxes or cartons of each in which the drawers are placed and displayed on the shelves of the retail dealer are of the same dimensions, but, as they are of the most convenient and appropriate size for the use to which they are applied, such fact alone does does not establish simulation. The

boxes or cartons of each party are white in color. Those of complainant have a gilt strip along the top edge; those of defendants have not. On the top of complainant's boxes are the words "Scriven's Patent Elastic Seam Drawers," and a cut of a pair of drawers, showing the elastic strip at the side and elastic piece at the bottom. On the front or display end of complainant's boxes are the same words and cut as upon the top, in addition the arbitrary number 50, and figures and words indicating the size of the waist and length of the seam; the words and figures being in blue ink.

There are no markings on the top of defendant's boxes, and on the front or display end are the words and figures:

PREMIUM trade-mark

UNION MADE.

WARRANTED FINEST QUALITY.

1/2 DOZ.

ELASTIC JEAN DRAWER.

Waist..... Length.....

—with the words indicating the size of waist and the length. The words and figures are in black ink, except that the word "Premium," which is made quite conspicuous, is in red, and the words "trademark" under it are in white on red background.

Defendants manufactured and sold three classes of these drawers, viz., jean, nainsook, and canton. The markings of each were the same as above described, except the word "Nainsook" was used in the place of "Jean" on the markings of nainsook, and "Canton" in the place of "Jean" on the markings of the canton drawers.

The difference in the markings are such as to disprove simulation, and clearly disassociate defendants' drawers from those of com-

plainant.

For these reasons, the decree rendered in each case is reversed, with directions to dismiss the bill.

SANBORN, Circuit Judge (dissenting). The court below appears to have been of the opinion that the evidence in this case proved that about 1885 the predecessor in interest of the complainant commenced to make and to sell drawers which he called "elastic seam" drawers, which were made of jean or other inflexible fabrics, down the legs of which were inserted strips of knit and flexible material of a buff color in the form of a parallelogram; that this predecessor and the complainant have ever since continued to make and sell such drawers with the buff color of the parallelograms therein; that these buff-colored parallelograms and the words "elastic seam" came, many years before the defendants commenced to use them, to signify the complainant's make of drawers; that neither the buff-colored parallelograms in the drawers nor the words "elastic seam" ever signified, before Scriven selected and applied them to garments of his make, drawers with parallelograms or flexible materials inserted in inflexible bodies; that neither of these marks had ever been used before Scriven applied them; that Scriven selected and used the form and the buff color of the flexible strips in the beginning for the sole purpose of marking the drawers as his manufacture; that he selected and applied to them the name "Elastic Seam" for the same purpose; that each of these marks was arbitrary and fanciful, and when Scriven first used them, and before he had taught the trade their meaning, neither described the drawers he made to persons of ordinary intelligence; that the complainant acquired the patent issued to C. A. Brown in 1881, No. 243,498, for gussets or gores of a knit fabric inserted in the arms and sides of shirts and in the legs of drawers the bodies of which were made of inflexible material, and that the complainant advertised its drawers as patented thereunder, but that the Brown patent secured no monopoly to any one, because it was anticipated by letters patent No. 179,661, issued to Philo H. Lee in 1876, for the insertion in the sides and arms of shirts and in the legs of drawers made of the tanned skins of animals of strips of a fabric suitable for clothing which were more flexible and porous than the bodies of the garments; and that the defendants have used and are using the buff-colored strips and the term "elastic seam" to sell drawers manufactured by them or by one of them. A careful examination of the record has forced my mind to the conclusion that these facts were established by a fair preponderance of the evidence, and to an agreement with the learned judge below, so that I am regretfully constrained to dissent from the opinion of the majority of this court.

In Singer Mfg. Co. v. June Mfg. Co., 163 U S. 169, 178, 186, 189, 201, 204, 16 Sup. Ct. 1002, 41 L. Ed 118, Centaur Co. v. Heinsfurter, 84 Fed. 955, 956, 28 C. C. A. 581, and Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co. (C. C. A.) 161 Fed. 318, cited by the majority, the courts held that in a case in which, during the life of a patented monopoly, the owner had conferred an arbitrary or generic name upon the patented article by which alone it had come to be known during the term of the monopoly, such as "Singer" and "Castoria," the right to use that name passed to the public upon the expiration of the monopoly. But this conclusion is an exception to the general rule that no one may lawfully use the trade-mark or trade-dress of another to sell goods of his own manufacture, and it is inapplicable to the cases at bar, because the Brown patent secured no monopoly of the manufacture or sale of the drawers made by the complainant, and hence under those decisions no right to use the complainant's trade-mark passed to the public when the term of the void patent expired. The patent to Lee was issued about five years before the patent to Brown, and it clearly anticipated it and deprived it of all legal effect. The patent to Lee related to the same art as did the Brown patent, to the art of clothing by means of undergarments; it disclosed the use of strips of more flexible and porous materials along the sides of garments the bodies of which were made of inflexible materials, and it left nothing of this subject-matter for Brown to either invent or secure.

It is, however, said that the complainant is estopped from denying that the Brown patent secured a monopoly to it, and hence from sustaining its trade-mark, because it advertised and sold its drawers as patented under this patent, and because it actually enjoyed a monopoly of the manufacture and sale of them until the term of the patent expired. The indispensable elements of an estoppel in pais, however, are: (1) Intentional or reckless misrepresentation of a known fact inconsistent with the subsequent claim of him who makes the misrepresentation; (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel; (3) action by the latter induced by the misrepresentation; and (4) injury to the latter if the truth is permitted to be proved. Bigelow on Estoppel (4th Ed.) p. 679. The alleged estoppel in this case lacks, as it appears to me, at least three of these essential elements, viz., intentional or reckless misrepresentation by the complainant, absence of knowledge and of equal means of knowledge of the truth by the defendants, and possible injury to them by proof of the truth. It is not, in my opinion, such a

false representation as will sustain an estoppel for the owner of a patent, void, but not yet adjudged void, because anticipated by another which is of record, to assert that his manufacture, which is covered by it, is patented thereby, and that was all the misrepresentation which the complainant made here. That statement lacks the moral turpitude or the reckless disregard of the rights of others essential to sustain an estoppel, because it is a true statement of the existence of the patent, and it leaves its legal effect for the consideration and determination of others who may be interested therein. A willful intent to deceive, or such gross negligence of the rights of others as is tantamount thereto, is an essential element of an estoppel in pais. There must be some moral turpitude or some breach of duty. Henshaw v. Bissell, 1 Wall. 255, 271, 21 L. Ed. 835; Bank v. Farwell, 7 C. C. A. 391, 394, 396, 58 Fed. 633, 636, 639. Again, the facts which disclosed the invalidity of the Brown patent were equally accessible to the defendants and to the plaintiff. They were exhibited by the Lee patent, and the defendants had the same means of knowledge upon this subject as did the complainant. And in the third place, no injury could be inflicted upon the defendants by proof of the truth. The only effect of such proof would be to deprive them henceforth of the use of the complainant's trade-marks, and they would not have been entitled to use these trade-marks if the complainant had never represented that its drawers were patented under the Brown patent.

Nor does it seem to me that a patentee who marks his product patented and advertises it as such while it is actually protected by a patent which is prima facie valid, although that patent subsequently turns out to be anticipated by another, is guilty of such iniquity as will repel him from a court of equity and deprive him of all relief at its hands against the continuing wrongful appropriation of his trade-marks by another. The acts of Congress declare that it shall be the duty of all patentees, and of their assigns, to mark any patented article, or the package which contains it, with the word "patented," and they penalize the affixing of that or any similar word to an article which is not patented. Rev. St. §§ 4900 and 4901 (U. S. Comp. St. 1901, p. 3388). But neither the statutes, the laws, nor the decisions of the courts appear to me to impose any penalty upon one who discharges this duty because the patent under which he marks and advertises his product is subsequently found to be anticipated. The marking and the advertising were intended to constitute caveats, notices of the existence of the patents, to the end that all parties might examine and learn for themselves whether or not their prima facie validity would be their ultimate legal effect.

Courts of equity often refuse relief to one who has made false statements calculated to deceive, relevant and material to the subject of a controversy, in the enforcement of the maxim that "he who seeks equity must come with clean hands." But the averment that the article is patented when the patent under which it is marked and advertised is anticipated by another of record is not a false statement, and does not render a petitioner's hands unclean, because the fact is that the article is patented when a patent is issued upon it by the Patent Office, and the true and entire meaning of such a statement is not that in no

future litigation or consideration will the patent be found to be void, but it is simply that the patent has been issued and that it is prima facie valid.

Every relevant decision cited by the majority is sustained by a material false statement made by the complainant, while, as it seems to me, there was no false statement in the representation of the complainant that his article was patented in the case at bar. The quotations from the opinions of the courts found in the opinion of the majority must be read with due reference to the facts the courts were there considering. In Hilson Co. v. Foster (C. C.) 80 Fed. 896, the false statement upon which the decision was founded was that only the best grade of Havana tobacco was used in the cigars. In Horlick's Food Co. v. Elgin Milkine Co., 120 Fed. 264, 56 C. C. A. 544, the false representation was that the malted milk of the complainant was made in accordance with the specifications of the process patent with which it was marked; that is to say, the proof was that the complainant had marked its product patented when it was not in fact covered by any patent. This false statement was material to sustain the decree, and the paragraph quoted from the opinion by the majority was unnecessary to the decision of the case, and it fails to commend itself to my judgment. There was no question of the validity of the patent under which the product was marked in that case, and it seems to me that in such a case it is material and is the very essence of the issue whether the statement that the product is made in substantial accord with the patent—that is to say, whether it is patented—is false or true.

In Leather Cloth Company, Limited, v. American Leather Cloth Co.. Limited, 4 De Gex, Jones & Smith's Reports, 137, 147, 149, and Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523, 531, the false statements which induced the decisions were that the complainant's products were those of the Crockett International Leather Cloth Company when they were not, that they had been made by I. R. & C. P. Crockett & Co. when they had not been, that they were made of tanned leather in accordance with the specified patent upon tanned leather when they were made of untanned leather and were not made in accordance with the patent, and that they were made either in the United States of America or at West Ham in England when they were not made in either place. How radically different in character, in tendency to deceive, and in natural effect are these statements from the truthful statement of the defendant that its product was patented when a patent prima facie valid existed upon it. It was of these false statements that Lord Kingsdown spoke in the excerpt quoted by the majority. And his remark, that "If a trade-mark represents an article as protected by a patent, when in fact it is not so protected. it seems to me that such a statement prima facie amounts to a misrepresentation of an important fact which would disentitle the owner of the trade-mark to relief in a court of equity against any one who pirated it," related to the false statement that the leather company's products were made of patented tanned leather when in fact they were made of leather that was neither tanned nor patented. The question whether a statement that a product was patented when it was so, but the patent was anticipated by another of record, is so misleading or

deceptive as to bar from relief in equity, was not presented in that case. was not considered by any of the members of the court, was not decided, and the remarks of Lord Kingsdown had no reference to it. In Dadirrian v. Yacubian, 39 C. C. A. 321, 326, 98 Fed. 872, 877, the false and deceptive representations which inspired the excerpt quoted by the majority and sustained the decision were that the product, "Madzoon," originated around Mt. Ararat, was used in Asia Minor largely as food and as medicine in every form of febrile diseases, and that the inhabitants of Asia Minor and Arabia during the season of intense heat resorted to it to allay their burning thirst and drank freely of it while enjoying the luxury of the Turkish bath. In Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706, the misleading statement was that the medicine was made by the complainant in New York when it was made by another in Massachusetts. In Prince Mfg. Co. v. Prince's Metallic Paint Company, 135 N. Y. 24, 31 N E. 990, 17 L. R. A. 129, the false statement was that the trade-mark covered an article to which it did not apply, and to this statement was added the misleading act of the sale of that article under that trade-mark.

The decision in Lorillard v. Pride (C. C.) 28 Fed. 434, 438, wherein Judge Blodgett held that the term "Tin Tag," which was not adopted or applied as a trade-mark by the complainant, but came during the life of the patent to be the name of tobacco to which a tin tag was attached, and for which with this tag attached the complainant had procured a patent, passed to the public when the patent was adjudged void, and the decision in Holzapfel's Co. v. Rahtjen's Co., 183 U. S. 1, 8, 22 Sup. Ct. 6, 46 L. Ed. 49, wherein the Supreme Court held that the sale of an article as patented upon which no patent had issued would not establish a trade-mark of which the word "patent" was an essential part, do not seem to me to be relevant to the issue before us. And the decisions in Consolidated Fruit Jar Co. v. Dorflinger, Fed. Cas. No. 3,129 that the use of the designation "Mason's Patent, Nov. 30th, 1858," after the patent had been adjudged void, was misleading and fatal to relief against a pirate, and in Preservaline Mfg. Co. v. Heller Chemical Co. (C. C.) 118 Fed. 103, that the representation that an article is patented after the patent has expired is false, misleading, and fatal, fail to reach the question in this case, because here the patent was in existence, it had not been adjudged void, and the statement that it was patented was true. The authorities cited by the majority have been reviewed for the purpose of showing, if possible, that while general expressions may be found in the opinions of the courts which. when read without the facts and issues then before the judges in mind, might seem broad enough to refer to it, yet in none of these cases where the question was at issue and necessarily decided has any court held that a patentee who has simply discharged his statutory duty to mark his product patented and has advertised it as such while the patent, which subsequently turns out to be anticipated by another, is prima facie valid, has thereby become guilty of such iniquity as renders his hands unclean, repels him from a court of equity, and bars him from all relief against those who boldly appropriate his trade-marks or his other property. Such a decision, it seems to me, must necessarily bar from relief in the courts of equity a very large number of patentees who are simply discharging their statutory duty and telling the truth by stating and advertising the fact that their products are patented, because it is common knowledge that many patents which are prima facie valid subsequently turn out to be anticipated by prior inventions which are described in the Patent Office. I am unwilling to place the ban of iniquity which closes the courts of equity upon patentees of this class. And because a statement that an article is covered by a patent when it is in fact patented, though it subsequently turns out that the patent is anticipated by another, is in fact true and neither deceptive nor misleading, because the facts regarding such a patent are spread upon the record of the Patent Office and alike open to all, because every one is presumed to know the law and hence to know whether or not the prior patent anticipates the later one, while in fact no one ever does know whether it anticipates or not until that question is adjudicated by some court, and until that time the law presumes the patent to be valid, and because it seems to me that it cannot be an iniquitous misrepresentation to state that to be true which the law presumes, I am of the opinion that such a statement and advertisement should not deprive this complainant of the equitable relief to which it is otherwise entitled. Sykes v. Sykes, 3 Barnewall & Cresswell's Reports, 541, 545; Edelstein v. Vick, 11 Hare, 86, 87; Morgan v. McAdam, 36 Law J. Ch. 229, 231.

Another conclusion to which I am unable to assent is that, in the absence of the rule in the Singer Case and in the absence of the Brown patent, the buff color could not constitute a valid trade-mark, because it selection was not arbitrary and for that purpose, and because that color had been used with anklets upon white bodies. It is not the buff color that constitutes a trade-mark here, but the buffcolored strips in the definite form of narrow parallelograms inserted in the sides of drawers whose bodies are composed of materials of a white or other contrasting color. Mere color of any kind may not constitute a trade-mark. But in my opinion colored parts of garments or of other articles of definite specific forms in contrast with parts colored otherwise may constitute perfect trade-marks. "A trade-mark is always something indicative of origin or ownership by adoption and repute, and is something different from the article itself." Fairbanks v. Jacobus, 14 Blatchf. 337, 339, Fed. Cas. No. 4,608. The buff color of the strips in the specific form of a parallelogram was not an essential part of the drawers. They would have been equally flexible and useful if the strips had been of any other color. Scriven and Stranahan testified, the court below found, and the entire evidence has led my mind to the same conclusion, that Scriven arbitrarily selected the buff color of the strips in this case for the sole purpose of marking his manufacture when he commenced it, and that his goods became known by that mark long before the defendant commenced to use it. The fact that buff-colored anklets were used with white bodies does not seem to me to affect the right of the complainant here. His trademark is not the buff color of one indefinite part attached to a white body: it is the buff color of the strips in the specific form of a parallelogram located along the sides of the legs of the drawers whose bodies are made of material of a white or other color. And, because the buff color of these strips is in no way material to give the drawers all the elasticity and other beneficial characteristics sought and secured by the complainant, because the strips which Scriven caused to be buff in color were definite and specific in form and location in garments whose bodies were of a contrasting color, because the evidence convinces me that this buff color was selected and applied to these strips of specific form and location by Scriven to distinguish his make of these drawers from those of all others, and because it had produced that result long before the defendant commenced to use it, it appears to me that it constituted a valid trade-mark, and that the decree which en-

joined the defendants from using it was right.

The question whether or not the term "elastic seam" was so descriptive of the complainant's drawers as to disqualify it for a trade-mark is not whether it described them when the defendants applied it to their manufactures subsequent to 1898, nor is it whether it so describes them now. The test of disqualification is, did it so clearly describe them, their qualities and characteristics, about 1885, when Scriven first adopted it, that men of ordinary experience in the trade would at that time have conceived the Scriven drawers upon hearing the term for the first time? Wellcome v. Thompson & Capper, 1 L. R. Ch. Div. 1904, pages 736, 742, 749, 750, 754; Keasbey v. Chemical Works, 142 N. Y. 467, 471, 474, 475, 476, 37 N. E. 476, 40 Am. St. Rep. 623. The proof is uncontradicted that no drawers with flexible strips inserted in them had ever been made before. The only elastic seam known at that time was one made by sewing machines by sewing materials together in a zigzag instead of in a straight line, and the term "elastic seam" drawers could not have conveyed to the minds of men the idea of jean drawers with flexible strips of knit material inserted in the sides of the legs before Scriven taught them by his application of the term to the drawers and his advertisement of them that this was the meaning which he gave to it. Words which are merely suggestive of the qualities, ingredients, or characteristics of the articles to which they are applied, but which do not so accurately describe them that men of ordinary intelligence would have recognized them upon seeing or hearing the words when first applied, constitute valid trade-marks. Such terms are "elastic" applied to bookcases (Globe-Wernicke Co. v. Brown [C. C.] 121 Fed. 185, 186); "Tabloid" (Wellcome v. Thompson & Capper, 1 L. R. Ch. Div. 1904, pp. 736, 744); "Bromo-Caffeine" (Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467, 471, 474, 475, 476, 37 N. E. 476, 40 Am. St. Rep. 623); "Cottolene" (N. K. Fairbank Co. v. Central Lard Co. [C. C.] 64 Fed. 133, 134); "Cocoaine" (Burnett v Phalon, 9 Bosw. [N. Y.] 192); "Maizena" (Mfg. Co. v. Ludeling [C. C.] 22 Fed. 823); "Valvoline" (Leonard v. Lubricator [C. C.] 38 Fed. 922); "Bromidia" (Battle v. Finlay [C. C.] 45 Fed. 796); "German Sweet Chocolate" (Walter Baker & Co. v. Baker [C. C.] 77 Fed. 181, 187, 188); "Anti-Washboard" (O'Rourke v. Central City Soap Co. [C. C.] 26 Fed. 576, 578); "No-To-Bac" (Sterling Remedy Co. v. Eureka Chemical & Mfg. Co., 80 Fed. 105, 25 C. C. A. 314); "Swan Down," applied to a complexion powder (Tetlow v. Tappan [C. C.] 85 Fed. 774); "Silicon" and "ElectroSilicon," applied to an article one of whose component parts was "Silicon" (Electro-Silicon Co. v. Hazard, 29 Hun [N. Y.] 369); "Celery Compound" (Wells & Richardson Co. v. Siegel, Cooper & Co. [C. C.] 106 Fed. 77); "Cream" (Price Baking Powder Co. v. Fyfe [C. C.] 45 Fed. 799); "Lightning," applied to hay-knives (Hiram Holt Co. v. Wadsworth [C. C.] 41 Fed. 34); "Maryland Club," applied to whisky (Cahn v. Gottschalk, 14 Daly, 542, 2 N. Y. Supp. 13); "Cough Cherries" (Stoughton v. Woodard [C. C.] 39 Fed. 902); "Sliced Cherries" (Stoughton v. Woodard [C. C.] 39 Fed. 902); "Sliced Animals," "Sliced Birds," "Sliced Objects," applied to dissected puzzle pictures (Selchow v. Baker, 93 N. Y. 59, 45 Am. Rep. 169); "Saponifier" (Pennsylvania Salt Mfg. Co. v. Myers [C. C.] 79 Fed. 87); "Insurance Oil" (Ins. Oil Tank Co. v. Scott, 33 La. Ann. 946, 39 Am. Rep. 286); "Congress Water" and "Congress Spring" (Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82); "Magnetic Balm," applied to a medicine (Smith v. Sixbury, 25 Hun [N. Y.] 232), and such a term, in my opinion, was "elastic seam" when applied to the drawers which the complainant made and sold under that name. As this term seems to me to constitute a valid trade-mark and the defendants are using it to sell goods of their manufacture, I agree with the court below that the complainant was entitled to an injunction to restrain them from so doing, both upon that ground and also because in my opinion the defendants were guilty of unfair competition by their use of the buff-colored strips and the term "elastic seam" to sell the goods which they make as those made by the complainant, and this upon the authority of Thompson v. Montgomery, 41 Ch. Div. 35, 38, 47, 51; Montgomery v Thompson, Appeal Cas. 217, 220; Lee v. Haley, 5 Ch. App. 155, 161; Wotherspoon v. Currie, L. R. 5 H. L. 508, 522, 523; Brewery Co. v. Powell (1897) App. Cas. 710, 716; American Waltham Watch Co. v. U. S. Watch Co., 173 Mass. 85, 53 N. E 141, 43 L. R. A. 826, 73 Am. St. Rep 263; Flour Mills Co. v. Eagle, 86 Fed. 608, 628, 30 C. C. A. 386, 406, 41 L. R. A. 162; American Brewing Co. v. St. Louis Brewing Co., 47 Mo. App. 14, 20; Cady v. Schultz, 19 R. I. 193, 32 Atl. 915, 29 L. R. A. 524, 61 Am. St. Rep. 763; Newman v. Alvord, 49 Barb. (N. Y.) 588; McLean v. Fleming, 96 U. S. 245, at pages 254, 255, 24 L. Ed. 828; Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; Reddaway v. Banham (1896) App. Cas. 199, 204, 211, 215; Buzby v. Davis, 80 C. C. A. 163, 165, 166, 150 Fed. 275, 277, 278; Shaver v. Heller & Merz Co., 48 C. C. A. 48, 59, 108 Fed. 821, 832, 65 L. R. A. 878.

FERGUSON-McKINNEY DRY GOODS CO. v. J A SCRIVEN CO. (Circuit Court of Appeals, Eighth Circuit. November 19, 1908.) No. 2,826.

TRADE-MARKS AND TRADE-NAMES (§ 81*)-UNFAIR COMPETITION-GROUNDS OF

To entitle a party to an injunction against unfair competition, it must appear that defendant at the time of filing the bill is doing, or threatening to do, that which constitutes, or will constitute, an invasion of

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complainant's rights; and where the defendant more than two years before the commencement of the suit on notice from complainant of its claim ceased the acts complained of, and thereafter committed no act of unfair competition, complainant is not entitled to either an injunction or an accounting.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 91; Dec. Dig. § 81.*

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Samuel S. Watson and George W. Winstead (Walter B. Raymond, on the brief), for appellant.

Arthur v. Briesen (George W. Case, Jr., on the brief), for appellee. Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

W. H. MUNGER, District Judge. This case is one similar to those of Rice-Stix Dry Goods Co., and Premium Mfg. Co. v. J. A. Scriven Co. (just decided) 165 Fed. 639. The questions as to the right of complainant to the exclusive use of the elastic buff-colored strip or insertion and trade-mark to the words "elastic seam," were disposed of in those cases and govern as to those questions this case.

The only thing to be considered now is, does the evidence show these defendants to have been guilty of unfair trade? The evidence shows that prior to the year 1903 defendant used cartons and markings which were probably in simulation of complainant's, but since that date the cartons and markings have been entirely dissimilar. In January, 1903, Messrs. Bakewell & Cornwall, counsel for complainant, wrote defendants, calling their attention to the fact that they were violating complainant's rights in the use of the buff-colored strip, the words "elastic seam," and simulating their markings. The president of defendant company immediately called upon Messrs. Bakewell & Cornwall, said they would discontinue those markings, and showed complainant the boxes and markings which they had arranged to use in the future, and since that date the boxes used by defendant, instead of being white, are of a dark color, the markings being entirely dissimilar and disclosing the true maker or manufacturer. Defendants' drawers are stamped in red with the monogram "F. Mc K." and the words "Own Make." Since January, 1903, complainant made no further objection to the markings and boxes of defendant. The only complaint made by complainant since that date was of the use of the buffcolored strip and the words "elastic seam," or words of such import. All the advertisements of defendants offered in evidence plainly show that their drawers are not of complainant's manufacture, except one advertisement of date November, 1900, one of March, 1901, and one of September, 1902. Since those dates all advertisements have clearly indicated the true maker and manufacturer.

April 3, 1905, a few days before this action was commenced, in re-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sponse to a notice from complainant that it had obtained an injunction against parties in the United States Court for the District of South Carolina, enjoining them from the use of the buff-colored strip, defendant wrote complainant that they would thereafter discontinue the use of the buff-colored strip. They tried for a time to use Egyptian cotton bleached white, but finding that the bleaching destroyed in part its elasticity they returned to the use of the natural buff color. However, as complainant is not entitled to the exclusive use of such buffcolored strip, they cannot complain on this account. As all markings of defendant in simulation of complainant, and all acts by defendant indicating that its goods were those of complainant's manufacture, ceased in January, 1903, more than two years before the bringing of this action, we do not think complainant now entitled to the relief asked. To entitle a party to an injunction, it must appear that defendant, at the time of filing the bill, is doing, or threatening to do, that which constitutes, or will constitute, an invasion of complainant's rights. Such does not appear to be the case here. For the same reasons, complainant is not entitled to an accounting. Worcester Brewing Corp. v. Rueter & Co., 157 Fed. 217, 84 C. C. A. 665.

The decree of the Circuit Court is therefore reversed, with direc-

tions to dismiss the bill.

SANBORN, Circuit Judge (dissenting). I am unable to concur in the opinion and judgment in this case for the reasons stated in my dissenting opinion in Rice-Stix Dry Goods Company v. J. A. Scriven Company and Premium Manufacturing Company v. J. A. Scriven Company (which is handed down herewith) 165 Fed. 639.

SPRING VALLEY WATER CO. v. CITY AND COUNTY OF SAN FRAN-CISCO et al.

(Circuit Court, N. D. California. June 29, 1904.)

No. 13.598.

1. COURTS (§ 282*) — FEDERAL COURTS—JURISDICTION—CONSTITUTIONAL QUESTIONS—REASONABLENESS OF WATER RATES.

Whether rates to be charged by a water company, fixed by a municipal ordinance under constitutional or statutory authority, are reasonable or unreasonable, is a judicial question, and the company has the right to invoke the jurisdiction of a federal court to determine whether such rates are such as to deprive it of its property without due process of law.

[Ed. Note.-For other cases, see Courts, Dec. Dig. § 282.*

Jurisdiction of cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Mining Co., 35 C. C. A. 7.]

2. Injunction (§ 136*)—Preliminary Injunction—Grounds—Ordinance Establishing Rates.

A preliminary injunction granted enjoining the enforcement of an ordinance passed by the board of supervisors of the city and county of San Francisco fixing the rates to be charged by a water company on a showing from which it appeared that under such rates the company could not

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes $165 \, \mathrm{F.}{-42}$

make a net income equal to 5 per cent, on the value of the property and ployed in the service.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 136.*]

In Equity. On motion for preliminary injunction.

M. B. Kellogg and Francis J. Heney, for complainant. Percy J. Long and John S. Partridge, for defendants.

GILBERT, Circuit Judge. An application for a temporary restraining order is made upon the bill of the Spring Valley Water Company, the answer of the city and county of San Francisco and the board of supervisors thereof, and the affidavits submitted on behalf of the re-

spective parties.

The substantial averments of the bill are the following: That on March 7, 1904, the board of supervisors of said city and county passed an ordinance fixing the rates to be collected by the complainant for water furnished to the city and inhabitants thereof for the fiscal year beginning July 1, 1904, and ending June 30, 1905, whereby they reduced the rates which had been fixed under their ordinance of March, 1902, to be in effect and in force for the fiscal year beginning July 1, 1902, and which had continued in force during the That the amount of such reduction was 7 per cent., ensuing year. except in respect to the hydrant rate, which rate they reduced 50 per cent., thereby reducing the monthly revenue derivable from hydrant service from \$2 per month to \$1 per month. The bill then sets forth in detail the properties which have been acquired by the complainant and which are used in supplying water, and the value thereof, alleging that the total value thereof at the present date is \$50,000,000; that the complainant is the successor of the Spring Valley Waterworks, the corporation which had constructed and operated the plant up to September, 1903; that in acquiring the said properties the complainant assumed and covenanted to pay all the bond issues which had been executed and put upon the market by its predecessor, also to issue stock to the stockholders thereof; that the amount of issued capital stock of its predecessor is \$14,000,000, par value; that the par value of the stock issued by the complainant is \$28,000,000; that the money invested in the complainant's plant, represented by stock and bonds, is \$28,000,000 or \$29,000,000, actual money. The bill then sets forth the dividends that had been declared upon the stock of the old company from the time of its inception in 1859 down to the end of the year 1902, and alleges that large amounts of these dividends which should have been declared were left by the stockholders of that company for investment in its property, and that, allowing for these accumulations, and deducting from the dividends those actually declared and paid with interest upon them, the balance of the cost of the works of the complainant, according to its books, is a little more than \$38,000,000; that the old company paid in the year 1875 dividends of 9 per cent. per annum upon its stock, during which year the current rates of interest in San Francisco upon good mortgage securities was 9 per cent.; that from that year down to the commence-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

ment of the year 1879 the dividends remained practically the same; that in 1879 the dividend became 8 per cent., but the current rate of interest remained at 9 per cent.; that from 1879 to 1883 dividends continued to be 8 per cent., except that in the latter year the dividend was 2% per cent.; that in 1884 it was 4½ per cent.; that for the four years following it was 6 per cent., during all of which times the current rates of interest were 7 per cent.; that in 1889 the dividend declared was $3\frac{1}{2}$ per cent.; that in the years 1891, 1892, 1893, 1894, and 1895, a dividend of 6 per cent. was paid, and the current rate of interest was 7 per cent.; that in 1896 a dividend of 5½ per cent. was paid, and in 1897 a dividend of 6 per cent., during both of which years the current rate of interest was 7 per cent; that in 1899 the dividend was 51/8 per cent.; that in 1900 it was 51/4 per cent.; in 1901, 3.78 per cent.; and in 1902, 4.2 per cent.; that in 1903, the enforcement of the ordinance passed in that year having been enjoined by this court, leaving the rates established under the ordinance of 1902 in force, the dividend was 4.6 per cent., during which time the ratio of interest on first-class mortgage securities was 6 per cent.: that the effect of the reduction of the rates so fixed by ordinance during the year last mentioned was to reduce the value of the shares of the complainant from \$103 in 1899, the highest figure it reached, to less than \$70 at the present time; that, according to the best information and belief of the complainant, its reasonable and necessary operating expenses for the coming fiscal year will be \$560,-000; that in estimating the revenue to which the complainant is entitled the board of supervisors fixed no sum whatever for operating expenses; that it allowed for taxation only the sum of \$345,000; that according to the best information available and the belief of the complainant the taxes for the coming year will amount to \$449,-000; that for the past fiscal year the complainant's property was assessed for, and it paid taxes in the sum of, \$325,278.21; that since the date of that assessment it has invested in permanent improvements of its property \$680,700; that the assessor appeared before the board of supervisors while they were discussing the rates to be fixed by the ordinance of March 7, 1904, and stated that he proposed to raise the assessment against the complainant in the city and county of San Francisco by the sum of \$3,822,000; that a large portion of the complainant's property is located in other counties in which it is also subject to taxation; that the par value of the capital stock of the complainant is \$28,000,000, divided into 280,000 shares of \$100 each, and that it is owned by 1,800 stockholders; that the complainant has in operation in the city of San Francisco 4,053 hydrants; that in April, 1903, the complainant's predecessor, the Spring Valley Waterworks, brought a suit in equity against the city and county of San Francisco and the then board of supervisors to enjoin and to set aside as void, unreasonable, and confiscatory the ordinance passed by the board of supervisors on March 9, 1903, and that upon an order to show cause and a hearing thereon had this court did enjoin, pendente lite, the enforcement of said ordinance, and that said injunction still remains in force, and said action has not yet been determined, but is still pending; that for the purposes of said hearing

the court considered the value of the said complainant's property therein to be \$26,752,500, and that it was entitled to receive at least 5 per cent, on the value of its property as a net compensation, and that the said ordinance would not produce more than 4.40 per cent. of such value; that, since the time of said hearing, \$680,767.01 has been expended in permanent improvement upon the waterworks of the complainant, and there has been no diminution in the actual value of said properties, but on the other hand there has been an increase in their actual value; that there has been no diminution in the ordinary and usual rates of interest or in the value of such services since said hearing in said former suit; that according to complainant's best information and belief there will be no material increase in its income in the fiscal year beginning July 1, 1904; that under the ordinance adopted March 7, 1904, the dividends which complainant will be able to pay to stockholders for the fiscal year beginning July 1, 1904, will not exceed 3 per cent.; that the interest on the bonded indebtedness of the complainant which it will be required to pay during the fiscal year beginning July 1, 1904, will amount to \$715,000.

The defendants in their answer make denials of many of the allegations of the bill concerning the cost and value of certain specified items of the complainant's property, and deny that the total value thereof is greater than from \$20,000,000 to \$24,000,000. They deny that the interest on the bonded indebtedness will be \$715,000, or that the operating expenses of the complainant will be \$560,000, or any more than \$400,000, and they deny that the taxes which the complainant will be required to pay during the fiscal year beginning July 1, 1904, will be more than \$240,000. The answer alleges that the board of supervisors of said city and county fixed the rates embodied in the ordinance of March 7, 1904, after full, fair, and just inquiry of the question of reasonable compensation to the complainant for supplying water to the city and county of San Francisco and its inhabitants, and conducted a public, open, free, full, and fair investigation of said questions, and gave to the complainant full opportunity to present evidence, to produce witnesses, and to cross-examine the witnesses produced before the board; that in fixing the rate, as it was fixed by the said ordinance, the board followed minutely and conscientiously the provisions of the laws of the state of California and of the charter of said city and county.

On behalf of the complainant, Pelham W. Ames, the secretary of the complainant, made affidavit that by the books of the complainant it is shown that the total cost of the tangible assets of complainant on January 1, 1904, was the sum of \$38,799,040.01; that for the fiscal year 1903-04 its taxes were \$325,278.21; that the assessor for said city and county has notified the board of supervisors that for the fiscal year 1904-05 for said city and county he will increase the assessment of the complainant's property by the sum of \$3,822,000 over and above the assessment for the preceding fiscal year; that since the assessment of the preceding year the sum of \$680,767.01 in investments has been made to the complainant's properties; that at the rates of the previous fiscal year the complainant's taxes for 1904-05 will be \$449,000, but that, upon information and belief, the rate of

taxation in said city and county will be raised from \$1.076, the rate of 1903-04, to \$1.20 for the ensuing year, which will make the complainant's total taxes \$467,000 for 1904-05; that the total operating expenses of the company for the year ending July 1, 1904, will be \$560,000.

The complainant then introduced affidavits of bankers and brokers familiar with the income yielded by investments of large amounts of capital in San Francisco, stating that the customary net income from investments in corporations judiciously managed is 6 or 7 per cent., and that capital could not be obtained for investment in quasi public or public utility corporations at a lower rate than that, and some of

the affiants placed the rate at from 7 to 10 per cent.

The affidavit of Geo. E. Booker, chief clerk of the complainant and for 30 years in its employment, states that on March 7, 1904, the total number of ratepavers for water in the city and county of San Francisco was 48,221, and that they paid for water furnished to 50,534 dwelling houses and 22,028 places of business; that, of said 50.534 dwelling houses, more than 50 per cent, of the ratepayers are tenants who move frequently and have no property over and above the exemptions to which they are entitled by law, and that the power of the complainant to shut off the supply of water from the premises occupied by them constitutes its sole protection for the collection of its rates for water furnished; that the difference between the amount the complainant would receive from said ratepayers under the old rates and the amount it would receive for the rates fixed for the fiscal year beginning July 1, 1904, would be absolutely lost to the complainant, and could never be collected if the ordinance of March 7, 1904, should ultimately be declared void by the judgment of the court; that as to the remainder of the ratepayers the complainant, in order to recover such difference, would be compelled to bring many suits for small amounts, and in the majority of such cases the attornevs' fees would more than exceed the amounts to be recovered: that in the judgment of the affiant, if the new ordinance should be ultimately declared void in this suit, more than one-half of the total amount of the difference between the sums collectible under the old rates and those collectible under the new would be absolutely lost to the complainant unless the enforcement of the new rate is enjoined pending this suit. He further deposed that upon careful computation he estimated that the gross income under the ordinance of March 7, 1904, for the fiscal year begining July 1, 1904, would be \$1,976,250, and that after deducting \$560,000, the operating expenses, and \$449,-000, the estimated taxes, the remainder or net income would be \$967,-250, which sum is 5 per cent. only on \$19,345,000, and that upon a valuation of \$26,752,500, as valued by this court in June, 1903, in the former suit, with cash expenditures and additions since amounting to \$680,767, or a total capital of \$27,433,267, the net income would be less than 3.53 per cent., and that upon a capital of \$29,000,000 the net income would be less than 3.33 per cent; and the affiant proceeded to show that the sum of \$18,000 should be added to the estimate of taxes on account of the increased rate of taxation above alluded to.

H. Schussler, for more than 37 years the chief engineer of the

complainant, in his affidavit stated in detail the values of the various items of the complainant's property, estimated the total valuation of the same at \$53,047,600, and the value of its established business and its franchises at \$6,000,000. He deposed that \$560,000 is a conservative estimate of the complainant's operating expenses for the fiscal

year 1904-05, setting forth an itemized list thereof.

The defendants offered the affidavit of Chas. W. Fay, the clerk of the board of supervisors, to show the sessions and the proceedings of the board, and the evidence considered by it in fixing the rates established by the ordinance which is complained of. It is unnecessary to refer to it in detail. It is sufficient to say that it appears therefrom that the board took pains to obtain all the information available to it, and gave free opportunity to the complainant to present its evidence and to examine the witnesses on whose evidence the board Nothing is disclosed in these proceedings, nor is anything shown in evidence on this hearing, which tends to indicate that the board acted otherwise than in good faith and with an honest purpose to arrive at a fair valuation of the complainant's property, and to fix a reasonable rate of compensation for its water and service. It appears from the affidavit of Mr. Fay that among other papers placed before the board, and upon which it acted, was an unverified report made by C. E. Grunsky, then city engineer of San Francisco, in which he estimated the value of the complainant's properties at \$24,-673,212, in addition to which he added \$1,500,000 for what he designated as "going business," but in which he made no valuation of the complainant's franchise.

The defendants offered also the affidavit of A. Wenzelburger, a public accountant, who for five months past had been engaged in experting and examining the books of the complainant, which shows that he found the total of tangible properties of the complainant, as shown by its trial balance on December 31, 1903, to be \$25,558,100.08, and that he found certain items charged to operating expenses which in reality went into part of the permanent improvements of said company; that the amount so erroneously charged to operating expenses he found for three consecutive years to be \$217,337.87, and that there were other items so charged to operating expenses for the last three years, which items should have no place in operating expenses, amounting in all to \$236,759.66; that the trial balance for one year shows a large sum charged to new construction account, but that nothing has been deducted from new construction account for depreciation, and that no sum is charged for depreciation, with the exception of the stable equipment account, which in 1904 amounted to \$799,066.

The affidavit of J. H. Dockweiler, a civil engineer, states that the affiant for four months last part had been engaged in examining the properties of the complainant; that he finds that certain of its properties are not in use for supplying water to the city and county of San Francisco, and that the cost of such properties which are not in use is placed in the statement of the complainant at the sum of \$1,873,717.77; that he has examined and prepared a map of the lands and properties of the complainant in the counties of Calaveras, Alameda, and Santa Clara, amounting in all to 7,392 acres, no portion of which

is in use for the storage and impounding of water nor for reservoirs, dams, or conduits or for any works employed for storing water for the inhabitants of the city and county of San Francisco; that the average cost per acre of the land on which are situated the complainant's infiltration galleries was the sum of \$78.72 per acre; that the average cost per acre of the complainant's lands in the Sunol Valley did not exceed \$40 per acre; and that the average cost of the land on which the Pleasanton Wells are situated was \$239.63 per acre.

An affidavit was produced showing that Mr. Ames, secretary of the complainant, testified before the supervisors that the rate of interest on the first-mortgage bonds of the complainant, being the amount of \$4,975,000, was 6 per cent. per annum, and that the interest upon the

remainder of the complainant's bonds was 4 per cent.

The affidavit of A. J. Rich, a dealer in real estate, stated that the average rate of income upon large investments in real estate investments of the sum of \$1,000,000 or over in said city and county is

from 4 to $4\frac{1}{2}$ per cent. per annum at the present time.

A. H. Wenzelburger further stated by affidavit that upon an examination of the books of the complainant he found the bond and stock issue of the Spring Valley Waterworks, the predecessor of the complainant, to be, bonds, \$13,975,000, stock issue, \$14,000,000, making a total of \$27,975,000, for which the company received in cash and property only \$23,122,443.15; that, of the difference between said totals, \$3,956,479 represented capital stock authorized, but not issued or paid in.

The defendants by their answer deny the power of the court to interfere with the enforcement of an ordinance made under legislative authority, and challenge the jurisdiction of the court to entertain the bill. The jurisdiction is invoked on the ground that the rates established by the ordinance so far unjustly deprive the complainant of its property and of the use thereof as to be repugnant to the clause of the fourteenth amendment, which forbids any state to deny any person within its jurisdiction the equal protection of the law, and to deprive the complainant of its property without due process of law. There can be no doubt of the jurisdiction of the court, upon the case which is stated in the bill. While the board of supervisors have the unquestioned right to regulate the charges to be made by the complainant for its water, the regulation must be reasonable and not confiscatory, and it is well settled that the question of the reasonableness or unreasonableness of the regulation is one for judicial determination. In Regan v. Farmers' Loan & Trust Company, 154 U. S. 397. 14 Sup. Ct. 1047, 38 L. Ed. 1014, the court, referring to the limit of judicial inquiry and the jurisdiction of the courts in such cases, said:

"There can be no doubt of their power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property; if found so to be, to restrain its operation."

And the court (page 399 of 154 U. S., page 1055 of 14 Sup. Ct. [38 L. Ed. 1014]) added:

"There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that

party be a single individual, an organized body, or the public as a whole) operates to divest the other of any right of person or property. * * * The equal protection of the laws, which by the fourteenth amendment no state-can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another or for the public."

These views were subsequently affirmed in Covington, etc, Turnpike Company v. Sanford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560, and in San Diego Land Company v. National City, 174 U. S. 753, 19 Sup. Ct. 810, 43 L. Ed. 1154, in which Mr. Justice Harlan, speaking for the court, said:

"That it was competent for the state of California to declare that the use of all water appropriated for sale, rental, or distribution should be a public use and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county, or town, or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the state cannot by any of its agencies, legislative, executive, or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law."

See, also, Chicago, Burlington, etc., Railroad v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Smyth v. Ames, 169 U. S. 524, 18 Sup. Ct. 418, 42 L. Ed. 819; and San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892. It is equally well established that the judiciary ought not to interfere with the rates established under legislative sanction, unless—

"they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and the public." San Diego Land Company v. National City, 174 U. S. 754, 19 Sup. Ct. 804, 43 L. Ed. 1154.

In other words, judicial interference is permissible only in a case where it is clearly shown that the legislative regulation of rates is such as to deny to the owner just compensation for his property or services taken for public use. What is just compensation is well defined in Virginia & Truckee Railway Company v. Henry, 8 Nev. 170, in which it was said:

"It is difficult to imagine an unjust compensation; the work 'just' is used evidently to intensify the meaning of the word compensation, to convey the idea that the equivalent to be rendered for property taken shall be high, substantial, full, and ample; and no legislation can diminish by one jot the rotund expression of the Constitution."

In San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261, Mr. Justice Van Fleet said:

"The question of what is just compensation in such a case is, we think, in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain, and it may be reduced to the formula that the public must pay the actual value of that which it appropriates to the public use."

Chief Justice Beatty, concurring with the majority of the court on that branch of the case, said:

"In fixing water rates, it is the duty of the city council to provide for a just and reasonable compensation to the water company. Anything short of that is simple confiscation, and is not only a violation of constitutional rights, but is an extremely shortsighted policy. Rates ought to be adjusted to the value of the service rendered, and this means that the water companies should be allowed to collect annually a gross income sufficient to pay current expenses, maintain the necessary plant in a state of efficiency, and declare a dividend to stockholders equal to at least the lowest current rates of interest, not on the par or market value of the stock, but on the actual value of the property necessarily used in providing and distributing the water to consumers."

The estimates of the value of the complainant's property found in the affidavits are so widely contradictory that it would be impossible in the very brief time which is allotted me for the disposal of the application for the restraining order to arrive at even an approximate estimate of its true value. The decision of Judge Morrow on the case between the same parties decided in this court a year ago, Spring Valley Waterworks v. City, etc., of San Francisco (C. C.) 124 Fed. 574, will, in this opinion, be regarded as a controlling precedent. The court in that case estimated the total value of the properties then used in supplying water to the city and county of San Francisco at \$26,-752,500, and reached the conclusion that a just annual compensation for the use thereof to be paid by the city and its inhabitants was 5 per cent. per annum. Taking those figures as a basis, the question arises, in what particulars does the present case differ from the former case? Since the date of that decision, the complainant has added to its investments the sum of \$680,767 01. On the hearing of the former case, the taxes were shown to be \$286,390, and the annual operating expenses were found by the court to be \$506,000. Assuming the estimate of the complainant for its operating expenses and taxes for the year beginning July 1, 1904, to be correct—and I see no reason now to question its correctness—it will appear that in the present case the property of the complainant invested in the water system exceeds that which was shown to be invested in the former case by \$680,-767.01; that its taxes for the coming year will be in excess of those shown on the former hearing by \$180,610; that its operating expenses will exceed the operating expenses of that year by \$54,000; and that its income from hydrants will be \$48,636 less than its income from the same source under the ordinance of March, 1903. On the face of these figures it is apparent at a glance that the net income of the complainant will be less under the new ordinance than the 4.40 per cent. which the court in the former case adjudged to be less than just compensation for the public use of the complainant's property, and to be such taking of the property of the complainant for public use, in violation of constitutional provisions, as would justify its temporary injunction. These considerations are controlling of the question whether the injunction should or should not issue in the present case, unless the estimate of the complainant's earnings should be largely increased by reason of the increase in the population of the city and county, and the resulting increase in the consumption of water. In the former case the court considered the probable annual increase

in the consumption of water from the increase in the population, and referred to the estimates that were submitted upon the hearing, one placing such increase in income at \$80,000, another at \$86,786, and still another at \$102,000. This latter estimate the court adopted, and added it to the income as estimated by the complainant in arriving at the conclusion before noted, finding the total income under the regulation in force before the ordinance of March, 1903, was adopted to be \$2,100,906. In the present case the complainant estimates that its gross annual income under the ordinance of March 7, 1904, would be \$1,976,250. No other estimate has been offered, and no evidence has been submitted to discredit that estimate, except that attention was directed to the statement of Mr. Ames, presented to the board of supervisors at the time of its investigation, showing that for 1903 the gross income of the company was \$2,075,983.09. But that income, it must be remembered, was derived under the rates established in March. 1902. It is admitted that the ordinance of March, 1904, reduced the rates of 1902 7 per cent., except as to hydrants, which are reduced 50 per cent. If, to the estimate of gross earnings furnished by the complainant, there be added, on account of increase of population, the sum of \$100,000 or \$200,000, it is still clear that upon the figures submitted the net income derivable from the complainant's property would, under the new ordinance, be less than 4.40 per cent. per annum.

It is urged that since the hearing of the former case the defendants have, at great expense, carefully examined, investigated, and estimated the values of the properties of the complainant, and have demonstrated by the affidavits which they have presented that large portions of such properties are not actually in use in furnishing water to the city and county of San Francisco, and that a state of facts is now shown to the court different from that which was shown on the hearing of the former case. Without attempting to pass finally upon the new evidence or to prejudge its effect when it shall be submitted on the final hearing, when all the matters therein involved shall be fully investigated upon the examination and cross-examination of witnesses, it is sufficient to say that the showing made at the present time is not convincing that the property so specified is not in use and is not necessary to the conservation of the water supply, the protection of its purity, and its delivery to the city, nor does it convince me that the estimate placed by the court upon the value of all the properties in the former case was erroneous or exceeded their actual value. The defendants and the inhabitants of the city can suffer but little injury in this case from the enforcement of a temporary restraining order, since all the consumers of water will be protected by a bond furnished by the complainant. On the other hand, if the injunction were refused and it should be finally determined that the ordinance complained of does in fact establish rates which are confiscatory and violative of the provisions of the Constitution, it is apparent that the complainant would suffer irreparable loss and be subjected to great inconvenience by reason of its inability to collect just rates from a considerable portion of the consumers of the water.

All the questions involved in this litigation ought to be speedily and finally determined. No reason is perceived why all the evidence bear-

ing upon the issues involved may not be presented within the time permitted by the rule of the court, and such will be the order of the court. A preliminary injunction will be allowed as prayed for, restraining the defendants pendente lite or until the further order of the court from enforcing the ordinance of March 7, 1904, and the complainant will be required to give a bond in the sum of \$175,000 to answer for all damages which the defendants or any person injured by reason of the injunction may sustain, if, upon the entry of a final decree herein, the said ordinance shall be sustained.

SPRING VALLEY WATER CO. v. CITY AND COUNTY OF SAN FRANCISCO et al.

(Circuit Court, N. D. California, October 7, 1908.)

1. CONSTITUTIONAL LAW (§ 277*)—DUE PROCESS OF LAW-SUBJECTS OF PROTECTION—"LIFE, LIBERTY AND PROPERTY."

The terms "life, liberty and property," as used in the fourteenth constitutional amendment, embrace every right which the law protects; they include not only the right to own and hold, but also to use, property, and profits and income are within the protection of the amendment, subject, however, to the rule that when property is devoted to a public use the owner is entitled to earn only such income therefrom as is just and reasonable as between him and the public.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 277 * For other definitions, see Words and Phrases, vol. 5, pp. 4156, 4157.]

2. COURTS (§ 282*)—UNITED STATES COURTS—CONSTITUTIONAL QUESTIONS— DUE PROCESS OF LAW.

The question whether rates fixed by a municipal body to be charged by a water company are just and reasonable, or confiscatory and unconstitutional, is a judicial one, for the determination of which the company has the right to invoke the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 282.*]

 CONSTITUTIONAL LAW (§ 47*)—DUE PROCESS OF LAW—REGULATION OF WATER RATES.

Such an action, however, is not one to review the action of the municipal body, and the evidence upon which it acted, its motives and methods of procedure, are immaterial on the question of granting a preliminary or permanent injunction to restrain enforcement of its rates, the only question being whether or not as a whole they are confiscatory, which is to be determined by the court from an independent investigation of the facts.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 47.*]

4. Waters and Water Courses (§ 203*)—Water Companies—Reasonableness of Rates.

The fact that interest rates generally have advanced within a short time does not necessarily entitle a water company to earn a higher rate of income than before without a corresponding adjustment of the value of its property.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292-294; Dec. Dig. § 203.*]

5. Waters and Water Courses (§ 203*)—Water Companies—Reasonableness of Rates.

Rates of charge fixed for a water company which will enable it to earn an income of 5 per cent. net on the value of its property after all

^{*}For other cases see same topic & \{ number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

taxes, operating expenses, and other legitimate and proper charges are deducted from the gross income are neither unreasonable nor confiscatory.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292-294; Dec. Dig. § 203.*]

 WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—REASONABLE-NESS OF RATES.

While in determining the reasonable value of the property and plant of a water company the estimated cost of a substitute system may be considered, it cannot be a controlling element.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292-294; Dec. Dig. § 203.*]

7 WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—REGULATION OF RATES—VALUATION OF PROPERTY."

The franchise of a water company to collect rates for water is property, and its value, as well as whatever value attaches to its business as a going concern, is to be considered in determining the value of its property for rate-fixing purposes, but the burden of proving such values rests upon the company.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292–294; Dec. Dig. § 203.*

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

8. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—REGULATION OF RATES—VALUATION OF PROPERTY.

In determining the value of the property of a water company for rate-fixing purposes, only such property as is at the time actually in use for supplying the water to which the rates apply, and necessary for such use, is to be taken into account, and it is to be valued at what it is worth for such purpose.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292-294; Dec. Dig. § 203.*]

9. WATER AND WATER COURSES (§ 203*)—WATER COMPANIES—REGULATION OF RATES—VALUATION OF PROPERTY.

In ascertaining the value of the property of a water company for rate-fixing purposes, the market value of its outstanding stock and bonds may properly be considered and given the weight to which it appears to be entitled.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292-294; Dec. Dig. § 203.*]

10. Waters and Water Courses (§ 203*)—Water Companies—Regulation of Rates—Reasonableness of Rates.

A water company is not entitled to charge to its current expense account for rate-fixing purposes the cost of replacing property destroyed through its own fault or negligence.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292-294; Dec. Dig. § 203.*]

11. Waters and Water Courses (§ 203*)—Water Companies—Regulation of Rates—Reasonableness of Rates.

In fixing reasonable and just rates to be charged for water by a water company, the depreciation of its plant from natural causes resulting from use should be taken into account, and the cost of replacement provided for out of the gross income.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292-294; Dec. Dig. § 203.*]

12. Injunction (§ 136*)—Preliminary Injunction—Conditions—Discretion of Court.

Under the Constitution of California the board of supervisors of the city and county of San Francisco is required to annually fix the rates

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes.

to be charged for water by any water company for the ensuing year. Complainant water company, which supplied water to the city and its inhabitants, brought suit to enjoin the enforcement of the ordinance fixing the rates for a certain year, which were slightly higher than those which had been accepted and charged by the company for a number of preceding years, but in the meantime taxes and operating expenses had increased so that its net income had substantially decreased. On the showing made it appeared probable that the rates made by the ordinance were so low as to be unreasonable and confiscatory under the changed conditions. Held, that complainant was not estopped by its acquiescence to maintain the suit, but that the court in the exercise of its discretion would grant a preliminary injunction restraining the enforcement of the ordinance rate only on condition that any amount collected in excess of that rate be impounded to abide the final order of the court.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 136.*]

In Equity. On motion for preliminary injunction.

Heller, Powers & Ehrman and Page, McCutchen & Knight, for complainant.

Percy V. Long, City Atty., and Thomas E. Haven and W. H.

Smith, Jr., Asst. City Attys., for defendants.

Edward Robeson Taylor, amicus curiæ.

FARRINGTON, District Judge. Under the provisions of the Constitution of the state of California, art. 14, § 1, it is the duty of the board of supervisors of the city and county of San Francisco in the month of February of each year to fix the rates or compensation to be collected by any person, company, or corporation for the use of water to be supplied to that city and county and to its inhabitants during the year commencing on the 1st day of July thereafter. The Constitution declares that the ordinance by which such rates are so established "shall continue in force one year, and no longer * * *. Any person, company, or corporation collecting water-rates * * * otherwise than as so established, shall forfeit" its "franchise and waterworks * * to the city and county * * for the public use."

The water rates so fixed by municipal ordinance of February, 1902, have prevailed, and have been collected by the Spring Valley Water Company, and by its predecessor, the Spring Valley Waterworks, from July 1, 1902, until the beginning of the present suit. Each year the board of supervisors has adopted a new ordinance, and in each of these enactments, except the ordinance of 1908, the rates were substantially less than the rates of 1902; but, with equal regularity, except in 1906, the water company has brought suit against the city and county of San Francisco, and the enforcement of each ordinance has been stayed by interlocutory injunction issued out of this court. Suit was brought in 1902 to restrain the enforcement of the municipal enactment of that year on the ground that the rates then established were so low as to be practically confiscatory. That suit was voluntarily dismissed by the complainant. The suits for 1903, 1904, 1905, and 1907 are still pending; not one of them has yet been decided or submitted to the court for final decision. In the 1903 suit,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and again in the suits of 1904 and 1905, the complainant in each bill of complaint expressed its willingness to supply the city and county of San Francisco and its inhabitants with water at the rates specified in the ordinance of 1902, and asked that it might, pending the litigation, be permitted to collect the rates fixed by that ordinance, upon such provisos as the court might think proper. In each case, however, the complainant stated that the rates of 1902 were less than the reasonable value of the services to be rendered. The rates adopted for 1908 are the rates of 1902, with this difference: the ordinance for 1908 fixes the compensation for water furnished the city and county for fire purposes and flushing sewers at \$2.50 per month for each hydrant; this is an advance of 50 cents per month per hydrant, and, as there are more than 4,000 hydrants, the rates for 1908 (the rates attacked in this suit) are higher in the aggregate, other things being equal, by more than \$2,000 per month, than the rates of 1902.

The Spring Valley Water Company now declares that the rates fixed by the ordinance of 1908 are still far too low to afford a just or reasonable recompense for its services and for the use of its property. For this reason complainant alleges the ordinance is repugnant to those provisions of the federal Constitution which prohibit the taking of property for public use without due process of law, and it now demands that each and all of the defendants, and all consumers of water in San Francisco, be enjoined, pending this litigation, from enforcing, or attempting to enforce, this ordinance by suit or otherwise, and from attempting in any manner to compel complainant to furnish water at the rates therein specified. As the propriety of restraining the defendants is the important question to be determined in this proceeding, it would be unprofitable to recite even the substance of the voluminous pleadings now on file. For the pres-

ent purpose the following statement will be sufficient:

Complainant is a California corporation with a capitalization of \$28,000,000, divided into 280,000 shares, having a par value of \$100 per share. In September, 1903, it acquired its plant from the Spring Valley Waterworks, also a California corporation, which at the time of the transfer had a capitalization of but \$14,000,000, divided into 140,000 shares, having a par value of \$100 each. Complainant's capital stock is in the hands of about 1,800 stockholders. Immediately prior to the earthquake of April, 1906, the market price of said stock was from \$37 to \$38.50; since that time the price has fallen until it now varies from \$18 to \$24. This depreciation is alleged to be the result of hostile legislation by successive boards of supervisors. The aggregate indebtedness of the company is \$17,859,000, on which the interest for the present fiscal year will be \$760,000. The Spring Valley Company owns about 20,000 acres in its Peninsula system, 29,000 acres in the counties of Alameda and Santa Clara, and 2,730 acres in Lake Merced Ranch. The Peninsula system controls about 114 square miles of watershed, on which the company has four reservoirs with a joint capacity of 29,300,000,000 gallons; Crystal Springs, the largest of these, is about eight miles in length, has a water area of about 1,730 acres, and a capacity of 19,000,000,000 gallons. The Alameda system controls at present about 600 square miles of watershed, stretching approximately from Mt. Hamilton on the south to Mt. Diablo on the north, and from Sunol on the west to Livermore Pass on the east. Alameda Creek and its tributaries bring practically all the drainage of this territory to Sunol. Here the subsurface flow is held by an underground dam built on the bed rock across the canyon; above this dam are 1,200 acres of gravel bed; 14,000 feet of cement tunnels collect the water after it has filtered through the gravel, and from this source 15,000,000 gallons of water are daily sent to San Francisco. Within the city limits the company has nine distributing reservoirs, with an aggregate capacity of 87,000,000 gallons; it has nine pumping stations, with a combined daily pumping capacity of 70,000,000 gallons; more than six miles of tunnel; 78 miles of water mains, from 22 to 54 inches in diameter; and 410 miles of distributing pipes laid in the streets of San Francisco; it is supplying nearly all the people of the city with water; its mains are connected with nearly all the buildings therein, whether public or private, and its customers number about 49,000; it supplies the city daily about 31,000,000 gallons of water, annually between eleven and twelve billion gallons. and has a present daily capacity of about 35,000,000 gallons; it has in storage in the neighborhood of 25,000,000,000 gallons of water, or two years' supply, with a daily inflow of 15,000,000 gallons from the Alameda system.

It is alleged that complainant's system of waterworks is not only ample for the needs of San Francisco with its present population, but with additional dams and aqueducts it will be capable of supplying sufficient water for more than \$,000,000 people, and that the value of the property is more than \$50,000,000, and its actual cost to stockholders more than \$53,758,450.72. Defendants deny any value to the Spring Valley Water Company property in excess of twenty or twenty-four million dollars, and any capacity, even with additional dams and aqueducts, to supply water to a population much greater than

San Francisco has at the present time.

Complainant alleges it is entitled to have its rates so fixed for the fiscal year 1908-09 as to afford a sufficient annual revenue to pay its operating expenses, estimated at \$600,000; its taxes, estimated at \$375,000; an annual sum to make good the depreciation in its plant, estimated at \$260,000; an annual sum to make good its losses by reason of the earthquake; and, in addition, an annual income of 7 per cent. per annum on its property in use for supplying the city and its inhabitants with water. The value of said property is claimed to be \$45,000,000 for property in actual use, and \$7,500,000 for property purchased for "reasonably immediate use." Defendants deny that complainant should receive, or is entitled to receive, any income in excess of that which will be yielded by the present ordinance; and deny that the company is entitled to anything for depreciation or earthquake damages.

The company contends that the ordinance in question will not yield an income of 2 per cent. net, above operating expenses and taxes, on the value of its property; that the supervisors have undervalued its property, and the rate of income, 5 per cent., adopted by the board, even if it could be realized from the rates established in the ordinance, is wholly inadequate. This is denied by defendants, who assert that the rates fixed in the ordinance will yield an income of more than 5 per cent, per annum, net, on the fair value of the property actually in use; and that 5 per cent. net, after taxes and expenses are paid, is just. Complainant alleges that the ordinance of 1908 was passed for the purpose of depreciating the value of the property in order that defendants might purchase it for less than its actual value; that the rates provided in the ordinance are unreasonable, unfair, unjust, fraudulent, and confiscatory; that they were fixed arbitrarily and at random, and by mere guesswork, and were not based upon actual value of the properties, but upon the mere whim of the board of supervisors; that said board never did determine, or pretend to determine, the value of the property in actual use for supplying water to San Francisco; that the rates were fixed by the board without regard to complainant's rights, or to the supply of water; without considering the value of the service, or what would be a reasonable income based on the cost or the actual value of the works and properties used and owned by the company in furnishing water to San Francisco; without regard to complainant's bonded and floating indebtedness, or the annual interest thereon, or the actual operating expenses, or taxes, or the right of complainant's stockholders to a reasonable or any dividend on their stock; without any allowance for depreciation, or to provide for the replacement of portions of the plant destroyed by extraordinary casualties; and without taking into account the value of the franchise, or the value of the going and established business. The defendants deny all this, and aver that the rates were fixed upon the actual value of the property, and after a full, complete, careful, and laborious consideration of such property, and of each and every part thereof, and of each item alleged to have been disregarded.

Complainant contends that the board of supervisors, in estimating the value of the property, refused to consider or make any allowance for the following items, to wit: (1) Complainant's established business and its franchise, which have a distinct and intrinsic value of more than \$4,000,000 in excess of the actual value of the tangible property; (2) the present serviceability of the Alameda system, such serviceability having been clearly demonstrated by continuous use since 1902; (3) the supervisors found a value of \$880,492 for that portion of the plant destroyed by earthquake; this sum was deducted from the estimated gross value of the property, but no allowance was made for certain subsequent restorations and replacements, amounting to \$571,715.13; (4) the value of water rights and other properties not in use at the present time for supplying water, but acquired by the company for "reasonably immediate use"; that such water rights and properties cost "many hundreds of thousands of dollars," and are now "worth many millions."

It is also urged in behalf of complainant that the board of supervisors, in practically re-enacting the rates of 1902, has ignored the

changes which have taken place during the past six years, and has given no consideration to increased taxes, operating expenses, and capital expenditures since 1902, or to depreciation. The figures furnished by the company show that operating expenses in 1902 were \$454,013.77, in 1907 \$607,232.07; taxes in 1902 were \$236,828.97, in 1907 \$314,933.07. The gross revenues of 1902 were \$1,980,651.72, as against \$1,907,272.20 in 1907. Thus the taxes and expenses of 1907 exceeded those of 1902 by \$231,322.40, and the gross income of 1907 was less than that of 1902 by \$73,379.52. It thus appears that the net income of 1902 was larger than the net income of 1907 by \$304,701.92. These figures given by Capt. Payson, president of the Spring Valley Water Company, do not agree with those of Mr. Schussler, its chief engineer. According to the tabular statement of income and expense given by the latter, the net income of the company in 1902 exceeded that of 1907 by but \$276,070.84, instead of \$304,701.92. The estimated taxes and expenses of 1908 will exceed those of 1902 by more than \$284,000, and the net income, less taxes and operating expenses, of 1902 will exceed the net income of 1908, as estimated by complainant, by \$18,808.98. Since 1902 the company has sold more than \$3,000,000 worth of its bonds, and invested the proceeds in additional constructions. The dividend paid to the stockholders in 1902 was 4.2 per cent. on the par value of the capital stock. For more than two years the stockholders have had no dividends; during this time they have paid assessments amounting to \$840,000, and for the past 71/2 years the stockholders have received as net dividends an average of 1.95 per cent, per annum. During the whole of this time the company has been collecting the rates of 1902. It is alleged that the structural portion of the plant, such as flumes, gates, buildings, pipes, reservoirs, etc., which decay and depreciate, are worth \$13,-000,000, and the annual allowance therefor should be more than \$260,000. Defendants deny that the franchise and element of going business have any value whatever, or, if they have value, that it should be added to the value of the tangible property for rate-fixing purposes; deny that the permanent serviceability of the Alameda system has yet been demonstrated, because no consecutive years of marked deficiency in rainfall have occurred since 1902, showing how much a drought would lower the subsurface water in the Pleasanton artesian wells and the Sunol filter beds; deny that the replacements were necessary, or that they are being used for the benefit of the city, or that they cost \$571,715.13, or any such sum. Defendants claim that complainant should be allowed only for property actually and physically in use, and not for property acquired and being prepared for "reasonably immediate use." Defendants also deny that depreciation is a cost or expense incurred by complainant in supplying water to San Francisco for the fiscal year 1908–09.

In order to provide what complainant insists is a just and reasonable compensation for the use of its property, it will therefore be necessary to make rates which will yield a gross annual income of not less than \$4,910,000 as against \$2,395,045, estimated gross income upon

which the supervisors based the rates of the ordinance in question. These estimates more in detail are as follows:

Rates fixed by the supervisors in the ordinance of 1908, designed to provide for income and expenses:

5% net income on \$25,000,000, estimated value of the company's property Operating expenses. Taxes	\$1,250,000 609,000 375,000
Total	\$2,225,000
Estimated income of the company for all service for the year begin 1, 1908, and ending June 30, 1909:	ning July
Income from private consumers (estimated by the company) 15% increase of business (estimated by the board) Income from shipping (estimated by the company) Income from contracts (estimated by the company)	256,505 122,002 70,025
Miscellaneous (estimated by the company)	$\begin{array}{c} 60,481 \\ 120,000 \\ 20,000 \end{array}$

Total income.......\$2,395,045

15,000

15,000

6,000

The Spring Valley Water Company claims that rates should be so fixed as to provide for income, expenses, etc., as follows:

Public schools (estimated by the board).....

Parks (estimated by the board).....

Sprinkling streets (estimated by the board).....

7% on \$45,000,000, the value of company property in actual use	\$3,150,000
7% on \$7,500,000, the value of company property purchased for reasonably immediate use	525,000
Earthquake damages	260.000
Operating expenses	600,000
Taxes	375,000

otal \$4,910,000

Complainant finally alleges that it will suffer irreparable damage unless it is permitted to collect such rates as will produce a fair, just, and reasonable income; that defendants threaten to enforce said ordinance and prevent complainant from collecting any other rates than those specified therein; that the rates payable by said city and county of San Francisco for water are payable out of the general fund, and, if that fund be exhausted before the company has received just compensation for the present year, complainant will be remediless, because under the law the debts of one fiscal year cannot be paid out of the revenues of any subsequent year, and that \$300,000 is less than a reasonable sum for such water for the present year.

Complainant prays the court to decree:

(1) That the ordinance is null and void.

(2) That complainant is entitled to have rates fixed for the present year so they will in the aggregate afford a just compensation for the services rendered, based on the value of the property used therefor, and of property purchased therefor to be used in the "reasonably imme-

diate future," that will yield a sufficient annual income to complainant to pay its operating expenses, taxes, an annual sum for depreciation of plant, provide for the replacement of portions of the plant destroyed by extraordinary casualty, and realize in addition the rate of 7 per cent. per annum upon its property in actual use in so supplying said city and county and its inhabitants with water, and that such value of said property is at least \$45,000,000 for property in actual use, and \$7,500,000 for property purchased for "reasonably immediate use."

- (3) That the board of supervisors be required to fix water rates for said fiscal year which will provide an income sufficient for the purposes mentioned in paragraph 2; and that the board also be required to afford complainant notice and opportunity to be heard, and to allow complainant and others to introduce evidence, "or to decree that said board has no jurisdiction in the premises to fix rates."
- (4) "That each and all of said defendants, and all consumers of water in said city and county, be, pending this litigation and perpetually at the conclusion of the litigation, enjoined from enforcing or attempting to enforce said pretended bill or ordinance pretended to have been finally passed June 15, 1908, and from bringing or causing to be brought any suit or action against the complainant, in law or in equity, to enforce said pretended bill or ordinance, or any forfeiture of the complainant's franchise, works, or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates thereby intended to be prescribed, and from any attempt, directly or indirectly, to compel complainant to furnish water at said rates; and that upon the filing of this bill of complaint the court or your honors, by order duly given and made, upon such provisos as may seem equitable, direct the defendants to show cause on a day certain why such injunction should not be issued pending this litigation, and that in the meantime, upon and from the filing of this bill of complaint until the determination of the court or your honors under such order to show cause, a like temporary injunction and restraining order be granted by the court or your honors."
- (5) That the court by decree determine what property is in actual use for supplying water; the value of such property; the value of the franchise and going business; the reasonable net income on such value; the amounts to be allowed for taxes, operating expenses, annual depreciation of plant, and for that portion of the plant destroyed by earthquake; also what is the reasonable value of the services rendered by complainant, and the value of property bought for future use, and

what income should be derived therefrom.

(6) That defendants be estopped from placing any less value than \$25,000,000 on complainant's properties as of date June 20, 1889.

(7) That defendants be restrained pending the suit from reducing the general fund of said city and county below a sum which will be sufficient to pay complainant reasonable rates for water furnished said city and county during the year 1908-09.

(8) Or that it be decreed that the business of complainant is being run without profit, at an enormous loss, and that complainant may sell

any or all of its property, and that it may sell water to consumers other than the city and county of San Francisco and its inhabitants.

The jurisdiction of this court is invoked on the ground that the ordinance in question is repugnant to that portion of the fourteenth amendment to the Constitution of the United States in which it is ordained that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This prohibition rests upon the board of supervisors, and upon every other instrumentality, executive, legislative or judicial, by which or through which the power of the state is exercised. Chicago, etc., R. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Capital City Gas Co. v. Des Moines (C. C.) 72 Fed. 818, 824; Central, etc., Ry. Co. v. R. R. Com. (C. C.) 161 Fed. 925, 965; Cooley, Const. Lim. 198.

The terms "life, liberty and property" embrace every right which the law protects; they include not only the right to own and hold, but also the right to use and enjoy property. Profits and income are property. The right of contract, the right to fix the terms and conditions upon which the owner will sell, lease, or otherwise dispose of his property, is itself property, and any statute or ordinance which limits or curtails these rights deprives the party affected of his property. But when a man parts with his property, it is no longer his. When he devotes it to the public use, it ceases to be private property. "He, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, as long as he maintains the use. When private property is devoted to public use, it is subject to public regulation. If the right to regulate exists," the right to establish the reasonable compensation for services as one of the means of regulation is implied. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

This is the principle which justifies and sustains that section of the Constitution of California in which it is made the duty of the board of supervisors to regulate water rates. In reply to the claim that the power to fix water rates is virtually left in the hands of the water consumers because the consumers elect the supervisors, and this is a violation of the principle that no man shall be a judge in his own cause, the Supreme Court in Spring Valley Waterworks v. Schottler, 110 U. S. 347, 354, 4 Sup. Ct. 48, 51, 28 L. Ed. 173, held that the municipal authorities had the power to regulate the prices at which the water company shall supply its consumers; that the supervisors are "bound in morals and in law" to fix reasonable rates, and that such regulations do not deprive the company of its property without due process of law.

"What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns." Munn v. Illinois, 94 U. S. 113, 133, 24 L. Ed. 77.

In Peik v. Chicago, etc., R. R. Co., 94 U. S. 164, 24 L. Ed. 97, decided in 1876, it was held that, while the owner is entitled to reasonable compensation for property in public use, the question as to what is reasonable is a question for the legislative body, and its decision binds the courts as well as the people. This doctrine was for a time unhesitatingly followed and affirmed by state and subordinate federal courts. It was frequently decided that a person or corporation injured by legislative determination as to what is a reasonable rate for the use of property affected with a public interest could not successfully claim that it had been deprived of its property without due process of law. Tilley v. Savannah, etc., R. R. Co. (C. C.) 5 Fed. 641; Spring Valley Waterworks v. Bartlett (C. C.) 16 Fed. 615; Atlantic, etc., R. R. Co. v. United States (D. C.) 76 Fed. 186, 196; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; State v. Chicago, etc., Ry. Co., 38 Minn. 281, 297–298; 37 N. W. 782; Wellman v. Ry. Co., 83 Mich. 592, 47 N. W. 489.

In subsequent decisions the rule was announced that judicial interference is only permissible "where the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. * * * Where the proposed rates will give some compensation, however small, to the owners, * * * the courts have no power to interfere. * * * But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere, and protect the companies from such rates." Chicago, etc., R. R. Co. v. Dey (C. C.) 35 Fed. 866, 878,

1 L. R. A. 744.

These authorities lend support to the position taken by defendants that, inasmuch as the question of rates has been left to the board of supervisors, its decision, like the decision of any other judicial tribunal, however inferior, upon a question of fact, is conclusive; and unless there has been fraud in fixing the rates, or the rates are so palpably and grossly unreasonable as to be fraudulent in effect, the court is powerless to set them aside. The only logical deduction from this doctrine was that legislative bodies might, under the guise of regulation, reduce the net earnings of public service companies to the minimum, and thus, while not taking their physical property, deprive them for the most part of that which constitutes its value; that is, of its use, its profits, and its earnings. This doctrine later gave way to the principle that, while the Legislature has the power to prescribe the charge, the reasonableness or unreasonableness of such a charge is a question for the courts; and if, in the exercise of their legal discretion, the courts determine that a charge so fixed is unreasonable, that determination must prevail over any presumption in favor of the legislative act.

In Chicago, etc., R. R. Co. v. Minnesota, 134 U. S. 418, 456, 10 Sup. Ct. 462, 466, 33 L. Ed. 970, this question was presented to the Supreme Court of the United States on a writ of error to review a judgment of the Supreme Court of Minnesota. The Minnesota court had refused to receive testimony offered by the railroad company as to

whether a certain rate fixed by the Railroad and Warehouse Commission of that state was reasonable. The refusal was based on the ground that the statute of Minnesota expressly declares that rates fixed by the commission, "if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely prima facie equal and reasonable, but final and conclusive as to what are equal and reasonable charges." Notwithstanding the fact that previous to fixing the rate the commission had investigated the matter, and had listened to a representative of the railway company, the Supreme Court of the United States held that the statute was in conflict with the Constitution of the United States, because it deprived the company of its right to a judicial investigation by due process of law under the terms and with the machinery provided for the investigation judicially of the truth of a matter in controversy. The court uses the following language:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

These views have been approved and sustained by the later decisions. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 397, 399, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Smyth v. Ames, 169 U. S. 466, 526, 18 Sup. Ct. 418, 42 L. Ed. 819; Louisville & Nashville R. R. Co. v. Kentucky, 183 U. S. 503, 510, 22 Sup. Ct. 95, 46 L. Ed. 298; Minneapolis, etc., R. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; Stafford v. Chippewa, etc., R. R. Co., 110 Wis. 331, 351, 85 N. W. 1036; Capital City Gas Co. v. Des Moines (C. C.) 72 Fed. 818, 822; Matthews v. Bd. of Corp. Com'rs (C. C.) 97 Fed. 404; Tift v. Southern Ry. Co. (C. C.) 138 Fed. 753, 760; Cons. Gas Co. v. New York (C. C.) 157 Fed. 849, 882; Western Union Tel. Co. v. My-att (C. C.) 98 Fed. 335, 342, 354.

In the last case the court says:

"Courts cannot legislate and pass judgment thereon. Legislative bodies, or boards that are constituted as legislative agencies, cannot render judgment upon their legislative acts. In either case neither the proceeding nor the result would be due process of law."

Under the law the company is entitled to a just and reasonable compensation for the use of that portion of its property which is employed in collecting water and bringing it to the people of San Francisco. This just and reasonable compensation is property, and up to and including the full measure of that which is just and reasonable it is the property of the complainant; it cannot be taken, directly or indirectly, by the power of the state for public use without due process of law. To say that a body of rates which affords some compensation, but something less than a reasonable compensation, is not confiscatory, is sim-

ply to say that the Constitution protects a portion, but not all, of a man's property. If the supervisors have the power, and it is their duty to prescribe just and reasonable rates, and the court has the power to decide whether such rates are reasonable, and to annul ordinances in which the rates prescribed are unjust and unreasonable, it must follow that "the court has no power," as Judge Morrow says in Spring Valley Waterworks v. San Francisco, infra, "to diminish the measure of what is just compensation in any degree." The court must ascertain the fact: ascertain whether the ordinance crosses the line which separates that which is just and reasonable from that which is unjust and unreasonable, and so declare. Southern Pac. Co. v. Bd. R. R. Com'rs (C. C.) 78 Fed. 236; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 399, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 87, 22 Sup. Ct. 30, 46 L. Ed. 92; Cons. Gas Co. v. New York (C. C.) 157 Fed. 849, 882; Cons. Gas Co. v. Mayer (C. C.) 146 Fed. 150, 152; Spring Valley Waterworks v. San Francisco (C. C.) 124 Fed. 574, 601.

In the last case cited Judge Morrow decided that 5 per cent, per annum was the smallest income which the court could, under the evidence in that proceeding, consider as reasonable and just, and that an income of 4.4 per cent. on the value of the property, or 3.3 per cent. on the capital stock of the company, "was unreasonably low and confiscatory, and amounted to the taking of private property for public use without just compensation, thereby depriving complainant of its

property without due process of law."

In the subsequent case of Spring Valley Water Co. v. City and County of San Francisco (No. 13,598, in this court) 165 Fed. 657, on the hearing of the motion for a preliminary injunction, Judge Gilbert adjudged that an annual income of something less than 4.4 per cent. on the value of the property was less than a just compensation, and was such a taking of the property of complainant for public use in violation of constitutional provisions as would justify the injunction.

It must always be borne in mind that the company has devoted certain property to public use; the public has thus acquired an interest in the property; the company owes a duty to the public as well as to its stockholders; and, when it is declared that rates must be just and reasonable, it must be understood that they are to be just and reasonable both to the company and to the public. Generally, that which is just, but no more than just, to the owner, ought to be the equivalent of that which is just, but no more than just, to the consumer. "A corporation is not entitled as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock. Stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." Covington & Lexington T. R. Co. v. Sandford, 164 U. S. 578, 597, 598, 17 Sup. Ct. 198, 205, 41 L. Ed. 560; Seaboard Air Line Ry. Co. v. R. R. Com. (C. C.) 155 Fed. 792, 805; Tift v. Southern Ry. Co. (C. C.) 138 Fed 753, 764.

Mr. Justice Savage in Water District v. Water Co., 99 Me. 371, 59

Atl. 537, 540, goes so far in stating the rule as to say:

"Rates must be reasonable to both (the company and the customer), and, if they cannot be to both, they must be to the customer."

In determining what is just and reasonable compensation to the owner for the use of property employed in the public service, the rule stated as follows, in San Diego Land Co. v. National City, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154, has been uniformly approved:

"The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant, the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same, the annual depreciation of the plant from natural causes resulting from its use, and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

Under the former rule that a rate-fixing ordinance, in the absence of fraud, was conclusively presumed to be just and reasonable, it was possible, under the guise of regulation, to reduce the earnings of property devoted to public service to the vanishing point, and thus set at naught the constitutional guaranty against taking property for public use without just compensation. The present rule gives to every person owning such property who is aggrieved by such an ordinance his day in court; neither his plant, nor any portion of its just and reasonable earnings, can be taken without due process of law. He is entitled to a fair return, not always upon the cost of the property, because it may have cost too much; not always upon the outstanding indebtedness, because it may be in excess of the real value of the property; not always upon the total amount invested, because some portion of that which is acquired by the investment may be neither necessary nor presently useful for the public service; but upon the fair present value of that which is used for the public benefit, having due regard always to the reasonable value of the service rendered.

Each case must depend very largely upon its own special facts, and every element and every circumstance which increases or depreciates the value of the property, or of the service rendered, should be given due consideration, and allowed that weight to which it is entitled. It is, after all, very much a question of sound and well-instructed judgment. Smyth v. Ames, 169 U. S. 466, 546, 547, 18 Sup. Ct. 418, 42 L. Ed. 819; San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; San Diego L. & T. Co. v. Jasper (C. C.) 89 Fed. 274, 282; San Diego L. & T. Co. v. Jasper (C. C.) 110 Fed. 702, 714; Chicago, etc., Ry. Co. v. Tompkins (C. C.) 90 Fed. 363, 369; Seaboard Air Line Ry. Co. v. R. R. Com. (C. C.) 155 Fed. 792, 806.

It is charged that the ordinance in question was passed for the purpose of depreciating the value of complainant's property in order that defendants might purchase it for less than actual value. It is also stated that the rates set out in the ordinance were fixed "arbitrarily, at random, by guesswork, and upon mere whim of the board of supervisors." These charges have not been proven. On the contrary, the evidence shows that months were devoted to careful and conscien-The Spring Valley Water Company had every tious investigation. opportunity to be heard, and to present to the board any evidence or argument which it deemed proper. The president and attorney of the company addressed the board frequently; representative citizens were permitted to express their views. Frequent discussions were had by the board, and its members personally inspected the company's property. In short, there is nothing in the record which indicates that the supervisors, or either or any of them, were actuated by any other motive than to do the thing which was just and right. For the present proceeding, this is a final disposition of the allegations that the ordinance of 1908 was passed for the purpose of depreciating the value of complainant's property, and that the rates fixed in the ordinance

Concerning the allegation that the board of supervisors "refused to allow anything for the four important elements of value which they excluded, namely, franchise, going business, repairs of earthquake damage, and value attaching to Alameda system due to demonstration of permanency," and in so doing that "they acted 'arbitrarily' and 'without the exercise of judgment and discretion,' and therefore 'they violated their duty and went beyond the powers conferred upon them," complainant takes the position that on application for preliminary injunction the court may review the proceedings before the rate-fixing body, and, if it clearly appears that elements which should have been considered have been ignored, a presumption arises that the rates are confiscatory; that this presumption is so strong, any presumption in favor of the validity of the ordinance is overthrown, and so conclusive that the court will not permit the supervisors to show that the deficiency from rejected elements was made good by generous allowance on other elements; therefore, the complainant is entitled to have the rates enjoined until the matter can be fully investigated, and such an investigation cannot be had before the final hearing.

I cannot agree with counsel that such serious consequences flow from what is alleged to be arbitrary conduct on the part of the board. This case comes here on one vital issue: Are the water rates confiscatory? To this all other questions involved are mere incidents. If the water rates in question are confiscatory, then the ordinance is repugnant to the federal Constitution, and must be pronounced invalid. Its invalidity cannot be healed by showing the supervisors were actuated by the purest motives, that they committed no error in applying the law to the facts, and that their deliberations were conducted in strict obedience to the rules which govern courts in the administration of justice, and in the admission and rejection of evidence. But, on the other hand, if it appears that the rates will afford com-

plainant a just and reasonable compensation for the use of its property, the ordinance is not repugnant to the constitutional provision invoked, because it does not deprive the company of anything whatever. And this is so even though it be shown that the board in its proceedings violated every rule in the law of evidence. The rates are either just and reasonable or unjust and unreasonable, and that fact must be ascertained by this court from its own independent investigations, and not from a review of the proceedings before the board of supervisors to ascertain whether it erred in the admission or rejection of testimony, or whether, on the testimony before that body, it should have arrived at a different conclusion.

This court cannot control the discretion of the supervisors; it cannot substitute its judgment for theirs. The power and duty of fixing water rates is cast by the Constitution on that board, and not on this court. The law nowhere provides an appeal to this court from an ordinance adopted by the board of supervisors, nor does it clothe this tribunal with any authority to review, revise, correct, or send back to that body for reconsideration an ordinance establishing the compensation to be collected for water. It has not been made entirely clear that the board of supervisors owed any other duty to complainant than to fix by ordinance a schedule of rates which, as a whole, will yield a just and reasonable compensation on the fair present value of the property used for San Francisco and its people. It may be that the rates were so adjusted that certain consumers will receive water at prices for less than it is worth; it may be that in determining the value of complainant's property some elements were placed too high, others too low, and still others totally ignored; but if, on the whole, the result is reasonable, and complainant receives a just income, it certainly has no grievance and no cause of action. This court will only consider whether the rates as a whole, and the value of the property taken as a whole, are fair and reasonable. Covington, etc., R. Co. v. Sandford, 164 U. S. 578, 596, 17 Sup. Ct. 198, 41 L. Ed. 560; Smyth v. Ames, 171 U. S. 361, 364, 18 Sup. Ct. 888, 43 L. Ed. 197; San Diego L. Co. v. National City, 174 U. S. 739, 760, 19 Sup. Ct. 804, 43 L. Ed. 1154; Minneapolis, etc., Ry. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; Chicago & N. W. Ry. Co. v. Dey (C. C.) 35 Fed. 866, 878, 1 L. R. A. 744; Matthews v. Bd. Corp. Com'rs (C. C.) 106 Fed. 7; San Diego L. & T. Co. v. Jasper (C. C.) 110 Fed. 702; Steenerson v. Great N. Ry. Co., 69 Minn. 353, 377, 72 N. W. 713.

Referring to the power of boards of supervisors in California to fix water rates, Mr. Justice Harlan in San Diego L. & T. Co. v. National City, 174 U. S. 739, 753, 19 Sup. Ct. 804, 810, 43 L. Ed. 1154, says:

"It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the state cannot by any of its agencies, legislative, executive, or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law. Chicago, Burlington, etc., Railroad v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Smyth v. Ames, 169 U. S. 466, 524, 18 Sup. Ct. 418, 42 L. Ed. 819.

But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use. Chicago & Grand Trunk Railway v. Wellman, 143 U. S. 339, 344, 12 Sup. Ct. 400, 36 L. Ed. 176; Reagan v. Farmers' Loan & Trusk Co., 154 U. S. 362, 399, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Smyth v. Ames, above cited. See, also, Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 614, 615, 19 Sup. Ct. 553, 43 L. Ed. 823."

This is quoted with approval in Spring Valley Water Co. v. San Francisco (No. 13,598) 165 Fed. 657, on application for preliminary injunction, decided by Judge Gilbert, who says:

"Judicial interference is permissible only in a case where it is clearly shown that the legislative regulation of rates is such as to deny the owner just compensation for his property or services taken for public use."

In Spring Valley Waterworks v. San Francisco (C. C.) 124 Fed. 574, 584, on an application for preliminary injunction, Judge Morrow uses this language:

"It is not the province of the court to review the evidence upon which the board of supervisors acted in adopting the ordinance under consideration. Whether the ordinance deprives the complainant of its property without due process of law, denies to it the equal protection of the laws, or abridges the privileges and immunities of the complainant, are questions to be determined by the court in this action upon an original independent investigation, and not by an examination of the proceedings of the board to ascertain what evidence it received and acted upon, and whether that evidence was sufficient to justify the conclusion reached. This does not mean that the same evidence submitted to the board may not be submitted to the court, as appears to have been done in this case; and, if the evidence is competent and relevant to the issues before the court, it will be considered. But it does not follow that, because the board may have received evidence that the court would have rejected, or has rejected evidence the court would have received, the proceedings of the board are to be regarded as illegal, and the ordinance as depriving complainant of constitutional rights. So with respect to the proceedings of the board in determining the value of complainant's property in actual use, and the necessary expense that will be incurred in keeping it in operation, elements may have been considered by the board that should have been omitted, and elements omitted that should have been considered, and still the ordinance be, in effect, just and constitutional."

Mr. Justice Van Fleet in San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 635, 38 L. R. A. 460, 62 Am. St. Rep. 261, in speaking of the scope of judicial inquiry in cases of this kind, says:

"All they (the courts) have to consider is whether in a given case the result of the council's action will be to take the property of the complaining party without compensation."

It would seem, therefore, that the court is limited to the determination of a single question, namely, is the ordinance confiscatory? On motion for preliminary injunction it is not necessary to show clearly and beyond doubt that the rates are confiscatory; it is sufficient if it appears from the evidence that the court will probably on final hearing pronounce the ordinance invalid, because its effect will be to deprive

complainant of its property without compensation. Such an application, however, does not enlarge the powers of this court, nor confer appellate jurisdiction which does not exist at the final hearing. It does not confer any jurisdiction by which this court may review the proceedings of the board of supervisors, and temporarily set aside an ordinance because elements may have been considered by the board that should have been omitted, and elements omitted that should have been considered. The court cannot act arbitrarily, or without exercise of judgment or discretion, or without investigation, even on motion for preliminary injunction. The magnitude of the interests involved. the fact that an order is asked the effect of which will be to restrain the enforcement of a municipal ordinance adopted only after months of investigation, and probably to confer upon complainant the power to regulate rates for the present fiscal year, demand that this court should investigate and carefully weigh the facts which tend to show whether the rates are actually confiscatory. The argument "that this hearing is not for the purpose of determining whether the ordinance deprives the company of its property," but merely to establish a probability and presumption of the right to an injunction pendente lite, is not altogether correct. While it is not proper for the court at this time to decide the merits of the case, nevertheless the court must decide every question which is essential to a wise and just exercise of judicial discretion in granting or withholding the injunction. The court should ascertain, not from conjecture nor by inference from mistakes committed by the rate-fixing body, but from an investigation of the facts, whether there are real and substantial grounds for believing the ordinance is probably confiscatory. If, on the final hearing, the court cannot interfere with rates unless they are clearly confiscatory, it is unreasonable to think that on an application for a preliminary injunction, when it is shown that the rate-fixing agency erred in rejecting elements of value which it should have considered, the court may draw an inference from this that the ordinance is probably invalid, and thereupon annul its enforcement, suspend the operation of the rates, and grant to the complainant for the time being practically all the relief which is could obtain as a result of a final decree.

Rate of Income.

We now come to the pivotal issues of this controversy. First, what is the probable reasonable rate of income for the property used in supplying San Francisco with water? Second, what is the probable reasonable value of such property?

It is insisted that rates of interest have recently increased by 1 to 2 per cent., and consequently a 5 per cent. net income on its property in use is no longer just to the company. This reason is not conclusive. The conditions which have caused interest rates to rise are probably temporary. In times of financial distress, when money is very much needed and not easily obtained, rates of interest go up, and many of those who most need money are forced to throw on the market property which otherwise they would hold. When unusual quantities of property are for sale by owners who must have cash, prices fall.

Thus it often occurs that high rates of interest are followed and counterbalanced by lower prices. Higher rates of interest do not necessarily indicate that complainant's services have become more valuable, nor do they justify a higher rate of income without a corresponding adjustment in the value of the property on which the income is computed. Steenerson v. Great Northern Ry. Co., 69 Minn. 353, 387, 72 N. W. 713. An income of 5 per cent. net, after all taxes, operating expenses, and other legitimate and proper charges are deducted from the gross income, is neither unreasonable nor confiscatory.

Expert Testimony as to Value.

For rate-fixing purposes the board of supervisors has valued the Spring Valley Water Company's property as follows: In 1902, \$24,-468,210; 1903, \$24,124,309; 1904, \$24,672,212; 1905, \$25,001,441; 1906, \$25,450,320; 1907, \$24,569,828; 1908, \$24,925,321. On the present hearing the experts for the company valued the property as follows: Frederick P. Stearns, \$70,000,000; James D. Schuyler, \$45,-960,000; Ralph Herring, \$44,770,900; Arthur L. Adams, from \$40,-000,000 to \$45,000,000; H. Schussler, \$56,568,000. The experts for the defendants have valued the property as follows: Edwin Duryea, \$25,451,000 : Desmond Fitzgerald, \$22,736,643,55 : C. E. Grunsky, \$28,-024,389; Marsden Manson, \$24,925,321; J. H. Dockweiler, \$24,059,-856.15. The estimates of Adams, Schussler, Manson, and Dockweiler were made for the present year; the other estimates were made in 1903 and 1904. The wide range covered by these figures is remarkable. Each witness is an expert in such matters, and has had long and varied experience in the conduct and study of great engineering enterprises. Practical scientific methods of valuation ought to yield approximately the same results. The highest valuation here is three times the lowest. Between the highest and the lowest valuations made by complainant's witnesses there is a difference of \$24,-000,000; and Mr. Schussler, chief engineer of the Spring Valley Waterworks for more than 40 years, reaches a figure which differs from that of each other expert by more than \$11,000.000. The estimates given on behalf of defendants do not take so wide a range; between the highest and lowest the difference is \$5,287,745, notwithstanding the fact that \$3,900,000 of Mr. Grunsky's estimate is for intangible property, viz., for franchise and going business, and that Mr. Fitzgerald based his estimate on the reasonable actual cost of the plant, and not on its present value. The variation in these estimates is due in some measure to the fact that four of the experts, namely, Fitzgerald, Manson, Dockweiler, and Duryea, fail to assign anything for the so-called intangible value of the property, and, of the others who do allow such values, only Adams and Herring agree as to the theory and method of estimating them.

Mr. Grunsky allows \$1,400,000 for the established business. This value he says results in part from the numerous connections between the company's distributing system and the service pipes of customers; he determines the amount of this allowance by taking 25 per cent. of the valuation of the city distributing system. This sum does not in-

clude the cost of connections, but is allowed in part because of the fact that such connections exist. Mr. Grunsky also allows \$2,500,000 for franchise. This amount he ascertains by taking 10 per cent. of a "reasonable estimate of the cost of reconstructing and reacquiring the properties, including the value of the established business." He says the franchise is not defined by any specific agreement with the city, and therefore there is no "definite basis for its determination," but he recommends it because of the uncertainty of adequate returns on investments in water properties, and the special risks and responsibilities assumed by the Spring Valley people in establishing and maintaining their works.

Mr. Stearns thought a proper estimate of the value of a going concern "should include the cost of organizing the business and establishing it on such a basis that it now has an annual revenue from nearly all of the buildings in the city, and due allowance should be made for the risk taken in starting a new business which may or may not be successful," and that there should be "an addition to the value otherwise obtained, for the skill and enterprise which has produced the works of special value." In other words, in determining the value of the plant, he would add to the physical value further sums for the business value of the going concern, and also for skill and enterprise.

Mr. Grunsky estimated the cost of bringing a supply of water to San Francisco from the Tuolumne river at \$39,531,000. Mr. Stearns revises this estimate, and finds the first cost of the Tuolumne scheme will be \$54,400,000; to this he adds \$16,100,000, which represents his estimate of the difference between the cost of future additions to the Tuolumne system and those which will be necessary for the Spring Valley plant. The final result of his computation is that the Spring Valley plant, measured by the cost of the Tuolumne scheme, has a value of \$70,000,000.

Mr. Herring says the value of the property is made up of tangible value and intangible value. The tangible value includes the city distributing system, pumping stations, reservoirs, pipes, conduits, lands, water rights, etc. The intangible value is a sum "representing what may be called the business value, going concern or good will." "The tangible value," he says, "I found to be \$39,770,900. The intangible value I have estimated at \$5,000,000. It is usual in waterworks practice to value works on the basis of alternate propositions for a water supply." Mr. Herring arrives at the intangible value, \$5,000,000, by taking one-third of the difference between his estimated value of the tangible property, \$39,770,900, and his estimate of the cost of the Tuolumne system, \$55,000,000.

Mr. Adams considers: First, that in order to pay stockholders current rates of interest on their investment, from its inception the property should have a value of \$50,500,000; second, that the actual investment, exclusive of loss to stockholders from lack of revenue subsequent to 1880, but inclusive of such loss prior to said date, or the cost of establishing the business, \$5,671,000, would be from thirty-five to thirty-six million dollars; third, that the cost of a complete substitutional system would be fully \$50,000,000; fourth, that the value of the service limits the value to be placed on the property to forty or

forty-five million dollars; fifth, that a valuation of \$35,000,000 is too low to allow a proper income to stockholders; he therefore concludes that the works are worth from forty to forty-five million dollars for rate-fixing purposes. In coming to this conclusion his judgment was chiefly influenced by the idea that rates to consumers "should not be increased beyond a certain point in pursuit of a sound public policy in the interest of both the water company as well as the rate-payers." He includes in this estimate the value of the going business at \$5,671,000; this sum he estimates is equal to the loss of income resulting from the failure of the business to yield current rates of interest on the investment from the beginning of the business until the year 1880; the value of the going business he thus measures by the deficiency of revenue prior to 1880.

Mr. Duryea measures the value of the property by his estimated cost of a substitute system for supplying San Francisco with water. He says the total cost to San Francisco of a water system collecting 50,000,000 gallons of water per day from the Santa Clara catchment areas of the Bay Cities Water Company, and carrying the same to and delivering it through the city, would be \$25,451,000, and the cost of a similar system delivering but 35,000,000 gallons (the average present capacity of the Spring Valley plant) would not exceed \$20,-

000,000.

Mr. Fitzgerald makes his estimate upon a computation of the actual reasonable primary cost of the plant, without deducting anything for depreciation of structures, or adding anything for appreciation.

Mr. Manson's valuation is based upon an actual appraisement of complainant's plant made by Mr. Grunsky with Mr. Manson's assistance in 1901 and 1902. Their investigations preparatory to their report and appraisement, extended over a period of two years, and involved a personal examination of the company's properties. Mr. Manson adopts this appraisement, and the subsequent valuations prepared by the city engineer's office for the board of supervisors, but fails to make any allowance for intangible property, such as franchise or going business. He also considers the reports submitted by the Spring Valley Water Company to the board of supervisors, covering betterments and other expenditures since the date of Mr. Grunsky's appraisement. The valuation in 1906 was \$25,450,320. A reduction of \$880,492 was made in the estimate for the following year on account of earthquake damages. To the valuation of 1907-\$24,569,-828—he added \$355,493.21, reported by the company for permanent improvements and betterments, thus making his estimated value of the works in use for the year 1908 \$24,925,321. Mr. Manson with this valuation also reported additional outlays by the company amounting to \$335,342.92, which he did not accredit to the value of the plant because these expenditures were for repairs and replacements made necessary by the earthquake.

Mr. Dockweiler, consulting engineer to the city attorney of San Francisco in all matters pertaining to water rates and water supply, says that he has devoted more than two years to studying and investigating the books, records, and properties of the Spring Valley Water Company. Mr. Dockweiler obtained his valuation by esti-

mating the present cost of "reduplicating the structures," and "apraising the lands and water rights at their present value"; to the sum of these estimates, \$23,192,656, he has added \$1,678,982.25 for additional constructions reported by the Spring Valley Water Company for 1904, 1905, 1906, and 1907. He testifies that in the Peninsula system of the Spring Valley Water Company and in the Pilarcetos, San Andreas, and Crystal Springs watersheds there were, in 1904, 18,859.94 acres of land which cost, according to the reports of the Spring Valley Water Company, \$1,231,139.23, or an average price per acre of \$65.28. Mr. Dockweiler appraised these lands at \$1,461,475, and the water rights at \$1,438,400. The Alameda system contains 23,400 acres of land; this, with the water rights, cost \$2,-116,718.91. Mr. Dockweiler appraised this property as follows: 23,-400 acres at \$70 per acre, \$1,638,000, 17,000,000 gallons daily supply of water at \$77,400 per million gallons, or \$1,000 per miner's inch, \$1,315,800—total, \$2,953,800. The Merced ranch contains 2,-730 acres. Mr. Dockweiler appraised this property at \$1,000 per acre for the land, and \$77,400 per million gallons for the water. The total land and water rights together he values at \$2,831,500.

Mr. Schussler appraises the constructed works of the company, such as reservoirs, pipes, conduits, pumping stations, city distributing system, wells, filter beds, meters, stock on hand, city real estate, Lake Merced lands, land at the pumping plants, and the rights of way, at \$26,418,000. He computes the combined value of all complainant's reservoir sites, watersheds, artesian and filter bed lands and water rights belonging to the Peninsula and Alameda systems, including water rights to the outflow of Lake Merced (measured by the estimated cost of the Tuolumne system), at \$30,150,000. The computation is made thus: Mr. Grunsky's estimated cost of that portion of the Tuolumne system which extends from the proposed receiving reservoirs in the southern part of San Francisco county to and including the headwater reservoirs was \$30,724,000. Mr. Schussler adds to this, for additional estimated cost of the pipe, \$12,694,000; and, for interest during construction, \$5,000,000—total, \$48,418,000.

Mr. Schussler estimates the value of the corresponding portion of the Spring Valley Water Company's constructed works, extending from its three receiving reservoirs, Lake Honda, College Hill, and University Mound, to the headwaters of the Alameda system and the Peninsula system, including the cost of completing 12 miles of a 54-inch safety pipe line from Crystal Springs to Ocean View pumps, at \$18,257,000. The difference between these two estimates—\$30,150,000, in round numbers—is Mr. Schussler's estimate of the unit value of the Spring Valley headwater lands and water rights, including

the Lake Merced water right.

The following table shows approximately the valuations of the Spring Valley properties given by Mr. Dockweiler, Mr. Schussler, Mr. Herring, Mr. Schuyler, and the city engineers. The city engineers' estimate was adopted by the board of supervisors. The sixth column shows the difference between the estimates of Mr. Dockweiler and Mr. Schussler.

	1	2	3	4	5	6
	Grunsky & Manson Estimates	Schussler Estimates	Dockweiler Estimates	Schuyler Estimates	Herring Estimates	Difference Between 2 & 3.
Structures such as pipes, reservoirs, pumps, etc Meters	\$15,887,521	\$17,134,190 150,000	\$13,831,948	\$15,586,788		\$3,302,242 150,000
gencies, etc	126,200	2,655,810 395,000	$\substack{\textbf{1,519,120} \\ 270,000}$	2,338,018		1,136,690 125,000
Total structural value	\$16,013,721	\$20,335,000	\$15,621,068	\$17,924,806		\$4,713,932
City reservoir sites and real estate	1,609,000	1,366,000	567,395			798,605
Peninsula, Lake Merced & Alameda systems	7,302,600	34,245,000 622,000	8,685,175	- 28,036,000		25,559.825 622,000
Total value Spring Valley property	\$24,925,321	\$56,568,000	\$24,873,638	\$45,960,806	\$44,770,900	\$31,694,362
Estimated cost Tuolumne system by Mr. Grunsky	\$39,531,000	\$39,531,000	\$39,531,000	\$39,531,000	\$39,531,000	
Alleged deficiency in Mr. Grunsky's estimate Interest Cost of pipe " " pumps " conduit		5,000,000 12,694,000		6,741,615 6,426,700 198,500 1,998,194	2,800,000 12, 690,000	
Total substitute system	\$39,531,000	\$57,225,000	\$35,304,360	\$54,896,009	\$55,021,000	-

Mr. Schussler's valuation of the company lands and water rights is \$25,559,825 higher than Mr. Dockweiler's, and nearly \$27,000,000 higher than the estimate adopted by the board of supervisors. Mr. Dockweiler appraises the Lake Merced lands at \$1,000 per acre, the remaining lands at about \$80 per acre, and the water rights at \$77,400 per million gallons of daily output, or \$1,000 per miner's inch. Mr. Schussler measures the value of lands and water rights by his estimated cost of the Tuolumne system; that is, he deducts from \$48,418,000, estimated cost of the Tuolumne system outside of San Francisco. \$18,257,000, value of certain Spring Valley property, and arrives at the result, \$30,150,000, as the value of the Spring Valley lands and water rights. If Mr. Grunsky's estimate of the cost of that system is correct, Mr. Schussler's total valuation must be reduced \$17,694,000, or from \$56,568,000 to \$39,126,000, and his unit value of lands and water rights from \$34,245,000 to \$16,569,000; or, excluding Lake Merced lands from \$30,150,000 to \$12,474,000; and, if Mr. Dockweiler's estimate of the total cost of the Tuolumne system is correct these values for land and water must be further diminished by \$2,726,000. The intangible value found by Mr. Herring will shrink to nothing if Mr. Grunsky's estimate is correct.

Mr. Schuyler estimates the original cost of Spring Valley lands and water rights at \$11,539,000. In order to ascertain how much they have appreciated in value, he subtracts the amount invested in the Spring Valley properties, as estimated by him, from his estimated cost of the Tuolumne system, and obtains \$16,497,000 as the total appreciation. As this depends upon his estimated cost of the Tuolumne system, which he has obtained by adding \$15,364,609 to Mr. Grunsky's estimate, if the latter is correct, this estimated increase in the value

of the lands must be correspondingly reduced.

The Grunsky estimate is claimed to be deficient in that he fails to allow for interest during the period of construction, and underestimates the cost of pipe. Mr. Grunsky estimates that 272,664,000 lbs. of iron pipe will be required for the construction of that portion of the Tuolumne system between Dry Creek power station and San Francisco, and that it will cost, in the ground and ready for service, \$19,-098,420, or a little over 7 cents a pound. Mr. Schussler and Mr. Herring say that it will cost about \$31,792,620, or 11.66 cents per pound laid in the ground and ready for service. Mr. Schuyler says it will cost about \$25,525,120, or about 9.3 cents per pound. Mr. Dockweiler says that, by substituting steel for iron pipe, there can be a saving of one cent per pound, and that the cost will be but \$16,371,780. or about 6 cents a pound. He also says that "the cost of Eastern steel pipe has been in some cases less than 5 cents per pound complete; that those estimated for New York and Los Angeles have been in the neighborhood of 5 cents per pound complete."

Mr. Schussler's estimated present worth of all the Spring Valley constructions, meters and stock on hand, including engineering and contingencies, is \$20,335,000. He says that the "constructed works of the complainant are worth what they would cost if they were to be constructed now under the present conditions of cost of materials and

labor, and of the same character of materials and workmanship used

and employed in their construction."

The testimony of J. H. Dockweiler, Robert Higgins, J. S. Emery. John Carey, and Mr. Wenzelburger tends to show that the original cost of these structures, some of them built 30 or 40 years ago, was much less than Mr. Schussler's estimate of the present worth, and thus justifies the inference from Mr. Schussler's language that his estimates are for actual present cost without deduction for deterioration. If this be true, Mr. Schussler's estimates lend but little support to the company's claim to an annual allowance of \$260,000 for depreciation.

Value of Property Measured by Substitute System.

Even if permissible, a valuation of the plant based on the estimated cost of the next available substitutional system is at best problematical. There may be other equivalent substitutes which are cheaper. We must reckon, not only with the uncertainties of the estimate itself, with the relative serviceability and permanency of the substitute system, with the relative quantity and quality of water which it is capable of furnishing, but also with undiscovered and overlooked elements which may greatly affect the cost. There is, however, a still more serious objection to this method of valuation. To say the value of the Spring Valley land and water rights for rate-fixing purposes is to be measured by the cost of the Tuolumne system, is to say that the price of Spring Valley water should be fixed by comparison with the cost of bringing water from Hetch-Hetchy. The same method was applied to railroad charges when rates were based on the cost of hauling freight by mule teams, that mode of transportation being the next most available substitute.

The owner of private property sets the price at which others may buy or use it; he cannot be compelled to accept less; this is his right of contract; but when he devotes his property to public use, he must submit to the right of the public to regulate his compensation for such use down to what is just both to himself and to the public, and that compensation is to be based, not on the cost of the next available substitute, but on a fair, reasonable value of the property at the time it is used for public convenience. While the cost of a substitute system may be considered in finding the reasonable value of the Spring Valley plant, it cannot be a controlling element. Otherwise, by securing control of all available sources from which water can be brought to San Francisco, the company might force a greatly exaggerated value upon its plant for rate-fixing purposes, and thus absolutely defeat the very object of government regulation.

The value of water as a necessity of life is simply incalculable. San Francisco must have it at any price. Nature has provided a source of supply in the immediate vicinity. This supply, according to the complaint, is sufficient for the present needs of San Francisco with 400,000 population, and, with development in the way of dams and conduits, it will be ample when San Francisco's population is 2,000,000. "A community is * * * entitled to the benefit of such natural and sufficient facilities for procuring pure water as exist in its vicinity. Com-

munities are in every respect entitled to the benefit of existing natural advantages," says Judge Savage in Water District v. Water Co., 99 Me. 371, 387, 59 Atl. 537, 543. If it be said that San Francisco did not secure these natural advantages, these water rights and watershed lands, but suffered practically all the nearby sources of water to pass into the ownership of complainant, the answer is, these water rights were secured for public service; they are devoted to public service; they have little commercial value for any other purpose; they were acquired under a law which permits reasonable public control of such property for the public good, and that law was old when in Aldnutt v. Inglis, 12 East. 527, 537, it was said:

"Though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be juris privati only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

On this subject Mr. Justice Savage further says:

"It therefore seems to be reasonable that a public water service company undertaking to supply a community with water is bound to do so wisely and economically. It is bound to take advantage of practicable natural facilities. If there is more than one source of supply, other things being equal, the community is entitled to have the least expensive one used. So long as the company enjoys practically exclusive franchises, so long it must afford the community the benefit of the conditions which nature has provided for them. For instance, if water can profitably be served from a nearer source of supply, at a certain rate, the company ought not to be permitted to charge a higher rate based upon the expense of bringing it from a farther and more expensive source." Water District v. Water Co., 99 Me. 371, 387, 59 Atl. 537, 543.

Franchise and Going Business.

That a franchise is property has been declared by the Constitution, and affirmed repeatedly by the Supreme Court of the state of California. Const. Cal. art. 13, § 1; Stockton Gas Co. v. San Joaquin County, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174. The Constitution also provides that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. Const. Cal. art. 13, § 1. Accordingly, from the fiscal year 1890–91 to and including the fiscal year 1906–07, complainant's franchise was assessed by the assessor of the city and county of San Francisco at figures varying from \$1,500,000 in 1890–91, to \$7,821,375 in 1905–06. The franchise was not assessed for the fiscal year 1907–08, nor is it assessed for the present year. The franchise of the company, then, is not only property, but, for the purposes of taxation, it has been so treated by the city and county of San Francisco.

Complainant contends that its franchise and going business have an intrinsic value of more than \$4,000,000, which should be added to the value of the tangible or physical property for rate-fixing purposes. Defendants deny that either element has any value, and also deny the company's right to have them or either of them treated or considered as of any value in fixing and establishing rates for the present fiscal year. That a franchise is property, "taxable, inheritable, alien-

able, subject to levy and sale on execution, to condemnation under exercise of the right of eminent domain, and invested * * * with the attributes of property generally," is undoubtedly sustained by the great weight of authority. Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; Consolidated Gas Co. v. New York (C. C.) 157 Fed. 849, 875. The fact that a franchise has been acquired from the municipality by gift or without adequate compensation may evidence lack of foresight, or something worse, on the part of the municipal government, but it can have no effect on the present problem. The franchise, however acquired, must be considered in determining reasonable rates for the use of property devoted to public service, otherwise it would be possible to practically destroy or confiscate its value. When property used under a franchise is condemned, the whole property is taken. The franchise is paid for as well as the physical property. The idea that a valuable franchise could be taken in condemnation proceedings, without compensation, would not be tolerated for an instant; and to permit such a franchise to be taken without consideration, indirectly, by means of rate regulation, is equally obnoxious to the federal Constitution. These views will find support in the following cases: Spring Valley W. W. v. San Francisco (C. C.) 124 Fed. 574, 587, 594; Consolidated Gas Co. v. Mayer (C. C.) 146 Fed. 150, 157; Consolidated Gas Co. v. New York (C. C.) 157 Fed. 849, 872. It also appears to be the law that whatever discoverable value may attach to the concern as a going business is proper to be considered in determining the value of complainant's plant for rate-fixing purposes. National Waterworks Co. v. Kansas City, 62 Fed. 853, 865, 10 C. C. A. 653, 27 L. R. A. 827; Spring Valley W. W. v. San Francisco (C. C.) 124 Fed. 574, 595.

Serious and perplexing questions arise when it is attempted to ascertain the value of the franchise and going business. Here very little has been settled by the courts, except that each case must depend on its own special circumstances. A franchise such as we have to deal with is thus defined in section 2, art. 14, of the Constitution of the state of California:

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"The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The value of the franchise, then, is the monetary value of the right to collect water rates. What, then, is it worth to complainant to collect water rates from the people of San Francisco? This question must ultimately be decided in the light of all the circumstances and conditions. The burden of proof is on complainant. Complainant must, if it wishes its franchise and going business to be treated as things of definite value, establish that value. Capital City Gas Co. v. Des Moines (C. C.) 72 Fed. 818, 822. It is not the duty of the court, nor was it the duty of the supervisors, to give value to the franchise, and add that value to the value of the physical property, unless it first appeared that the franchise had an intrinsic productive value of its own. Their duty was and is to measure the disclosed

and apparent value of the franchise. In 1858 there was an act of the Legislature of California under which certain predecessors of complainant were authorized to collect water rates which would yield an income of not less than 20 per cent. per annum on the actual capital invested in the waterworks. If complainant were now operating under such a law, its franchise would be immensely valuable, and that value could be readily ascertained by computations based on the difference between 20 per cent. and the prevailing rate of interest. When the prevailing rate of interest is 7 per cent., a franchise which will enable its owner to collect 20 per cent. net on his investment is valuable. But, on the other hand, when the prevailing rate of interest is 20 per cent., a franchise under which the owner can realize but 7 per cent, has very little value. "It is obvious * * * that either for the purpose of condemnation or regulation the value of a franchise depends wholly upon what is earned under it. * * * The best way of finding out how much a franchise separately considered is worth is to ascertain what those persons desirous of continuing operations under it consider it to be worth." Consolidated Gas Co. v. New York (C. C.) 157 Fed. 849, 878; Monongahela Nav. Co. v. United States, 148 U. S. 312, 329, 13 Sup. Ct. 622, 37 L. Ed. 463; Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 19, 60 L. R. A. 856; Montgomery Co. v. Bridge Co., 110 Pa. 54, 59, 20 Atl. 407, 408. In the last case the court said:

"Their (referring to franchises) value necessarily depends upon their productiveness. If they yield no money return over expenditures, they would possess little, if any, present value. If, however, they yield a revenue over and above expenses, they possess a present value, the amount of which depends in a measure upon the excess of revenue. Hence it is manifest that the income from the bridge was a necessary and proper subject of inquiry before the jury. The court permitted the plaintiff to prove the receipts for, say, five years before the taking, but denied the defendants permission to extend the inquiry back to the time of the organization of the company. We perceive no error in this ruling."

How much has this franchise yielded to complainant and its predecessors above going rates of interest? In 1907 there was no dividend, the net income after paying taxes and operating expenses was but 4.12 per cent. on a valuation of \$24,369,828; in 1906 it was 3.02 per cent. on a valuation of \$25,450,320; in 1905 it was 5.4 per cent. on a valuation of \$25,001,441; in 1904 it was 5.23 per cent. on a valuation of \$24,672,512; in 1903 it was 5.12 per cent. on a valuation of \$24,124,309; in 1902 it was 5.27 per cent. on a valuation of \$24,-These valuations are less than the actual cash invested. Complainant claims that its aggregate net income since the initial investment has been more than \$25,000,000, less than the aggregate interest which the same investment would have yielded in the same time at current rates of interest. It appears by the complaint that the average dividends for 50 years have been 4.938 per cent. per annum, while during the same period the average rate of interest has been 9.6 per cent. per annum. Mr. Adams, testifying in behalf of the complainant, says that the deficiency in revenue prior to 1880 that is, the amount by which actual dividends fell short of interest,

computed at current rates on actual stock investment—was \$5.671,-509; he also says that between 1880 and 1900 there was no "provision made at all for the creation of a renewal and abandonment fund, but only enough revenue allowed to pay 4 per cent, upon the actual investment in the property." The percentages range from a minimum of 2.4 per cent, in 1883 to a maximum of 4.8 per cent, in 1880, and the average for the entire period of 20 years was exactly 4 per cent, per annum. It would seem from this that Spring Valley revenues have never been adequate to yield anything in excess of a fair return upon the capital actually put into the plant. There has been no income which might be credited as earnings to the franchise in addition to and above what is apparently a scant reward for actual capital invested. ditions thus disclosed do not necessarily predicate unfair action by the board of supervisors. It may be that the water company itself has been extravagant, or that its investments have been larger than the needs of San Francisco demanded.

If the company could be assured of a certain income for a definite number of years, stability would be given to the investment, and probably the franchise and going business would become exceedingly valuable: but this is impossible under a law which requires annual adjustment of water rates. The value of the franchise and going business depends upon their earning power. Their earning power depends on the rates, and the rates at the present time are regulated by the board of supervisors. If the board establishes rates higher than an adequate return for the physical plant requires, either by increasing the rate of income or by adding to the value of the plant itself, an earning power, and consequently a value, is thus given to the franchise and going business, in addition to and above the earning power and the value of the physical plant. If, when the franchise was acquired, or at any subsequent time, the city entered into a contract with the company providing for definite rates of income, and this agreement is now binding, and gives a present value to the franchise; or if, for a number of years, the aggregate market value of the stock and bonds of the company has exceeded the actual value of the physical plant; or if, as in Consolidated Gas Co. v. New York (C. C.) 157 Fed. 849, 878, the franchise was capitalized for some fixed sum, say \$100,000, the actual cash invested was \$100,000, and \$200,000 worth of stock was issued, which has maintained itself at par and paid satisfactory dividends on the whole amount of stock for a number of years —it would be very easy to determine whether the franchise has value, and what that value is. But here it does not appear that the franchise is defined by any specific contract with the city; neither is it an exclusive franchise; and it is not shown that the market value of the stock and bonds ever exceeded the value of the physical property. The water company's system, in so far as it is now in service. and possibly in so far as it will be presently serviceable, is to be treated as a unit. It probably has a value as a whole which exceeds the sum of the values of its several physical elements and characteristics. That value is affected by the franchise, by the fact that the concern is a going business. The plant operated under a franchise, a legal right to collect water rates, is more valuable than without such a right; and a plant with an established business, with customers who have connected their houses with the company's distributing pipes, is more valuable than it would be without such connections and without such customers. These facts, as well as all other discoverable elements of value, should be weighed, but it must be remembered that while the ratefixing agency is in duty bound to establish rates which will afford a reasonable compensation for the use of this plant at a fair valuation as affected by the fact that it is a going business and operated under its franchise, there is no duty to go beyond this and confer an additional value for these intangible elements, which is neither discoverable nor apparent. If the franchise and going business have ever had a distinct, independent, productive value, it should appear somewhere or at some time in an exhibition of distinct earning power. If it be assumed that the net annual income of the Spring Valley plant for 50 years past has been but 5 per cent., it is conceivable that the property without any franchise, and without any going business in San Francisco or in any other municipality, could not have earned more than 3 per cent. This difference of 2 per cent, might fairly be considered as representing the earning power of these two elements, and as the controlling factor in calculating their value. In fixing rates this difference is to be considered as a part of the 5 per cent.; it is not to be added to it, because that would be to make a gift, to create, not to find, value. The mere fact that a franchise has been given and is in operation lays upon the municipal government, no duty which was not present when the franchise was originally acquired to add to its value.

The argument that the franchise ought to be worth something for rate-fixing purposes if it is worth millions for taxation is not without force. The value fixed by the assessors, however, is not admissible as evidence of value in condemnation proceedings. Lewis on Eminent Domain, § 448. And such evidence is of little worth here. If the aggregate value of the franchise and physical property as assessed did not exceed the total valuation for water rates, the company suffered no injustice. Valuations of the franchise and going business which are ascertained by taking a certain percentage of the estimated cost of reconstructing and reacquiring the Spring Valley property, and of the value of the city distributing system, seem to ignore the effect of the profitableness of the business on these elements. Both elements are certainly worth much more if the plant is operated at a profit than if it be conducted at a loss. A valuation of the going business which is found by taking one-third of the difference between the estimated cost of the proposed Tuolumne system and the valuation of the Spring Valley tangible property does not commend itself by showing any apparent ratio to the earning power of the business itself, and is subject to every objection which can be made to measuring the present value of a thing which is in actual existence by the estimated cost of something which is to be hereafter constructed which may possibly be an equivalent substitute.

Two of the experts estimated the value of the going business to be equal to the total amount by which current rates of interest exceeded

the net profits of the business prior to 1880. In other words, the value of the going business is equal to the cost of establishing the Spring Valley Water Company's business originally, and that cost is equal to the deficiency of revenue prior to 1880. This estimate is open to the objection that the deficiency of revenue may have been due to extravagant or wasteful management. The company may have purchased a plant larger and more expensive than necessary; current rates of interest may have been abnormally high; many causes which have absolutely no relation to the value of the company's business now as a going concern may have increased or diminished the deficiency in revenue. Furthermore, if it be conceded that early deficiency of revenue is the proper measure of value for the present going business, then it follows that, the greater the deficiency and the more unprofitable the business, the greater the present value of the going concern; and, if the business had yielded large profits from its very inception, the going business to-day would be worthless.

These variant methods, leading to equally variant results, are not in accord with the actual conditions. None of the estimates can be followed, but such valuation as the conditions justify for the two intangible elements will be hereafter amply provided for in the valuation

of the property which is made for this proceeding.

Property for Future Use.

The valuation put on this property by Mr. Schussler, like that alleged in the bill, is open to the objection that it includes a large amount of property not now in use. It is unnecessary to attempt a segregation of such property. Complainant alleges its present value to be \$7,500,000; that it "cost hundreds of thousands of dollars, and is now worth millions." It is stated in the bill that it was purchased for "reasonably immediate use," but as to when that will be the record is silent, except as it may be inferred from the fact that the present daily consumption is 31,000,000 gallons, the present daily capacity 35,000,000, and it is alleged that with additional dams and aqueducts the plant will be capable of supplying water for more than 2,000,000 people. It is not just to compel consumers to pay for more than they receive, or to pay complainant an income on property which is not actually being used in gathering and furnishing water. If in this case the company, in anticipation of the growth of the city and its future needs, acquired property for future use at a cost of hundreds of thousands of dollars which is now worth millions, it has acted wisely, but it should be satisfied with the goodness of its bargain and the enhanced value of its property, without asking in addition gratuities from its customers in the way of higher rates. When the property does come into necessary service, the company is entitled to have it credited at its then fair and reasonable value for rate-fixing purposes. San Diego L. & T. Co. v. National City (C. C.) 74 Fed. 79, 83. "What the company is entitled to demand, that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." San Diego L. & T. Co. v. National City, 174 U. S. 739, 757, 19 Sup. Ct. 804, 811, 43 L. Ed. 1154. The statement of this rule in practically all the cases, in the present tense, is significant. In San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 442, 23 Sup. Ct. 571, 574, 47 L. Ed. 892, Mr. Justice Holmes says:

"If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not yet have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return."

In Water District v. Water Co., 99 Me., at page 376, 59 Atl. 539, Mr. Justice Savage uses the following illustration:

"Suppose that a five-hundred horse power engine was used for pumping when a one-hundred horse power engine would do as well. As property to be fairly valued, the larger engine might be more valuable than the smaller one, yet it could not be said that it would be reasonable to compel the public to pay rates based upon the value of the unnecessarily expensive engine."

The corollary to this is, if the company sees fit to use, for the mere catchment of water, lands which are much more valuable for other purposes, it is unreasonable in fixing rates to appraise such lands for more than they are worth as watershed areas. Capital City Gaslight Co. v. Des Momes (C. C.) 72 Fed. 829, 844; Boise City I. & L. Co. v. Clark, 131 Fed. 415, 65 C. C. A. 399; Cons. Gas Co. v. New York (C. C.) 157 Fed 849, 854; Beale & Wyman on R. R. Rate Reg. §§ 343, 344, 462.

Stocks and Bonds.

In Spring Valley Waterworks v. San Francisco (C. C.) 124 Fed. 574, decided on motion for interlocutory injunction, Judge Morrow found the total value of all the property then used in supplying San Francisco and its inhabitants with water to be \$26,752,000, and that 5 per cent. per annum, net, thereon, was a just and reasonable remuneration for the service rendered. A year later, Judge Gilbert, in Spring Valley Water Co. v. San Francisco, also on motion for preliminary injunction, treated Judge Morrow's decision, particularly in relation to value and rate, as a controlling precedent. Judge Morrow's valuation was fixed by adding the sum of the bonded and floating indebtedness to the average value of the capital stock of the company for that fiscal year, and was summarized as follows:

Capital stock, then present value \$84 per share	\$11,700,000
Bonded indebtedness	13,975,009
Floating indebtedness	

Total \$26,752,500

Since that time (1903) the Spring Valley Waterworks has disposed of all its interest in the property to complainant, Spring Valley Water Company. June 15, 1903, the latter company offered to purchase from the Spring Valley Waterworks all its business, franchise, and property as a whole, subject to all outstanding incumbrances, for the sum of \$11,480,000, and to issue all or any part of its capital stock to the stockholders of the old company in the proportion of two shares for each share in the Spring Valley Waterworks, and at a price of \$41 per share for the stock of the new company. This offer was

not accepted. A subsequent offer in similar terms, but raising the aggregate price to \$12,600,000, and the price of the stock to \$90 for the stock of the old company, or \$45 for the new, was accepted. The price thus fixed may be summarized as follows:

Selling price	\$12,600,000
Bonded indebtedness	14,475,000
Floating indebtedness	980,500

As this price included all the property of the corporation, it also included all properties not then in use, which Mr. Dockweiler estimated at \$3,807,117. This sum, deducted from \$28,055,500, would leave \$24,247,883 as the value of property then in use.

J. M. Duke, secretary of the water company, testifies "that no valuation of the properties transferred was made, and their value was not considered at the time of the sale"; that the Spring Valley Water Company was organized for the purpose of taking over the properties of the Spring Valley Waterworks, and also for the purpose of increasing the capitalization to such a point that a larger bond issue would be possible under the laws of the state of California.

At the beginning of this suit the par value of the bonds and stock of the company was as follows:

Bonded indebtednes	stockss.	. 17,859,000
Total	•	£45 024 100

During the year ending June 1, 1908, the average market price of the stock was but \$21.46, and the average market price of the bonds was \$83.39. During the month of May, immediately preceding the suit, the prices were \$22.50 for the stock and \$82.621/2 for the bonds. Thus the total market value of bonds and stocks of the company added to the floating debt was as follows:

280,000 shares of stock at \$22.50. \$17,859,000 in bonds at \$82.62½. Floating debt.	14,755,988
Total	\$21,131,188

This represents the present value of all the property of the company, whether in use or not, as measured by the market value of its stock and bonds. If the actual intrinsic value of the property is more than \$52,500,000, as alleged in the bill, by deducting the total indebtedness, \$17,934,190, the remainder, \$34,565,810, will be the net value of the property which was then represented by the stock.

It seems hardly believable that a property worth \$34,500,000, net, could for a whole year have an average value of less than \$6,300,000 in the stock market. True, the market quotation of stocks and bonds is not always a correct index of value; such prices often go up and down without much regard to the intrinsic worth of the property represented, yet it seems to be clear, under the authorities, that, in order to ascertain the fair value of the property being used by the company for the public "the amount and market value of its bonds and stock" are "matters for consideration, and are to be given such weight as may be just and right." Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Ames v. Union Pac. Ry. Co. (C. C.) 64 Fed. 165; Cotting v. Kansas City Stock Yards Co. (C. C.) 82 Fed. 850; Spring Valley Waterworks v. San Francisco (C. C.) 124 Fed. 574, 596. It is shown in the bill that the stock for a long time prior to February 1, 1901, and before the rate litigation, had an average market value of \$97. This is but 6 points below the highest price ever reached by the stock, and is equivalent to \$48.50 per share for the stock of the present company. It also appears that the company has property 'purchased for reasonably immediate use," but not now in service, of the value of \$7,500,000. Mr. Dockweiler testifies that on January 1, 1904, properties costing the company, according to its construction account, \$4,044,670.61, had gone out of or had never come into use. In this he does not include Arryo Valle lands, some 4,400 acres, purchased for future use, nor lands held by trustees.

Bearing these matters in mind, the present value of the property, measured by the stock at \$48.50, and bonds at par, may be summarized as follows:

280,000 shares of stock at \$48.50. Bonded indebtedness. Floating debt.	17,859,000
Total Deducting from this for property not in use	
We have the net value of the property in use	\$27,514,190

Original Cost.

Capt. Payson, president of the company, states that the actual expenditure for the creation of the Spring Valley system was over \$28,000,000. Mr. Duke, secretary of the company, places the amount at \$29,037,947.44, apportioned thus:

Original investment to December 31, 1904	\$ 9,177,496 82
Assessment in 1906	840,000 00
Improvements in 1905, 1996 and 1907	1,161,450 62
Bonded indebtedness May 31, 1908	17,859,000 00

Mr. Dockweiler says that, up to and including the year 1907, the

Actual cash capital paid in	\$10,017,496 82
Bonded debt	17,859,000 00
Floating debt	75,190 20

amount was as follows:

Total \$27,951,687 02

He also says that, according to the construction account and reports of the company, the total cost of property used and useful Janu-

ary 1, 1908, was \$24,059,896.15, and the cost of property not in use January 1, 1904, was \$4,044,670.61; total, \$28,104,566.76. If we deduct from the total cost the cost of properties out of use, or purchased for future use, we shall have approximately \$25,000,000 as the cost of properties now in use. Of this amount a large portion went into the construction and replacement of perishable portions of complainant's plant, such as water pipes, buildings, flumes, reservoirs, and pumping plants. The present worth of these constructions, according to the experts, is as follows: Mr. Schussler, \$20,335,000; Mr. Dockweiler, \$15,621,068; Mr. Schuyler, \$17,924,806; Mr. Manson, \$16,013,721. Flumes and buildings decay, iron rusts, machinery wears out and

Flumes and buildings decay, iron rusts, machinery wears out and reservoirs gradually fill up with silt. Mr. Adams, Mr. George R. Webster, and Mr. Schussler agree that in order to keep the original investment good, and to make up for this slow destruction of the constructed portions of the system, complainant is justly entitled to an annual allowance of \$260,000, consequently it is unreasonable to believe that these constructions, many of which were made 30 or 40 years ago, are

worth as much today as they originally cost.

The company claims to own about 49,000 acres of land in the Peninsula and Alameda systems, or about one-tenth of the watershed area which feeds the reservoirs, filter beds and artesian wells. 18,859.94 acres of the Peninsula system cost \$1,231,139.23, or \$65.28 per acre; 23,400 acres of the Alameda system, with the water rights, cost \$2,-116,718.91, or \$90.40 per acre, for both water and land. mainder of the total acreage is not in present use. The prices paid for Alameda lands since 1899 range from \$10.06 per acre for a very large tract to \$512 for a 4-acre piece. The total cost was \$3,347,858.14. This property, except 2,310 acres of reservoir land in the Peninsula system, 1,800 acres of artesian land and filter bed, and 1,300 acres of reservoir site of the Alameda system, is rough, hilly land, and, in the main, wholly unsuited to tillage. It is too far away from the centers of population to be in demand at the present time for anything but pasturage or shedding water. To the ordinary observer, it is simply wild, unimproved land, and fit only for pasturage. This property is appraised by Mr. Dockweiler at \$5,853,675; that is, at the rate of \$1,000 per miner's inch, or \$77,400 per million gallons of daily water capacity, and \$78.99 per acre for the land. There is little testimony as to recent prices paid for land and water in this vicinity, but such as there is indicates moderate appreciation. The value which complainant has added to the property is in the plant which intercepts and stores the drainage of these watershed lands, in the development of water, in the strategic situation of the lands selected for water gathering, and in the fact that such a large area, about 70 square miles, is under one ownership and one control, making it possible at the present time not only to control the output of 700 square miles, but to take such measures as are requisite to guard the water from pollution. In Pasadena, Cal., where water was relatively scarce, 10 years ago it was appraised at \$1,000 per miner's inch. The authorities of the city of Los Angeles set the same value on water when delivered. Mr. Herring appraises the Spring Valley water at \$150,000 per million gallons

of daily delivery, while Mr. Grunsky appraises the Alameda water supply at but \$40,000 per million gallons of daily delivery. The original cost of the 2,730 acres in Lake Merced ranch does not appear, but the proximity of this tract to the city gives it a value far in excess of its value as a watershed. Mr. Dockweiler has appraised this property at \$2,831,500 for water-producing and water-storing purposes. The lake itself, as a nearby storage for water, is a valuable adjunct to the system. Mr. Baldwin testifies that the property, exclusive of improvements would sell for at least \$4,000,000.

Present Value.

It is unnecessary to pursue this line of inquiry further; it can lead to no definite results because of the necessarily incomplete and inconclusive character of the testimony. On final hearing, when all the facts will be presented and the witnesses subjected to cross-examination, it may be possible to arrive at conclusions which will be satisfactory, at least to the court. At the present time, in fixing the probable, fair and reasonable value of the property, whether we consider the market value of the stock and bonds of the company before the beginning of the rate litigation, or whether we consider the original cost of the lands, water rights, and improvements, after weighing the increased cost of labor and materials, the deterioration of structures caused by use, and the ordinary action of the elements, and the fair increase in the value of real estate and water rights, as shown by recent prices paid for similar or the same property, it is not easy to escape the conclusion that the value fixed by the board of supervisors is too low: that the value fixed by Judge Morrow in the 1903 case, \$26,752,500, was not then too high.

Earthquake Damages and Investment Since 1903.

Since 1903 a large sum of money raised by assessment and the sale of bonds has been expended on improvements, but how much of this expenditure was in the purchase of property for future use or for replacements, or how much was made necessary by the earthquake and fire, does not clearly appear. Neither has it been shown that complainant was entirely free from fault in permitting its feeder pipes in the lower part of the city to remain in swampy and loosely filled ground. It was in and on such ground the earthquake wrought its greatest havoc. There is unexplained and unanswered testimony tending to show, not only that it was possible to have placed main feed pipes on a solid foundation, but that the chief engineer of the company, realizing the danger years before the disaster, urged the construction of a system on proper ground. It is difficult to understand why the consequences of such ill-advised location of pipe lines should be visited on the public and not on the company. There is always a certain amount of loss by accident, which seems to be inseparable from the conduct of many kinds of business; it usually can be counted on in advance, and no amount of care or precaution will entirely eliminate

it; it is incident to the business. Such losses are considered by the Interstate Commerce Commission in fixing rates, but the rule is never applied in favor of a carrier who has suffered loss by reason of defective appliances and facilities which he has knowingly used or provided. New Orleans Livestock Exchange v. T. & P. R. Co., 10 Interst. Com. R. 327, 330. Therefore, in order to meet the changes which have occurred since 1903, in the absence of any testimony clearly showing that a larger amount ought to be allowed, the difference between the valuations adopted by the city engineer's office for the years 1903 and 1908 will be added to the \$26,752,500, making the value of complainant's property which is found for the purposes of this proceeding \$27,553,512. On the showing which has been made, there is a real and substantial controversy as to whether complainant is not justly entitled, for rate-fixing purposes, to the valuation thus fixed. A higher amount is not warranted by the testimony.

Depreciation.

This brings us to the question as to whether a gross income which provides only for taxes, operating expenses, and what is at best but fair interest on the present value of its property now in use, is altogether fair to the company. Suppose a man says to his neighbor: "I have had your thousand dollars for years, I have paid you 5 per cent., \$50 interest regularly each year; your money is now lost, I haven't got it; if you will replace the money and let me have another thousand dollars, I will continue to pay you \$50 per year; I can't pay interest on the first thousand dollars because it is gone, and therefore I am no longer using it, and it is not right for you to exact interest on money which I am not using." A large portion, possibly half, of the Spring Valley property now used in supplying water to San Francisco is perishable. At the end of the time which measures their life, the pumps and water mains which have cost the company millions of dollars will go to the junk pile. Can the city then say to the company: "Replace the pumps and the watermains with new pumps and new mains, so that we may have water, and you shall continue to enjoy an annual income of 5 per cent. net on the value of the new pumps and watermains; we can pay you nothing more on account of the money which was expended in purchasing and installing the old pipes and pumps, because we are only to pay you for that which we use?" This is to assume the attitude of the man who pays the interest, but who does not pay the principal of his indebtedness.

An ordinance fixing the compensation for perishable property devoted to public use which fails to make any provision for physical depreciation of such property, and to keep the original capital intact, is unjust to the owner. It has been held repeatedly that in fixing rates the depreciation of the plant from natural causes resulting from use should be taken into consideration. San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; San Diego L. & T. Co. v. National City (C. C.) 74 Fed. 79; Spring Valley Waterworks

v. San Francisco (C. C.) 124 Fed. 574, 599; San Diego Water Co. v. San Diego (dissenting opinion by Chief Justice Beatty) 118 Cal. 557, 588, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; Beale & Wyman on R. R. Rate Reg. § 430. In San Joaquin & King's River C. & I. Co. v. County of Stanislaus (recently decided in this court by Judge Morrow) 163 Fed. 567, it appeared that the complainant's works were suffering considerable deterioration, but the rates in question made no provision therefor. It was held the rates were unreasonable and unjust for that reason, if for no other. San Joaquin & King's River C. & I. Co. v. County of Stanislaus (C. C.) 163 Fed. 567; Long Branch Com'rs v. Tintern Manor Co., 70 N. J. Eq. 71, 62 Atl. 474, 478; Brymer v. Butler Water Co., 179 Pa. 231, 251, 36 Atl. 249, 36 L. R. A. 260. While there is considerable testimony as to depreciation, the proper amount to be allowed for that element is not free from difficulty. Mr. Adams, Mr. Webster, and Mr. Schussler testify that \$260,000 per annum is a proper allowance. But in view of the testimony showing such a relatively high present value for the perishable property as compared with its probable original cost, the allowance will be arbitrarily fixed for the present proceedings at \$160,000.

Taxes and Operating Expenses.

Taxes for this fiscal year have been estimated at \$375,000, and operating expenses at \$600,000. No testimony has been offered showing these figures to be excessive or improper; they were accepted as fair by the board of supervisors, and in this proceeding they will be deemed just.

The foregoing considerations, then, lead to the conclusion that the water rates for the present fiscal year should provide for income as follows:

Operating expenses	\$	600,000	00
Depreciation	•	160,000	00
Taxes		375,000	00
5 per cent. income on \$27,553,512, approximate present value		•	
of the property	1.	377,675	60
Total gross income	\$2,	512,675	60

The income of 1907, under the 1902 rates, was \$1,932,778.58. Mr. Booker, chief clerk of the company for many years, estimates the income for the present fiscal year at \$2,246,000. It has been claimed for the defendants that the business of this year will show an increase of 15 per cent. above that of 1907, and that the income of the present year will amount to \$2,395,045. No substantial basis is suggested for such an estimated increase. It is too speculative to form a foundation for judicial action.

The following table shows the income of the company for each year, beginning with 1902: In column 1 appears the gross income from all sources; in column 2, the gross income from sales of water; and in column 3, net income after paying taxes and operating expenses. In passing it is proper to say that \$571,751.13, expended by the com-

pany for "extraordinary replacement" in 1906 and 1907, is not included in the operating expenses of those years.

	1	2	3
1902	\$1,980,651	\$1,933,192	
1903	2,075,983	2,020,334	1,235,004
1904	2,212,303	2,070,765	1,291,954
1905	2,299,765	$2,\!226,\!260$	1,359,446
1906	1,535,782	1,492,322	769,012
1907	1,932,778	1,870,560	1,013,737
1908: Estimate by supervisors	$2,\!395.065$	2,334,584	1,420,065
Estimate by company	2,246,000	2,185,519	1,271,000

Before the earthquake the annual increase in business was between 5 and 6 per cent. In view of present business conditions, \$2,246,000 will be accepted as the probable income for the present year. This estimated income will fall short of the required income, as shown above, by \$266,675.60. After paying taxes, operating expenses, and depreciation, there will remain a net income of \$1,111,000 for the use of complainant's property, or 4.03 per cent. upon the present value of the property in use. This is less than a just and reasonable compensation, and "amounts to the taking of private property for public use without just compensation, thereby depriving the complainant of its property without due process of law." Spring Valley Waterworks v. San Francisco, 124 Fed. 574.

Preliminary Injunction.

The situation disclosed by the record is novel, to say the least. Such a condition has never presented itself before in the history of this litigation. Hitherto the company has sought to prevent the enforcement of ordinances reducing rates; now it seeks to enjoin the enforcement of an ordinance which raises rates. In previous suits complainant offered to conform to the rates of 1902, and asked permission to collect such rates; thus the court was enabled to judge in advance the effect of its order; but in the bill of complaint now under consideration there is a significant absence of suggestion that the water company is willing to conform to any specified schedule of rates, or that the charges for water, in case an injunction pendente lite is granted, be limited or defined by the court in any manner whatever. Furthermore, it was contended in the argument that this court neither on preliminary injunction nor final hearing has any power to place a limit upon the amount which the company may collect. Without the restraining influence of the ordinance the company can exercise its own judgment as to what is just and reasonable; it can offer to deliver water on its own terms; its customers must either accept those terms or forego the use of water. Complainant has not, in so many words, asked permission to adjust water rates, but it has asked an injunction which this court in the exercise of its discretion may grant or refuse. If refused, the ordinance fixes a limit beyond which the company cannot raise its charges for water; if granted, the ordinance is temporarily annulled, and the company is thereby given a right, which it does not and otherwise cannot enjoy, during the present fiscal year, namely, the right, practically unlimited under present conditions, to fix prices at which it will sell

water. Freedom to raise water rates is the result, and therefore a part of the injunctive relief sought by complainant, and it must be so regarded. Equity looks at the substance of things; it is the effect, not the mere form of the demanded relief, which must be considered.

We are thus led to the question whether, under such conditions, a court of equity can in the exercise of its discretion issue such an injunction. Defendants contend that by collecting the rates of 1902 for more than five years prior to this suit complainant acquiesced therein, and in the rates which it now seeks to enjoin, and hence, whether the ordinance be valid or invalid, a preliminary injunction should not issue. In Perkins v. Northern Pac. Ry. Co. (C. C.) 155 Fed. 445, after an order of the State Railroad and Warehouse Commission, and also an act of the Legislature of Minnesota reducing freights and fares, had gone into effect and had been accepted and put into operation by the railroad companies, certain stockholders of the railroad company brought suit to restrain further enforcement of the reduced rates, alleging they were confiscatory. Judge Lochren refused a preliminary injunction on the ground that the office of such a writ is to keep matters in statu quo, and ordinarily it should not go beyond that, and it should not go "beyond cases where there is actual fraud; where the person receiving the property has no fair claim of right * * * to the property. If he can show that he has a fair color of right which may be litigated, he ought not to be deprived of an opportunity to preserve the status quo until the matter should be properly deter-And inasmuch as it was claimed, and no doubt honestly, by the authorities, that the rates were adequate and not confiscatory, it was held by Judge Lochren that an injunction could not go against rates which had been accepted by the railroad, and were in operation. It is "a general rule that long acquiescence on the part of a plaintiff in a state of things which he afterwards seeks to have enjoined will constitute sufficient ground for refusing the desired relief." 1 Spelling on Inj. & Extraordinary Rem. § 267, p. 40. But "the acquiescence which will bar a complainant from the exercise in his favor of the discretionary jurisdiction by injunction must be such as proves his assent to the acts of the defendant, and to the injuries to himself which have flowed or can reasonably be anticipated to flow from those acts." Lux v. Haggin, 69 Cal. 255, 271, 4 Pac. 919, 10 Pac. 674. The record shows that complainant has rarely missed an opportunity to protest against the rates of 1902, and to urge both in court and in the board of supervisors that the rates for that year were unjust and insufficient. Furthermore, even though the rates since that year have been constant, the increased outgo for taxes and operating expenses has resulted in a much diminished income to the company. There has been no sufficient acceptance of, or consent to, the rates of 1902, or to its diminishing net income under those rates, to constitute acquiescence on the part of complainant within the legal acceptation of that term.

Defendants insist that the function of a preliminary injunction is to preserve the status quo. They argue that ever since 1902 the company has furnished water at the 1902 rates; that condition is therefore the status quo; to set aside the 1902 rates is to destroy the status quo,

and to maintain those rates is to preserve the status quo; and that "the granting of this preliminary injunction will absolutely destroy the status quo; it will leave the inhabitants of the city, as well as the city officials, entirely at the mercy of this complainant company," and hence it should not issue. On the other hand, complainant says, before this suit no ordinance and no official rates were in force, and consequently the status quo is a condition in which there is no ordinance, no rates fixed by law, and the company is free to regulate its charges by contract with its customers. As the doctrine is usually stated:

"The sole object of an interlocutory or preliminary injunction is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the perpetration of wrong, or the doing of an act whereby the right in controversy may be materially injured or endangered. It cannot be used for the purpose of taking property out of the possession of one party and giving its possession to another; nor does it compel the defendant to undo what he has done, as this might injure him as much as his act would injure his opponent. Injunction prevents the further continuance of injurious acts begun, or prevents doing them, if only threatened. It acts only prospectively to preserve things in statu quo until ultimate decision. It does not prejudge without hearing; it does not anticipate ultimate decision, giving decision on the merits and then hearing." 1 High, Inj. §§ 4, 5, 355, 715.

"If a preliminary order restrains one of the parties from interference with the property in dispute and leaves the other free so to interfere, the court will modify such order so as to do equal justice to the parties, and keep the property in statu quo until the determination of the controversy as to title and their respective rights. * * * If it undertakes, or if its effect is, to dispose of the merits of a controversy without a hearing, or if it devests a party of his possession or rights in property without a trial, it is void." 1 Beach, Inj. §§ 110, 112; Bettman v. Harness, 42 W. Va. 433, 441, 26 S. E. 271, 273, 36 L. R. A. 566, 571; Cole Silver Mfg. Co. v Virginia & Gold Hill Water Co., 1 Sawyer, 685, 693, Fed. Cas. No. 2,990; City of Newton v. Levis, 79 Fed. 715, 25 C. C. A. 161; Alaska Ry. Co. v. Copper River Ry. Co. (C.

C. A.) 160 Fed. 862; 5 Pom. Eq. Jur. § 264.

If we adopt defendants' conception of the status quo, the injunction will be denied, the ordinance will remain in force, and complainant will collect substantially the rates of 1902. Since 1902, however, conditions have changed; taxes and operating expenses have increased to such an extent that the net income of the company in 1907 was less than the net income in 1902 by about \$300,000; and, although the company estimates an increase in its business for this year, the net income of 1902 will still exceed the estimated net income of 1908-09 by \$18,808.98. Thus, while the rates are practically the same as in 1902, the net income will probably be less; and this is the condition notwithstanding the fact that during the interval the company, by assessing its stockholders and by the sale of bonds, has raised about \$3,000,000, all of which has been expended in repairs or betterments; and notwithstanding the further fact that San Francisco consumed but 10,102,000,000 gallons of water in 1902 as against 11,181,000,000 gallons in 1907. If at the end of one or two years, as the case may be, a final decision is reached, and the ordinance is declared confiscatory, how is the company to recover the difference between what it has collected and what it should have received? Of its 49,000 customers many will have departed, and others will be pecuniarily irre-

sponsible. George E. Booker, chief clerk of the company, testifies that "one-half of the customers are tenants, who move frequently and have no settled or permanent place of abode." The same section of the Constitution of California which requires the board of supervisors to fix water rates also declares that "any person, company or corporation collecting water rates in any city or county or city or town in this state otherwise than as so established, shall forfeit the franchise and waterworks of such person, company or corporation to the city and county or city or town where the same are collected for the public use." This provision is certainly drastic enough to deter the company, in the absence of an injunction pendente lite, from charging or attempting to collect rates higher than those set out in the ordinance. If the company charges the rate of the ordinance and receives the same without protest, or demand of payment at a higher rate, it would probably be unable to recover anything more, even if the court on final hearing should declare the ordinance invalid and the company entitled to a higher rate. Consolidated Gas Co. v. Mayer (C. C.) 146 Fed. 150, 153. Again, under the Constitution of California and the charter of the city and county of San Francisco, the municipal expenses of any one fiscal year cannot be paid out of the funds and revenues raised for any subsequent fiscal year. The ordinance in question ceases to be effective July 1, 1909. It is highly improbable that a final decree can be had by that time. It is therefore obvious that to maintain the status quo as contended for by defendants is to defeat the very object which equity seeks to accomplish in preserving the status quo. It is also clear that complainant's injury will be irreparable without such an injunction if it prevails on final hearing. To deny the injunction is to deny complainant any substantial relief, and to empty the final decree before it is rendered

While it appears that the ordinance in question is probably confiscatory, and therefore invalid, the fact that complainant will suffer irreparable injury unless an injunction issues is not decisive. The court owes equal consideration to both parties: it must not issue an injunction which will do more harm to one party than good to the other; it should so preserve the matters in dispute as to protect each party as far as possible from harm. We have no means of knowing the plans of the company; whether it will raise the rates for the remainder of the fiscal year to the full amount of what is alleged to be reasonable—that is, so as to realize an income of more than \$3,000,000 net—or whether it will be content with something less. If the ordinance is finally adjudged valid, any collections made in excess of the rates specified therein must be repaid. Such repayment can be secured by a proper bond; but if the ordinance is adjudged confiscatory, and therefore invalid, there is no practicable remedy for the consumer, who, under the necessity of agreeing to the terms offered by the company or foregoing the use of water, contracts to pay and does pay more than is just. His injury is irreparable. It is not sufficient to say that courts will enjoin the unreasonable charges, or that this court will promptly dissolve the injunction, if, pending the suit, complainant abuses the process of the court. Whether the rates so fixed by the

company are reasonable or unreasonable is a question of fact which no court would presume to decide without a hearing, and such a hearing may be long and expensive. Most consumers will consider water of any quality or price cheaper than litigation. Neither conception of the status quo is satisfactory. Neither, if maintained, will afford adequate protection but to one party. If the ordinance is confiscatory, complainant is entitled to an additional sum which will make its compensation just and reasonable. This sum will be lost to complainant if the injunction is denied. On the other hand, if the ordinance is confiscatory and the injunction is granted as prayed for, if complainant exacts a compensation in excess of what is just, the excess will be lost to San Francisco and its inhabitants. Equity, however, has no peculiar concern for the status quo, except that its preservation usually, if not always, accomplishes that which is the object of a preliminary injunction; that object is to preserve the fund, the property, the right. or other thing in dispute, from waste, destruction, or disturbance until the rights and equities of the contending parties can be fully considered and determined. Notwithstanding the fact that the ordinance is probably confiscatory, and that its enforcement should be restrained pending suit in order to save complainant from irreparable injury, an interlocutory injunction, the effect of which is to give complainant the authority, practically without limit, to fix prices at which it will sell water, must be denied for the following reasons:

1. It is an abuse of judicial discretion to issue an injunction which will permit one party to obtain any advantage by acting, while the hands of the adverse party are tied by the writ. Northern Pac. R. R. Co. v. City of Spokane (C. C.) 52 Fed. 428, 430; Lake Shore & M. S. Ry. Co. v. Taylor, 134 Ill. 603, 25 N. E. 588; Macon, etc., R. R. Co. v. Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135, 147; 1 Beach on Inj § 110 In Macon, etc., R. R. Co. v. Gibson, supra, the court uses this language;

"A court of equity, or a court of law in the exercise of equitable functions, may, and should, always impose just terms as a condition to its interference by interlocutory injunction in behalf of suitors. The granting and continuing of an injunction is not matter of strict right in the parties, but of sound discretion in the judge of the court. In the exercise of such discretion, it seems highly inexpedient to hold one of the parties to the litigation absolutely bound, whilst the other party remains perfectly free. This would have the appearance of subjecting the former to the will, or even the caprice of the latter."

In Northern Pac. Ry. Co. v. City of Spokane, supra, there was a controversy as to the title to a tract of land in the city of Spokane; the city claimed the land was dedicated for a public street, and it was claimed by the railroad as a part of its right of way. The company owned a warehouse which covered a portion of this ground; the ground was also the site of a railroad depot which had been destroyed by fire. The city, claiming that the structures were or would be a nuisance, proposed to tear down the warehouse, and also to prevent the company from rebuilding the depot on any part of the street. A preliminary restraining order was issued. On motion to vacate this order the court held that the destruction of the warehouse should be re-

strained, and that the city could not be enjoined from preventing the rebuilding of the depot on the street, because:

"The purpose of a restraining order pendente lite, in all cases of this nature, is to preserve property which is the subject of controversy in its existing condition until a final hearing and determination of the cause; and the order should be limited so as to simply preserve the status quo, and should not give either party an advantage by proceeding in the acquisition or alteration of property, the right to which is disputed, while the hands of the other party are tied."

2. The court must so exercise its discretion as to safeguard the interests of both parties. Schneider v. New Amsterdam Gas Co., 116 App. Div. 345, 101 N. Y. Supp. 535; Sampson & Murdock Co. v. Seaver-Radford Co. (C. C.) 129 Fed. 761, 773.

3. It is a well-settled doctrine that a preliminary injunction which takes, or has the effect of taking, property out of the possession of one party, and placing it in possession of the other, is improper, because:

"It is not the form but the effect of the order which must be regarded. If it take or permit the taking from a defendant anything he has, it would anticipate and forejudge the merits of the controversy, and transcend, as we have seen, the purposes of a preliminary injunction." Southern Pac. R. Co. v. City of Oakland (C. C.) 58 Fed. 50, 54; Calvert v. State, 34 Neb. 616, 52 N. W. 687, 692.

The reasoning on which this rule is based should apply with equal force to an interlocutory injunction, the effect of which will be to restrain the operation of a rate-fixing ordinance adopted by defendants in execution of a power conferred by the Constitution of the state of California, and transfer the power to regulate rates to complainant for the remainder of this fiscal year.

4. The effect of the injunction to the full extent prayed for will be, for all practical purposes, a decree in favor of the complainant in advance of the trial. During the interval which must elapse before final hearing and the end of the fiscal year, the company will be at liberty to exercise and enjoy substantially every right for which it will contend on the trial. If the injunction issues, the complainant has prevailed for the present, without a trial, and at the very beginning of the suit; it need do nothing more than delay the proceedings as much as possible. Such an injunction goes too far, because it gives to the complainant the rights for which it contends in advance of a decision. Trow Directory v. Boyd (C. C.) 97 Fed. 586; Chester Traction Co. v. Philadelphia, 174 Pa. 284, 34 Atl. 619; Calvert v. State, 34 Neb. 616, 52 N. W. 687, 692; Van Veghten v. Howland, 12 Abb. Pr., N. S. (N. Y.) 461; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566, 570; Ladd v. Flynn, 90 Mich. 181, 51 N. W. 203, 204.

5. It is conceded by both parties that the court cannot on this hearing fix water rates. That power is vested by the Constitution in the board of supervisors. The court is now asked, in view of its own inability to fix rates, in view of the fact that it can give no decision on the merits of the case until final hearing, to clothe this complainant with authority to regulate rates pending suit. Reasonable rates must be based on a decision as to what is the reasonable value of the service, and this may be one of the most vital issues in the suit. Has it

ever been held a proper exercise of judicial discretion in a strenuously contested case to permit one of the parties to decide his own cause in advance of the final decree?

We are confronted with this condition: To refuse a preliminary injunction is to deny complainant all relief. On the other hand, an injunction, unrestricted, as prayed for, will not only ill accord with equitable principles, but will subject water consumers to irreparable loss. If the court could say to the company, keep your water, and to the consumer, keep your rates until this matter is finally adjusted, the solution would be easy, but it is impossible; the people must have water, and the company must continue to supply them. Having once enlisted in the public service, the company cannot withdraw. Though denied relief, the company must continue to perform its part of the con-

tract at a continuing loss, at a loss which is irreparable.

Again, if it be conceded that the 1902 rate is the status quo, and that no interlocutory injunction can issue subverting the status quo, then the 1902 rates must prevail until the end of the case, and the company must continue to furnish water at the rates of 1902. If those rates are unjust to the company, the deficiency in its income will be continuing; each day will add to the deficiency and to the sum total of the company's irreparable loss. This suit may linger in the court for years, as others have. If the board each year re-enacts the 1902 rates until final judgment, and thereafter adopts the same rates, or rates which will yield substantially less than a reasonable compensation, when will complainant be able to escape from the 1902 rates as the status quo, or from such continuing loss, even though the court declares each ordinance confiscatory? If the court attempts to prescribe rates to be collected pending suit, it is at once met with the objection that it has no more power to fix rates than the board has to adjudge a rate-fixing ordinance valid and constitutional; but the court has no less power to deal with rates prescribed by the company than to deal with rates established by ordinance.

It has been established in this proceeding that complainant is probably entitled to a gross income \$266,675.60 larger than the present rates will afford, and that such sum will probably be lost if not in some manner protected by the court. This can only be accomplished by so prohibiting the enforcement of the ordinance that complainant may collect the additional amount from its customers. So much relief complainant ought to have, but no more. This court is bound to gauge with even hands its interlocutory relief by the circumstances, conditions, and rights which have appeared, to the end that each party shall suffer the minimum of injury. But at this time in these proceedings, under what principle can an order be justified by which the court says, in effect, to complainant, "You are entitled to so much relief; this the court deems just and reasonable; you will not only be permitted to take this, but you will be put in such a position that you can take as much more as you think reasonable." True, this court cannot fix water rates, but it can require each suitor who seeks equity to do equity, or go away empty.

If an interlocutory injunction issues without restrictions, water rates will be arranged by contract between complainant and its customers.

It is urged that any such restrictions would be improper because they would violate complainant's right of contract, which also is protected by the federal Constitution. It is unnecessary at the present time to define complainant's contractual rights under the ordinance when it is in force. It is sufficient to say that the company cannot fix prices in excess of those specified in the ordinance, which consumers must accept or otherwise forego the use of water; nor can it enjoy or exercise any such right during the present year and pending this suit, except as the result of an exercise of judicial discretion by this court in behalf of the company. This is not a case where the Constitution has left to the Legislature or to the board of supervisors the power and discretion to decide when water-rate regulation is necessary and proper, in addition to the power and discretion to regulate such rates. Under such a law when the rate-fixing agency, presuming such regulation is unnecessary, has failed to act, the water owner and the water consumer may contract freely. This is what is decided in Fresno Canal, etc., Co. v. Park, 129 Cal. 437, 62 Pac. 87; but here there is no presumption that regulation is unnecessary; the Constitution has declared the necessity of regulation, and under severe sanctions requires the board to fix rates each year. If now the court in its discretion sees fit to grant an injunction pending the suit, under conditions which limit complainant's liberty to exact rates, it is simply defining the privilege which it confers, not curtailing a right. "As to the power of a court of equity to impose any terms in its discretion as a condition of granting or continuing an injunction, there can be no question." Meyers v. Block, 120 U. S. 206, 214, 7 Sup. Ct. 525, 529, 30 L. Ed. 642. "In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with. The court may often by imposing terms on the one party, as the condition of either granting or withholding the injunction, secure the other party from damage in the event of his proving ultimately to have the legal right." Kerr, Inj. 28. The court "will take care so to frame its order as not to deprive either party of the benefit he is entitled to, if in the event it turns out that the party in whose favor the order is made shall be in the wrong." Id. 27; Russell v. Farley, 105 U. S. 433, 439, 26 L. Ed. 1060; Great Falls Mfg. Co. v. Henry, 25 Grat. (Va.) 575; Guttenberger v. Woods, 51 Cal. 523.

It is insisted on behalf of complainant that the preliminary injunction demanded here is in form precisely like the injunction issued in the suits of 1903, 1904, and 1905, between the city and the water company. This is true, but the conditions are strikingly different. In those cases the purpose was to restrain the city from enforcing an ordinance reducing water rates; here the ultimate purpose is to so restrain the city that the company may raise its rates. In those cases the complainant, with becoming deference to the great principle that he who seeks equity must do or offer to do equity, came into this tribunal offering to conform to the water rates of 1902, and asking an order permitting those rates to be collected. Here the only intimation

contained in the complaint, if it may be considered an intimation, as to the measure of rates to be collected during the controversy, is the allegation that complainant is justly entitled to an annual income of more than \$3,000,000 net. In Consolidated Gas Co. v. Mayer (C. C.) 146 Fed. 150, two acts of the Legislature and an order of the gas commission reducing gas rates from \$1 to 80 cents per 1,000 cubic feet were attacked. An interlocutory injunction was issued in which it was provided "that the gas company might charge or demand payment at the old rate, and might collect at that rate from such as choose to pay" It also provided that the difference so collected between the old rate and the new rate should be impounded under direction of the court so as fully to insure its return to the person paying the same, in the event of the company's failing to succeed in its litigation. A similar order was made in Buffalo Gas Co. v. City of Buffalo (C. C.) 156 The gas company asked "leave of the court to issue to its customers bills or demands for gas consumed each month at the rate of \$1 per 1,000 feet, the difference between such sum if paid by the customer and the amount fixed by the commission to be impounded until the controversy may be determined." The order was so made, but with the provision "that the customer may have the option of paying the higher or lower rate" An order will follow this decision providing that an injunction pendente lite issue; that complainant be permitted, under certain restrictions and limitations, to arrange its prices for water, delivered during the time said injunction remains in force, by contract with its customers; that all compensation for water collected in excess of the rates specified by the ordinance in question be impounded to await the final decision or further order of this court; and that complainant execute an undertaking in the sum of \$100,000 to answer for damages, and to insure its prompt and faithful obedience to such order.

I am aware that impounding such funds will occasion much inconvenience, but I believe such inconvenience will be counterbalanced by the additional assurance to consumers of prompt, equitable, and gracious distribution, in case it be finally decided that such moneys, or any portion of them, ought to be returned. Another and weightier reason prompts such a course. On a preliminary motion like this the testimony is not ripe for final consideration, and there is of necessity a wide margin of uncertainty. The court should therefore proceed with caution, and, if it retains control of these funds until final decree, it will then be possible to correct any errors which may have been made, without serious loss to any one who may be injured by said order, and it will be possible to maintain such fund intact until the imperfections and errors of this proceeding and in this court are corrected by the Court of Appeals.

AMERICAN ICE CO. v. POCONO SPRING WATER ICE CO. et al.

(Circuit Court, E. D. Pennsylvania. December 10, 1908.)

1. Corporations (§ 619*) — Dissolution—Officers as Trustees for Division of Assets—Pennsylvania Statute.

Act Pa. May 21, 1881 (P. L. 30), provides that trading corporations whose charters expire may bring suits and maintain and defend suits already brought for the protection of their property and the collection of debts, and sell, convey, and dispose of their property, and make title therefor, as fully and effectually as if their charters had not expired, and that the officers last elected, or the survivors of them, shall be officers to represent said corporations for such purposes: "Provided that this act shall be construed only so as to enable said corporations to realize and divide their assets and wind up their affairs and not to transact new business." Held, that, where the existence of a corporation had come to an end either because its charter had terminated by limitation or because of a sheriff's sale of all of its property and corporate franchises, its officers last elected became trustees to distribute its assets, and that they had no power to prefer one general creditor over another, and, in case they did so, were liable for an accounting as individuals to a creditor so discriminated against.

[Ed. Note—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. § 619.*]

2. Corporations (§ 619*) - Dissolution - Suit by Creditor After Dissolution.

As such statute does not authorize a dissolved corporation to be sued, but only to "bring suits and maintain and defend suits already brought," a creditor, although his claim is unliquidated, may from the necessity of the case maintain a suit in equity against the officers to require an accounting from them as trustees, and the court having jurisdiction to distribute the fund has power to liquidate his claim and to determine the right of all claimants to share in the fund

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. § 619.*]

3. LANDLORD AND TENANT (§ 180*)—EVICTION—ACTION FOR DAMAGES BY TENANT—FAILURE OF CONSIDERATION

A lessee who assumed and performed a contract made by the lessor as a part consideration for a lease for a term of years, on his eviction, after a part of the term has expired, is entitled to recover for failure of consideration on account of such performance only in proportion to the unexpired term of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 723; Dec. Dig. § 180.*]

4. LANDLORD AND TENANT (§ 180*) — EVICTION — DAMAGES RECOVERABLE BY TENANT—VALUE OF IMPROVEMENTS.

Under the law of Pennsylvania by which a lessee on his eviction can recover the value of improvements made on the demised premises only where the eviction was through the wrongful act of the lessor, where the lessor is a corporation it cannot be charged with liability for such improvements because the eviction was brought about by the fraud of its officers committed for their individual benefit and not that of the corporation.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 725; Dec. Dig. § 180.*]

In Equity. On final hearing.

For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frank R. Savidge, Henry R. Edmunds, and John G. Johnson, for complainant.

Ira Jewell Williams, Aaron Goldsmith, Francis Shunk Brown, and

Alex. Simpson, Jr., for defendants.

J. B. McPHERSON, District Judge. The Pocono Spring Water Ice Company (hereinafter called the Pocono Company) was a trading corporation duly chartered in 1895 by the state of Pennsylvania for the purpose, inter alia, of "cutting, storing and selling ice" in the county of Monroe. In April, 1903, its real and personal property and its corporate franchises were sold at sheriff's sale for the sum of \$50,250. The sale was held under process issued upon a first mortgage belonging to Chester Fulmer, administrator, to whom about \$29,000 of the purchase price was awarded. Out of the balance a further sum was paid to Van Orden Bros., a judgment creditor who had obtained a lien on the fund in the sheriff's hands, and the rest of the purchase money was applied to the payment of three general creditors of the company—the First National Bank of Easton, the First National Bank of Bangor, and the estate of T. T. Miller. These creditors had no lien, and the money was applied to their debts by the direction or with the consent of the defendants, Chester Snyder, the last elected president of the company, Frank C. Miller, its treasurer, and Robert J. Richards, its secretary. Richards was not a defendant originally, but was added by stipulation "as though he were expressly named as a defendant in the bill already filed." The American Ice Company (hereinafter called the ice company), which claims to be a creditor also, received no part of the fund, and has filed this bill, asking as the principal relief "that an account be stated by the said Chester Snyder and Frank C. Miller (and Robert J. Richards) under the direction of your honorable court of the surplus of \$22,000, which remained after payment of the execution of the said Chester Fulmer, administrator, etc., as well as of all other estate, effects, and assets of the Pocono Spring Water Company." The object of the proceeding is to compel the defendants to pay a proportionate share of the fund that was originally distributed among the three creditors just named.

The bill is founded upon the Pennsylvania act of May 21, 1881 (P. L. 30), which provides as follows:

"That all corporations for mining, manufacturing or trading purposes, whether created by general or special acts of assembly, whose charters may have expired, or may hereafter expire, may bring suits, and maintain and defend suits already brought, for the protection and possession of their property, and the collection of debts and obligations owing to, or by, them, and sell, convey and dispose of their property, and make title therefor, as fully and effectually as if their charters had not expired; and the officers last elected, or the survivors of them, shall be officers to represent said corporations for such purposes, and if no officers survive, the stockholders may elect officers under their by-laws: Provided, that this act shall be construed only so as to enable said corporations to realize and divide their assets, and wind up their affairs, and not to transact new business."

That this statute applies to such a case as is now presented, where the charter of the company has not expired by limitation, but where the corporate existence has been brought to an end by sheriff's sale, was decided by the Supreme Court of Pennsylvania in another suit between the Pocono Company and the ice company, reported in 214 Pa., at page 640, 64 Atl., at page 398. After deciding that the Pocono Company was a trading corporation, and was therefore within the scope of the act, the court used the following language in dealing with the objection that the statute did not apply because the charter of the company had not "expired":

"It is equally apparent, we think, that the act was intended to apply to all trading corporations whose business had ceased or terminated for any cause whatever, and was not confined to corporations whose charters had expired by express limitation. Why, it may be asked, should the Legislature have enacted a remedy for the stockholders and creditors of a trading corporation whose charter had expired by limitation, and not of a corporation whose charter rights had been extinguished by any other means? The evil was the same in both cases. So far as such interested parties are concerned, the effect was the same whether the corporation had expired by limitation or its property and franchises had been sold under execution. If this statute is not operative in the latter class of cases, the large sum due the plaintiff corporation, involved in this suit, and any other claims it may have against solvent parties, will be retained by the debtors, whereas they could have been collected if the plaintiff corporation had been dissolved by the expiration of its charter. The necessity and reason for the protection of the stockholders and creditors are the same in both cases, of which the Legislature was duly aware. The manifest purpose of the act was to afford a remedy in all cases, supposed not to exist at common law, where the life of a trading corporation expired or came to an end by any means whatever, in order that the parties interested might avail themselves of its assets. The statute is remedial, and therefore is to be extended to cases in equal mischief."

But the Supreme Court of Pennsylvania had no occasion to pass upon the questions presented by the bill now under consideration, and they must therefore be resolved without the aid of any opinion from that tribunal. And first, what duties are imposed by the act of 1881 upon the officers of a corporation whose charter came to an end? The answer is plainly written in the statute. Suits may be brought to protect or to gain possession of the corporate property, or to collect debts and obligations owing to the corporation by other persons; and, if suits have been already brought against the corporation, these may be maintained and defended. The officers may also sell, dispose of, and convey the corporate property as fully and effectually as the corporation itself might have done; but this and every other power given by the act have the single purpose in view of enabling the officers to realize the assets in order to divide them among the persons entitled thereto, and thus to wind up the corporate affairs. In a word, the officers are trustees with limited and definite powers, and these powers are to be exercised for the specific purpose of realizing the corporate assets and making distribution among creditors and (contingently) stockholders. The officers of the Pocono Company had few duties to perform. All the real and personal property of the corporation, and its franchises as well, had been converted into money by the sheriff's sale, and there was only one suit that needed attention, namely, an action against the ice company, the case reported on appeal in 214 Pa. 640, 64 Atl. 398. This resulted in a judgment (which was duly paid) of about \$14,000 in favor of the Pocono Company.

Having in hand, therefore, a fund which had been produced by the

corporate assets, what were the officers to do with it? Manifestly, to divide it; the act so directs, and this would have been their duty if the statute had been silent on the subject. It is at this point that one of the principal disputes arises. If the corporation had continued to exist, it could have disposed of its assets, speaking generally, according to its will and pleasure. Certainly it could have used them to pay its debts, and in such payment it could have preferred some of its creditors to the exclusion of others. This was the undoubted right of the corporation—subject only to be interfered with by the bankruptcy law—and to this right the officers claim to have succeeded, asserting that, when they preferred the two banks and the Miller estate and excluded the complainant, they did no more than they were legally entitled to do To the correctness of this position I am unable to assent. There is nothing in the statute that gives to the officers the power to prefer one creditor over another, and, since the act has not transferred it from the corporation to these trustees, it no longer exists. This right to prefer is personal to a debtor. It is a privilege that belongs to him as an individual, and does not survive his natural death. executor or administrator of an insolvent estate cannot exercise it, but must divide the assets pro rata among all the creditors. This is true also of an assignee for the benefit of creditors. And the analogy should hold, I think, where a corporation has suffered a civil death. and its property has passed either actually or potentially into the hands of the law for distribution. Equity has undoubted jurisdiction of such a subject, and it will no more sanction unequal distribution among creditors of the same class than it would enter such a decree of its own motion. Unless the statute has laid down a different rule the duty of the officers was plain. That duty was to "divide," and the statute has merely emphasized the obligation. Prima facie, this means divide equally (subject, of course, to such liens as may have existed upon the property when it was converted into money), and, if the officers undertook to divide unequally, they did so at their peril. They were under no compulsion to run any risk in the distribution. Being trustees, they could have applied to a court of equity having jurisdiction either of the fund, or of the parties in interest, or of both the fund and the parties, and the decree of that court would have been a complete protection. But they could not distribute on their own motion except at their own risk, and it seems clear to me that under the facts in proof the risk has fallen out against them, and that they must account to the complainant on the basis of whatever sum may appear to be justly due. The argument that the statute has given to the officers the right to prefer among the corporate creditors, because it declares that the officers may make title to the property as fully and effectually as if the charter had not expired, does not need much attention. This provision is intended, I think, merely to remove any doubt that might arise concerning the goodness of the title that the officers were able to convey, and has no reference whatever to the distribution of the corporate property, or of its proceeds, among the creditors.

But it is argued that the claim in suit is for unliquidated damages, and therefore will not sustain a bill for an account, at least until there

has been a liquidation by proceedings at law. Whatever weight might be given to this objection under other circumstances, I do not think it can be sustained in the present suit. The situation is exceptional. The claim of the ice company cannot be liquidated at law, because no suit can be brought against the Pocono Company. It is a dissolved corporation, against which an action could not be maintained at common law, and this immunity from suit has not been removed by the Pennsylvania Legislature, for the act of 1881 only permits such a corporation to "maintain and defend suits already brought," and the present claim had not been put in litigation when the charter of the Pocono Company came to an end. From the necessity of the case, therefore, as well as upon familiar equitable principles, the court that has jurisdiction to distribute the fund must have the power to hear and determine all controversies concerning the right to share in such distribution, and this power extends to the liquidation of the claim in dispute.

The claim has several elements. It grows out of an agreement made in the fall of 1899, by which the Pocono Company leased to the ice company—

"the icehouse having a capacity of 59,000 tons and the engine house and machinery connected therewith owned by the party of the first part and situated at Naomi Pines in the county of Monroe, and state of Pennsylvania, together with the exclusive privilege of cutting, taking and harvesting ice from Lake Naomi and the free use and enjoyment of all the machinery, fixtures, implements, utensils and other personal property which are now in, upon or connected with the said icehouse and engine house; also the free use of any and all rights of way over the lands of the party of the first part, or others, to, from, around and about Lake Naomi, and to and from the said icehouse and other buildings; also, any and all lands of the said party of the first part, to be mutually agreed upon hereafter, which may be desired by the party of the second part for the construction of additional buildings, whether temporary or permanent, for the housing and storing of ice; and also any and all such lands of the party of the first part in said county of Monroe as may be required by the party of the second part for the construction, maintenance and equipment of railroad tracks, switches, turnouts and depots."

The term of the lease was 10 years from November 1, 1899, but the ice company had the option of extending it for two successive terms of three years each. The rent was \$7,500 a year, with a certain royalty for ice cut, taken, and harvested. As part of the consideration also, the ice company assumed the fulfillment of a contract which the Pocono Company had made with the firm of Van Orden Bros., of Paterson, N. J. The Pocono Company agreed to keep the dam, icehouse, and other buildings on the property in good and substantial repair, and agreed further that the ice company might remove whatever additional buildings it might erect during the terms of the lease. The Pocono Company also covenanted that the ice company should have the peaceable and quiet enjoyment of the premises "without any let, suit, trouble, hindrance of or from said party of the first part, its successors or assigns, or any other person or persons whomsoever."

At the time this lease was executed, the property was incumbered of record by the Fulmer mortgage of \$25,000, upon which the sheriff's sale was afterwards had in 1903. The sale, of course, divested the lease, and the ice company was obliged to surrender possession of the

premises in October of that year. By reason of this eviction, the covenant of quiet enjoyment was broken, and for the damages directly resulting therefrom the claimant is entitled to recover. This is one element of the claim, and the measure of damage therefor would be the value of the unexpired portion of the term described in the lease, and such other direct loss as may have been caused by the eviction—for example, damage to property, cost of removing machinery, etc. Another element is partial failure of consideration. As already stated, part of the consideration for the lease was an agreement by the ice company to assume the Van Orden contract. For reasons which do not appear in this litigation, the ice company did not carry out its agreement, whereupon the Van Ordens sued the Pocono Company and recovered judgment for the breach. This is the judgment that became a lien upon, and was paid out of, the proceeds of the sheriff's sale, but the Pocono Company made this loss good, for it was successful in a counter suit against the ice company, based upon the agreement to assume the Van Orden contract, and the ice company was thus compelled to fulfill that obligation. But, as this assumption by the ice company was made as a partial consideration for the whole term of the lease, and as four years of the term had been enjoyed when the eviction took place, there was no failure of consideration during these four years, and recovery can only be had now after a proper allowance for this period has been made.

The ice company claims the right also to recover for the value of the permanent improvements that were put upon the leased premises, but this item must, I think, be excluded from consideration. Counsel concede that such value cannot be recovered under the rule established in Pennsylvania (Lanigan v Kille, 97 Pa. 120, 39 Am. Rep. 797), unless the eviction was brought about by the fraud of the lessor; and it was therefore urgently argued that fraud had been established. The leading facts upon which the argument rests were before the Supreme Court of Pennsylvania in Pocono Co. v. Ice Co., and were thus commented upon (214 Pa., at page 645, 64 Atl., at page 399):

"The learned court was clearly right in declining to submit to the jury the question whether the American Ice Company had been evicted from the leased premises by the fraud of the Pocono Company. There was not a scintilla of evidence in the case to sustain the defendant's allegation of fraud. The acts or circumstances suggested as evidence of fraud were not sufficient to create in an unbiased mind even a suspicion of wrong. They are constantly occurring in transactions of this character, and are regarded as perfectly proper and legitimate. As has been repeatedly said, fraud is never presumed, but must be established either by direct proof or by facts clearly proved sufficient to warrant a presumption of its existence."

It is true that this language is only a dictum. The decision of the court was that no damages due to the eviction could be set off in that action, because the covenant for quiet enjoyment had not been broken at the time the suit was brought. Manifestly, therefore, the foregoing remarks of the court concerning the proper measure of damage to be allowed in a suit where the eviction could be considered were not called for by the decision, and in strictness may be disregarded. I do not feel bound by them, but, in view of the fact that the testimony offered in the present suit to prove a fraudulent eviction, while it is

more detailed than in the former suit, does not add much that is essential, I think the language of the Pennsylvania court is entitled to respectful consideration. But there is another, and a stronger, reason why the charge of fraud should not influence the award of damages to the complainant. It is to be noted that the fraud which will permit a lessee to recover the value of permanent improvements is the fraud of the lessor, while the fraud that is charged in the bill and is said to be established by the evidence is fraud on the part of Snyder and Miller, by which it is averred that they have individually profited. The seventh paragraph of the bill is as follows:

"Your orator doth further aver that the said Chester Snyder and Frank C. Miller, not regarding the said covenants of the said the Pocono Spring Water Ice Company, whereof they the said Snyder and Miller were officers as aforesaid, but contriving and fraudulently intending to violate the same and to procure the said lessee, your orator, to be evicted from the said premises and to deprive your orator of its said lease and property and improvements, and themselves unjustly, dishonestly, and against equity to appropriate and possess themselves of the same, did fraudulently and unlawfully conspire, combine, confederate, and agree to and with each other and with other parties and persons, whose names to your orator are unknown, to carry their said unlawful intention into effect; and thereafter, to wit, on or about the 4th day of April, 1903, by their own willful and voluntary act and acts did cause and procure all the real and personal property and all the corporate franchises of the said the Pocono Spring Water Ice Company to be sold at judicial sale to one Aaron Goldsmith, trustee, whereby the said corporation, the Pocono Spring Water Ice Company, did become dissolved and extinguished in law and incapable of being sued; and thereafter, to wit, on or about the 1st day of October, 1903, the said Snyder and Miller, together with the said Aaron Goldsmith, trustee, wrongfully, unjustly and against equity did cause your said orator to he evicted and dispossessed of the premises demised to it by the Pocono Spring Water Ice Company as aforesaid, and did cause and procure the said Aaron Goldsmith, trustee, to enter thereupon and to seize and possess himself of the said property and improvements; and thereafter, to wit, on or about the 5th day of August, 1903, did cause and procure a new corporation to be organized and created under the laws of the commonwealth of Pennsylvania styled 'The Pocono Pines Ice Company,' for the purpose of 'the supply of ice to the public,' in which said new corporation the said Chester Snyder was a stockholder, holding 59 shares, and the said Frank C. Miller was a stockholder, holding 385 shares out of a total of 571 shares issued; and thereupon the said Snyder and Miller did cause and procure the said Aaron Goldsmith, trustee as aforesaid, to convey to the said Pocono Pines Ice Company the lands, tenements, and premises aforesaid, together with the improvements placed thereon by your orator as aforesaid, all of which thenceforth and down to the time of filing this bill have been occupied, used, and enjoyed by the said the Pocono Pines Ice Company."

The evidence in support of these averments falls short of establishing fraud on the part of the corporate lessor, and I do not understand it to be seriously contended that the Pocono Company could be held liable for the individual and unauthorized acts of its president and treasurer, merely because these persons had been elected to their respective offices. It seem clear that, if the defendants Snyder and Miller have been guilty of fraud, the remedy at law is adequate.

One objection of the Pocono Company remains to be considered. It is argued that no part of the ice company's claim for damages due to the eviction can be allowed in this suit because the subject is res adjudicata, having been necessarily involved in the suit decided by the

Supreme Court of Pennsylvania. This, however, is a mistake. In that suit the only counterclaim of the ice company which could have been heard was the claim that the Pocono Company had broken its covenant to keep the buildings in repair; and for damages of this description the ice company does not now ask to recover. It agrees that upon this subject it had its day in court, and failed to offer the necessary proof. The Supreme Court of Pennsylvania thus disposed of the question:

"A like trouble arose when the defendant company attempted to prove the loss it had sustained by reason of the failure of the plaintiff to comply with its covenant to keep the premises in repair. Whatever damages the defendant suffered by reason of this default, it was entitled to set off in this action. It first conceived the measure of damages to be the value of the repairs which it had made, but it failed to show the amount it had expended for repairs, and hence the jury was given no data from which it could find a verdict. Subsequently the defendant called a witness to show the difference in the rental values of the premises by reason of the failure of the plaintiff to perform its covenant to repair. If that was the proper measure of damages, the difference was not shown, as the only witness offered for the purpose was properly held to be incompetent and his evidence was excluded."

But for damages due to the eviction, no counterclaim was then permitted, as will distinctly appear by the following quotation from the opinion:

"The covenant for quiet enjoyment was a distinct and independent covenant from that of the defendant to assume the Van Orden Bros.' contract. Wright v. Smyth, 4 Watts & S. 527; Obermyer v. Nichols, 6 Bin. 159, 6 Am. Dec. 439; Fame Ins. Co.'s Appeal, 83 Pa. 396. A breach of the covenant was not a bar to this action by the plaintiff. Obermyer v. Nichols, supra. If, however, at the time the action was brought, the defendant company had suffered any damages by reason of the failure of the plaintiff company to perform its covenant for quiet enjoyment, it could recoup the damages sustained by reason of the default. No fraud or bad faith having been shown on the part of the plaintiff, the defendant could not recover the value of the improvements it made on the premises for the prosecution of its business. Lanigan v. Kille, 97 Pa. 120. Nor can we see how, under the circumstances and evidence in the case, the defendant can in this action avail itself of any damages sustained by reason of the eviction. Notice to the defendant company to surrender possession of the leased premises was served after this action was brought, and it was not required to, and did not, remove from the premises until three months thereafter. There was, therefore, no eviction at the impetration of the writ in this case. There had been no interference with the defendant's beneficial enjoyment of the demised premises up to that date, and consequently no eviction. It follows that there could be no set-off in this action for a breach of the covenant for quiet enjoyment. A set-off is in the nature of a cross-demand, and, being incomplete at the impetration of the writ, is not available for the defendant in this action. Roig v. Tim, 103 Pa. 115; Gunnis, Barritt & Co. v. Cluff, 111 Pa. 512, 4 Atl. 920; Zuck v. McClure, 98 Pa. 541; Garrison v. Paul, 1 Penny. 380. If, however, the defendant company's claim for damages was ripe for action and was enforceable by way of set-off, it produced no competent evidence under the facts disclosed on the trial to prove the claim. The evidence offered was properly excluded by the trial judge."

Damages for the eviction were therefore not involved in the other suit, and may now be recovered.

I conclude, therefore, that the complainant is entitled to an account from the defendants, and a decree to that effect may be entered. It should not embrace, however, so much of the fund produced by the sheriff's sale as was awarded to the Fulmer mortgage, nor so much also

as was paid out of that fund to satisfy the Van Orden judgment against the Pocono Company. The sums to be accounted for are the balance of the purchase money after these two sums have been deducted, plus the amount afterwards received from the ice company in satisfaction of the judgment that was affirmed by the Supreme Court of Pennsylvania. A master will be appointed to state the account, and he will be directed to liquidate the claim of the ice company in accordance with the rules laid down in this opinion.

ROSS et al. v. CARGO OF 3.408 TONS OF POCAHONTAS COAL et al.

CROWLEY et al. v. CARGO OF 3,639 TONS OF POCA-HONTAS COAL et al.

(District Court, D. Maine. November 21, 1908.)

Nos. 10, 12.

1. Shipping (§ 171*)—Demurrage—Construction of Bill of Lading.

The provision of the new bill of lading that, after arrival and notice to the consignee and the expiration of 24 hours, the vessel shall have precedence in discharging over all vessels arriving or giving notice after her arrival, requires such vessel to be given her turn subject to whatever customs or necessities exist at the port of discharge and which may fairly be presumed to have been within the contemplation of the parties.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 568; Dec. Dig. § 171.*]

2. Shipping (§ 171*)—Demurrage—Delay in Discharging—Right of Precedence.

Schooners which arrived at the port of Portland, Me., for discharge of coal cargoes under bills of lading providing that they should have precedence in discharging over all vessels arriving or giving notice after their arrival, and that for any violation of such provision they should be compensated in demurrage as if, while delayed by such violation, their discharge had proceeded at the rate of 300 tons per day each, must be held to have contracted with reference to the facilities for coal discharging at that port, and, among them, the facilities at the wharves of the railroad company to whose wharves they were assigned, and are not entitled to claim a violation of contract because steamers of regular transatlantic lines arriving after them were, in accordance with contracts and long custom, given precedence in discharging at the company's wharves which were not used as discharging places for coal but for general cargoes. They were, however, entitled to precedence, over after-arriving vessels carrying coal cargoes, to discharge at any wharf of the company used for discharging coal, so long as they were not assigned to any particular berth, and, after such assignment, to precedence over any after-arriving vessel at such berth.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 568; Dec. Dig. § 171.*

Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.]

3. Shipping (§ 183*)—Demurrage—Delay in Discharging—Construction of Bills of Lading.

Where other vessels were given precedence in discharging over such schooners in violation of their bills of lading, they were entitled to be

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

compensated in demurrage only as if their discharge had proceeded at the rate of 300 tons per day, regardless of the number of vessels so given precedence which were discharging at the same time.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 593; Dec. Dig. § 183.*]

4. Shipping (§ 171*)—Demurrage—Construction of Bill of Lading.

The fact that the railroad company to whose wharves the schooners were assigned, in order to secure a certain supply of coal for its own use had contracted with a particular coal company to give its vessels immediate discharge in consideration of the right to use a percentage of all coal so discharged, did not entitle such vessels to precedence in discharging without liability on the part of the consignees for violation of the contract, in the absence of any express provision therefor; and for the same reason vessels carrying cargoes of coal for the company's own use had no right of precedence in discharging, since the parties could not be presumed to have contracted with reference thereto.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 568; Dec. Dig. § 171.*]

In Admiralty.

Benjamin Thompson, for libelants.

Bird & Bradley, for claimants and respondents.

HALE, District Judge. These two causes in admiralty are heard together. The libel in the first case is brought by Alexander Ross in his own behalf, and as the agent for the owners of the schooner Helen W. Martin, against a cargo of 3,408 tons of Pocahontas coal, of which Samuel D. Warren and others were consignees, and are now claimants. This suit is to recover five thousand dollars (\$5,000) for detention of the vessel at the port of Portland in April, 1903.

The second libel is by John G. Crowley, in his own behalf, and as agent for the owners of the schooner Van Allens Boughton, against cargo of 3,639 tons of Pocahontas coal, and also against Samuel D. Warren and others, as the charterers of the vessel and consignees of the cargo. This suit is to recover seven thousand one hundred and nineteen dollars and fifty-two cents (\$7,119.52) for detention of the

vessel at the port of Portland in March, 1903.

The testimony shows that on the 17th of February, 1903, the schooner Helen W. Martin was chartered by an oral charter, to load at Lambert's Point, Va., a cargo of coal, to be carried to the port of Portland at the agreed freight of \$1.15 per ton and bridge money, cargo to be discharged free of expense to the schooner; that on March 7th the schooner received on board at Lambert's Point a cargo of 3,408 tons of Pocahontas coal, for which the master signed the usual bills of lading, by which he promised to deliver the cargo at the port of Portland, dangers of the sea excepted, to S. D. Warren & Co., they paying freight thereon, as agreed, together with all expenses of discharging. The bill of lading contained the provisions as to discharging of the "new bill of lading" or the "National Association bill of lading." All that is material of this bill of lading will be referred to later in this opinion. The Martin sailed on her voyage, arriving in Portland Sunday afternoon, March 15, 1903. Her master, Capt. Ross, came ashore

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

immediately, and went at once with his bill of lading to the office of the schooner's agent, Mr. Clark, of J. S. Winslow & Co., who immediately saw Mr. William M. Bradley, the agent and attorney of S. D. Warren & Co., the consignees named in the bills of lading. The schooner's agent informed Mr. Bradley that the Martin had arrived with coal consigned to S. D. Warren & Co., and that she had been reported to the Maine Central Railroad. Mr. Bradley requested Mr. Clark to report her at the Grand Trunk Railway. Mr. Clark took the Martin's bill of lading, went to the office of Mr. R. W. Scott, the Portland agent of the Grand Trunk Railway Company, and gave notice of the vessel's arrival. The vessel's arrival was also telephoned to Mr. Hammond, the agent of the Forest Paper Company, at Yarmouth, Me., the corporation for which the coal was intended. This corporation is a branch of the business of S. D. Warren & Co. Its mills lie near the Grand Trunk Railway at Yarmouth; and cargo can most conveniently be forwarded to it over the Grand Trunk Railway.

In January, 1903, the schooner Van Allens Boughton was chartered orally to load a cargo of coal at Lambert's Point, Va., to be carried to the port of Portland, at the agreed price of \$1.15 per ton and bridge money; said cargo to be discharged free of expense to the vessel. Pursuant to the charter, this schooner received on board at Lambert's Point a cargo of 3,639 tons of Pocahontas coal, for which, on February 3d, the master signed the usual bills of lading, by which he agreed to deliver the cargo at the port of Portland, dangers of the sea only excepted, to S. D. Warren & Co., they paying the freight for the same, as agreed, together with all expense of discharging cargo. The bills of lading contained the same provisions as were in the bills of lading of the Martin, to which I shall call attention later in this opinion.

The Boughton proceeded on her voyage, and on February 13, 1903, at 9 o'clock in the forenoon, she came to anchor inside the breakwater at Portland Harbor. Capt. Carter, the master, immediately came ashore and went to the office of the schooner's agent, Mr. Clark, of I. S. Winslow & Co., who at once endeavored to find out by telephone to whom the Boughton should report. Upon communicating with S. D. Warren & Co., he was instructed to report the Boughton's arrival to the Maine Central. Capt. Carter then went to the office of the Maine Central Railroad Company, but found that the Maine Central would not accept the report. Capt. Carter then returned to the office of his agent, and, at Mr. Clark's suggestion, went to the office of Mr. Scott, the agent of the Grand Trunk Railway, at 12 o'clock, noon, and gave the clerk in Mr. Scott's office the bill of lading, requesting him to indorse upon it the Boughton's arrival. Capt. Carter then stated that he was there to report. The clerk declined to indorse the bill of lading, but made a note of the Boughton's arrival.

The evidence shows that at all times after their arrival and report, the two schooners of the libelants were ready to make delivery of their cargo, in accordance with the terms of their contract. The Martin arrived and reported, as I have already indicated, at 10 o'clock in the forenoon of Sunday, March 15th, and was reported to the Grand Trunk Railway, by direction of Mr. Bradley, at 1 o'clock the same afternoon. She was not assigned to any berth until April 7th, when she was di-

rected to proceed to Galt's Wharf, where she was docked on the same day. Her discharge began on April 8th, and was completed April 13th. Her cargo was shipped over the Grand Trunk Railway to the Forest Paper Company, Yarmouth. The corrected bill of lading shows that she had on board 3,403½ tons. Under the ordinary discharge of 150 tons a day, the consignee would have been entitled to 22 days, 16 hours, and 33 minutes in which to discharge her, excluding Sundays and holidays. She was therefore entitled to have her discharge com-

pleted at 11 o'clock a. m. on April 10th.

The Van Allens Boughton, as I have already said, arrived in Portland at 9 a. m., February 13, 1903, and at once reported to the consignees. By their direction she reported to the Maine Central Railroad at 11:40 the same forenoon, and to the Grand Trunk at 12 o'clock, noon. No berth was assigned to her until February 28th, when she was assigned to the coal pockets; on the day following, the assignment was countermanded; and on March 3, 1903, she was assigned to shed No. 6; the reason for the change in berths being the fact that discharging at the coal pockets would interfere with the Grand Trunk Railway getting its own supply of coal at the pockets. The Boughton was docked at shed No. 6 at 11 a. m. on March 3d; her discharge was completed at 12 o'clock, midnight, March 12th. The Boughton had on board 3,639 tons of coal. Under the ordinary rate of discharge she should have been discharged in 24 days, 6 hours, and 5 minutes, omitting Sundays and holidays. The time, therefore, would have expired on the 14th day of March, at 5:45 p. m.

It is contended on the part of the libelants that after the arrival at the port of Portland of the two schooners, and after their report to their consignees, various other vessels, both steamers and sailing vessels, with coal cargoes, arrived at the port of Portland and were discharged at the berths of the Grand Trunk Railway Company ahead of the Martin and Boughton; that thus the conditions of the bills of lading were violated by the consignees; that, during the time while other vessels were receiving precedence in their discharge, under the terms of their contracts, the Martin and Boughton were entitled to be compensated in demurrage as if their discharge had proceeded during the said time at the rate of 300 tons per day. Libelants claim that, under their contracts, the consignees could not exceed the number of lay days provided for, and, further, that their schooners must have precedence over subsequently arriving and reporting vessels, even though thereby their schooners are the sooner discharged. On the other hand. the claimants contend that, if any vessels did have precedence in discharging over these two schooners of the libelants, such precedence was given on account of the necessities of the Grand Trunk Railway Company and the customs existing at the discharging berths of that company; and that such necessities and such customs may fairly be held to be within the contemplation of the parties when the contracts were made.

I will further discuss in their order the details relating to the various contentions arising in the case.

1. The charter parties were oral; their terms are not fully proven. The bills of lading present the controlling evidence of the written con-

tracts before the court in relation to both vessels. Each of these bills of lading contained the provisions of the "new bill of lading" or the "National bill of lading." The only provision which is now material is the same in both bills of lading, and is as follows:

"And 24 hours after the arrival at the above named port, and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day, Sundays and legal holidays excepted, for every one hundred and fifty tons thereof; after which the cargo, consignee, or assignee, shall pay demurrage at the rate of six cents per ton a day, Sundays and legal holidays not excepted, upon the full amount of cargo, as per this bill of lading, for each and every day's detention, and pro rata for parts and portions of a day, beyond the days above specified, until the cargo is fully discharged; which freight and demurrage shall constitute a lien upon said cargo. After arrival and notice to the consignee as aforesaid, and the expiration of said 24 hours, said vessels shall have precedence in discharging over all vessels arriving or giving notice after her arrival; and for any violation of this provision she shall be compensated in demurrage as if while delayed by such violation her discharge had proceeded at the rate of three hundred tons per day."

This form of bill of lading has been before this court and has been commented upon by it in Carroll v. Holway, 158 Fed. 328, in which case I had occasion to draw the distinction between this contract and the old bill of lading, under which vessels were required to arrive at the wharf before the lay days began; while, under the new bill of lading, lay days begin 24 hours after arrival in port and reporting. In reference to this bill of lading, I referred to Choate v. Meredith, 1 Holmes, 500, Fed. Cas. No. 2,692, where Judge Shepley said:

"The new form of bill of lading seems to have been adopted to secure the shipowner against the delay consequent upon an obstruction of the consignee's wharf by other vessels or from other causes, and against his being compelled to await his turn to unload at the consignee's wharf. Under this form of bill of lading, if the consignee desires to exercise the right of requiring the master to unlade at the consignee's wharf, he must pay for the detention consequent upon that wharf's being inaccessible, if there are other suitable and convenient wharves accessible after the arrival of the vessel in port at which the vessel may be unladen."

Reed v. Weld (D. C.) 6 Fed. 304; Hall v. Eastwick, 1 Low. 456, Fed. Cas. No. 5,930; Manson v. Railroad (C. C.) 31 Fed. 297; Lake v. Hurd, 38 Conn. 536.

2. The claimants contend that the contract, as stated in the bills of lading with reference to precedence being given to other vessels, should be construed with reference to the customs and necessities which existed at the port of discharge, and which must have been within the contemplation of both parties. The bills of lading were identical in the two cases; and so I sometimes refer to them in this opinion as if they constituted one contract. The contest arises over the following provision in the bills of lading:

"After arrival and notice to the consignee as aforesaid, and the expiration of said 24 hours, said vessel shall have precedence in discharging over all vessels arriving or giving notice after her arrival; and for any violation of this provision she shall be compensated in demurrage as if while delayed by such violation her discharge had proceeded at the rate of three hundred tons per day."

It is claimed by the libelants that many vessels arriving and giving notice after the arrival and report of the Boughton and Martin were given precedence in discharging over these two schooners; and a list of the vessels so given preference is stated in an amendment to the libel. The libelants claim that, for the violation of this provision of their contract, they should be compensated in demurrage as if, while so delayed, their discharge had proceeded at the rate of 300 tons per day.

On the other hand, the claimants make the contention that no precedence was given, except such as was made necessary by the customs and necessities of the port of discharge. The learned proctor for the claimants divides the vessels, alleged by the libelants to have had precedence within the meaning of the bills of lading, into five classes, as follows:

"(1) Vessels arriving with and for cargo belonging to steamship lines with which the Grand Trunk Railway Company had contracted to receive inward and provide outward cargoes with berths for handling same.

"(2) Vessels arriving with coal cargoes belonging to a steamship line with which the Grand Trunk Railway had contracted to receive coal, and to provide for discharge thereof at a particular berth at once on arrival, upon condition that the railway company should have a portion thereof to relieve its necessities, and to enable it to continue in operation of its railway.

"(3) Vessels arriving with cargoes of coal belonging to the railway company and contracted for by it and necessary to it to enable it to continue in operation of its railway. (Some of the vessels of each of the above classes

may also be equally entitled to be in another of said three classes.)

"(4) Vessels arriving with 'Commercial' or 'Industrial' coal, viz., schooner Brookline and steamer Mattawan in the first case, and the steamer Cardium in the second case.

"(5) Vessels arriving light for outward grain cargoes forwarded by the railway in the usual course of its business as forwarder of foreign freight, viz., steamers Headlands and Montauk in the first case, and steamer Yola in the second case."

The contracts between libelants and charterers were business agreements, and related to the carrying of coal cargoes. The testimony induces me to believe that, in entering into them, both parties alike must have known of the general facilities for the discharge of coal at the port of Portland, where their contract of charter was to be executed. Within reasonable limits, the charterers had the right to send the schooners to any terminal facilities in the harbor of Portland to discharge their cargoes. Whenever they selected the place of discharge, and designated the party to effect the discharge, they constituted such party their agent in the performance of that obligation.

The court in this circuit has, in several cases, had questions of this character under consideration. In Evans v. Blair, 114 Fed. 616, 52 C. C. A. 396, speaking for the Court of Appeals, Judge Putnam said:

"From the application of the well-known rule that where, in maritime contracts, parties have seen fit to choose fixed forms of expression, the great variety of contingencies incidental to maritime transactions disenable the courts from establishing any safe theory by which the letter can be modified to meet any supposed intent. * * * Practically, therefore, this case comes down to the mere question whether or not the vessel was given her turn, subject to whatever customs or necessities existed at the port of discharge which might be fairly within the contemplation of both parties.'

Judge Putnam further discussed the vessel's right to precedence or her "turn," and further said:

"Nevertheless, as we have already said, this did not give the Maine Central Railroad Company (the consignees) an arbitrary right, but only one which was just and reasonable. As well said by Lord Esher, the Master of the Rolls, in Carlton S. S. Co. v. Castle Mail Packets Co. (1897) 2 Q. B. 485, 490, although in a different connection, this is a power given to the charterers for business reasons."

All the cases in this circuit, and, in fact, all cases which have discussed similar questions, recognize and illustrate the difficulty which presents itself in construing a contract where the court has to decide what necessities, customs, and conditions the parties had in mind when they made the contract. Donnell v. Amoskeag Manufacturing Co., 118 Fed. 10, 55 C. C. A. 178; Stephens v. Macleod, 19 Ct. of Sessions Cases (4th Series) 38; Davis v. Wallace, 3 Cliff. 123, Fed. Cas. No. 3,657. In Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402, 73 C. C. A. 502, in speaking for the Court of Appeals in this circuit, Judge Putnam has carefully reviewed all the late cases which bear upon this question. In Harding v. 4,698 Tons of Coal (C. C.) 147 Fed. 971, this court had before it a similar question. The court refused to read into the charter any limitations as to the custom of the port, on the ground that such custom was not shown to be within the contemplation of both parties when the contract was made. In that case, the court found that the exceptional conditions and particular circumstances which were invoked as a defense were not proven, and could not be held to have been within the minds of both parties in making the contract. After reviewing some of the cases upon this point, the court said:

"The business reasons suggested by Lord Esher and referred to in Evans v. Blair, supra, have led courts in recent decisions to modify what Judge Putnam has called the 'primitive rule'; but in Ardan Steamship Co., Ltd., v. Andrew Weir & Co., L. R. App. Cases 1905, 501, it will be seen that the House of Lords indicates a tendency of English courts to return to something like the 'primitive rule.' In the present attitude, however, of English and American law, it is difficult to determine in each case to what extent business reasons are competent matters of defense."

It is somewhat difficult in the matter now before the court to determine what customs and necessities at the port of discharge the parties had in mind when they made their contracts. I have given the claimants' statement and substantial admission as to the classes of vessels which actually had precedence in discharging over the two schooners of the libelants.

The question now before the court is whether any or all of the five classes of vessels which had precedence in discharging at the wharves of the consignees' agents were rightfully given such precedence on account of any custom or necessity existing at the port of discharge and within the contemplation of the parties when the contracts were made.

The situation in reference to the wharves and discharging facilities of the Grand Trunk Railway Company, as well as the methods and customs under which that company was carrying on business, are presumed to have been within the knowledge of S. D. Warren & Co.,

the charterers and consignees. Among the conditions existing at the Grand Trunk Railway at the time was the fact that the railway company regarded all of its wharves and discharging facilities as private; that the company was under contract to take coal from coal steamers; that for these reasons it would not guarantee berths for the discharge of any commercial coal; that it reserved the right to give preference to vessels with which it was under contractual obligations; and that at all of its wharves it gave precedence to steamers over sailing vessels, in discharging and loading. With these existing conditions, the charterers and consignees selected their place of discharge, as they had the

right to do.

What, then, were the discharging facilities of the Grand Trunk Railway at the time in question? The proofs show that the Grand Trunk Railway owned 11 docks or discharging berths; that the principal dock for coal cargoes was known as the "Coal Pockets," situated near the Northern end of the Grand Trunk Railway bridge; that these pockets were so constructed that 1,500 tons of coal could readily be discharged per day, and indeed that 2,000 tons had actually been discharged there in 24 hours from vessels of the class of the Martin and Boughton. These pockets were built to handle the Dominion Coal Company's coal, and, under certain contractual relations between the coal company and the Grand Trunk Railway, the latter was to be furnished with a portion of all coal discharged from the coal company's steamers, in consideration of its prompt discharge and transportation of the balance of the coal to the customers of the coal company residing in Montreal and other places. During the time, however, to which the controversy relates, all classes of vessels and all classes of coal cargoes were discharged at the coal pockets, but in such a way as to interfere as little as possible with the discharge of the coal steamers.

The other berths of the Grand Trunk were sheds 1, 2, 3, 4, 5, 6, 7, 8, and Galt's Wharf. Of the berths last named, Galt's Wharf and shed No. 6 were the berths fitted up and used almost exclusively at the time in question for the discharge of coal. At Galt's Wharf the company had three sheer legs for the discharge of coal; and at that berth discharge could be made from three hatches at the same time. Shed No. 6, while ordinarily adapted for transatlantic freight, at the time in question had been fitted up with facilities for discharging coal which were

fully as ample as those at Galt's Wharf.

The coal pockets, Galt's Wharf, and shed No. 6 were, therefore, the coal-discharging berths of the Grand Trunk at the time to which this controversy relates; but the evidence shows that coal was also discharged at some of the other berths and wheeled through the sheds, which were ordinarily adapted for the storage of transatlantic merchandise. In sending coal-laden vessels to be discharged at the Grand Trunk, the consignees must have had in mind that their vessels would probably be discharged at one of the three berths named which were in use at that time. In making a contract for discharging at the port of Portland, the libelants also must be held to have had in view the well-known facilities of the port at the time, and to have made their contracts with reference thereto. Among those facilities were the three discharging berths which I have enumerated, with such excep-

tions as the Grand Trunk might see fit to make at their other berths for business reasons, in order to facilitate the unlading of coal cargoes.

The other sheds to which I have referred by numbers 1, 2, 3, 4, 5, 7, and 8, were, as the evidence shows, built for the handling of general cargoes; they were not discharging berths for coal, but had been built and were operated for transatlantic traffic. During the winter of 1902-03, the Grand Trunk Railway had at their last-named berths seven lines of transatlantic steamers running to and from Portland. With these steamship lines the railway company had contracts to receive inward and provide outward cargoes with berths for handling these cargoes. In making the contracts now before me in the case at bar, the parties cannot be held to have had knowledge of any private contracts which the Grand Trunk Railway Company had with steamship lines; but they must be held to have had knowledge of the fact, which was open and obvious to any one acquainted with the shipping facilities of Portland, that these lines of steamers were running to the several wharves, which I have enumerated, of the Grand Trunk Railway Company. I must hold that the contract was made with this knowledge. Under the general business reasons to which Lord Esher referred, and which Judge Putnam evidently had in mind, the parties to these bills of lading must be held to have contracted, having in view the facilities for coal discharging at the port of Portland, and, among them, the facilities at the wharves of the Grand Trunk Railway. They must have known that the wharves, other than the three which I have enumerated, were not built or used at that time as discharging places for coal, but were built and used for general cargoes; and that their general use was then, and had been for a long time, in connection with the transatlantic steamship traffic.

I hold, then, that transatlantic steamers under contract with the Grand Trunk Railway Company, and all vessels with and for transatlantic cargo, and vessels with which the Grand Trunk Railway Company had contracted to receive inward and provide outward cargo, were entitled to precedence at the wharves where such cargoes were usually loaded and discharged, namely, at wharves 1 to 8, inclusive; and, therefore, that there was no violation by the consignees of their contracts of charter in consequence of the Grand Trunk Railway Company allowing such precedence. But this conclusion is subject to the following exception in reference to berth 6: At that berth, in my opinion, there could be no violation of the contract in cases where transatlantic steamers, arriving with general cargo, and, incidentally, with coal, discharged at the same time at which the transatlantic freight was being discharged or loaded. But in cases where transatlantic steamers with coal cargoes, either for the Grand Trunk Railway or for commercial people, arrived and reported at times subsequent to the arrival and report of the libelants' schooners, and were discharged at No. 6, or at any of the other transatlantic sheds, ahead of libelants' schooners, such vessels must be held to have been receiving a preference over the libelants' schooners, in violation of the bills of lading; for there is no pretense that coal cargoes had any connection with transatlantic freight. The Grand Trunk Railway Company was not obliged to change over its transatlantic facilities into coal-discharging

berths in order to accommodate coastwise or commercial people; but if, for its own convenience, or for other reasons, it did temporarily transfer or adapt its transatlantic facilities into coal-discharging facilities—as it did at No. 6—such berth, when so altered, for the time being at least, presented discharging facilities at which the libelants' schooners were entitled to be discharged, just as other vessels with similar cargoes were so entitled; and the same is true, if it shall appear that the same kind of discharge was made at any of the other transatlantic berths, namely, if it shall appear that such berths were actually used for discharging coal cargoes during any portion of the time when the libelants' vessels were waiting to discharge their cargo.

The Grand Trunk Railway Company, then, had a right, upon the arrival of the Boughton and Martin, to assign them to any safe berth at which they could most conveniently be discharged. It necessarily follows that, if the Grand Trunk Railway Company had so assigned these vessels, then, from the time of such assignment, only such subsequently arriving and reporting vessels as were discharged ahead of them, at the berth so assigned, could be said to have been given precedence. But no particular berths were assigned to the Boughton and Martin; although there was no reason, so far as the character of the vessels or their cargoes were concerned, why they should not have been discharged at one berth as well as another, except that the convenience and contractual relations of the Grand Trunk Railway Company were such that it was to its advantage to give precedence in the discharge of other vessels. In reference, then, to all vessels subsequently arriving and reporting, and which were discharged, at the three berths which I have enumerated—subject to the limitation as to No. 6—prior to the discharge of the libelants' schooners, it therefore follows that such vessels violated the provisions of the contracts with the libelants. Therefore, during the time while such precedence was given, the libelants are entitled to be compensated in demurrage as if the discharge of their schooners had proceeded during that time at the rate of 300 tons per day, and such precedence must be held to have continued until a berth was assigned to the schooners of the libelants; but, after such assignment was made, such precedence must be confined to vessels which arrived and reported later than the libelants' schooners, and which were in fact discharged at the particular dock or berth assigned to them.

The libelants claim that this 300 ton rate in the discharge of their vessels should apply to each of the vessels receiving such precedence, notwithstanding there may be several being so discharged at the same time. It is said that these are separate and distinct violations of the contracts, and therefore entitle the vessel so discriminated against to an additional 300 tons for each violation. The contracts provide that the libelants' schooners shall—

"have precedence in discharging over all vessels arriving or giving notice after her arrival; and for any violation of this provision she shall be compensated in demurrage as if while delayed by such violation her discharge had proceeded at the rate of 300 tons per day."

This provision of the contract was undoubtedly intended to prevent unjust discriminations in the discharge of vessels; but there is

nothing in the language of the contract which indicates any intention that the rate of discharge was to be increased with all the vessels that might be receiving precedence. In the event, then, that it shall appear that such precedence was in fact given, then the libelants' vessels will be entitled in any event to be compensated in demurrage only at 300 tons per day. For, in cases of this sort, the law does not favor penalties. All legal presumptions are to be taken in limitation, rather than an extension, of a penalty. In Continental Coal Co. v. Bowne, 115 Fed. 945, 946, 53 C. C. A. 427, 428, in speaking for the Court of Appeals for this circuit. Judge Putnam said:

"This clause is in the nature of a penalty, so that it ought not to be imposed unless the case comes clearly within the purpose which it intended to accomplish. That is the preventing of unjust discrimination."

While, as I have already held, the provision creating a penalty is applicable here to a certain extent, yet the enforcement of the penalty should not be carried further than the absolute reason of the case requires. Whether this particular aspect of the matter becomes material or not, can only be determined by the consideration of the matter by an assessor.

I have thus endeavored to dispose of all questions relating to the first class of vessels in claimants' enumeration; but I have not been able to follow claimants' enumeration with strictness, and have included in my finding vessels which will come under some of the other classes in the enumeration.

- 3. It is now the duty of the court to find whether any of the other classes of vessels enumerated by the claimants had precedence of the libelants' schooners; but in what I have to say in this opinion touching the other classes of vessels in the claimants' enumeration, it must be remembered that I have already covered some matters which strictly arise upon this point; so that, when I speak of the other classes of vessels in the enumeration, I do not intend to hold anything inconsistent with what I have distinctly held in the former part of my opinion.
- (a) Under the second class, the claimant urges that certain vessels of the Dominion Coal Company properly had precedence of the schooners of the libelants, for the reason that the coal pockets were originally erected by the Grand Trunk Railway Company for the use of the steamers of the Dominion Coal Company; that, forced by the grave shortage of coal under which it was suffering, the railway company, in order to obtain even a percentage of the coal brought by the Dominion Coal Company to Portland, was compelled to contract with the Dominion Coal Company for the prompt and immediate docking and discharging of its steamers at the coal pockets. And the claimant urges that the docking of these vessels at the coal pockets was enforced upon the Grand Trunk Railway Company by the necessities under which it was laboring, in view of this contract with the Dominion Coal Company, and by the fact that, unless it did obtain coal in quantities adequate for the operation of its road, a reversal of the whole course of its business would have resulted,

I cannot hold that any sufficient reason is here given for allowing precedence to vessels of this class, unless they come within the rules

which I have already laid down. The shortage of coal under which this precedence was given was not one of the conditions which the parties to the bills of lading could have had in mind when they made their contracts. There is no more reason for allowing precedence to this class of vessels than there is for holding that strikes, frosts, or floods are within the business reasons which the courts have allowed to create an exception in cases of this sort. For in cases of strikes, floods, or frosts the courts hold that the charterers have the control in the matter, and can, if they choose, make special arrangements to meet special emergencies; and, if they do not choose to make these special arrangements in order that the chartered vessel may be unloaded within a time which may be reasonable under ordinary circumstances, it is only just that they should indemnify the shipowner for his loss. Randall v. Sprague, 74 Fed. 247, 21 C. C. A. 334; Wright v. New Zealand Shipping Co., 4 Ex. Div. 165; Randall v. Lynch, 2 Camp. 352.

In Niver v. Steamship Co., supra, the court said:

"A condition of affairs brought about by a contractor on the one part does not relieve him from his obligations to each of the contracting parties on the other part, acting severally, because the condition resulted in embarrassing all of them at the same time. To consent to any other rule would permit a contractor to relieve himself from his contracts in proportion to the number of parties he might involve in his own embarrassment by virtue of his own separate voluntary acts."

In the case from which I have just quoted, the court held that strikes were not the immediate cause of the difficulty. The court quotes the memorable language of Lord Bacon:

"It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."

I do not find anything which relieves the charterers and consignees from their contracts; for the evidence shows that, at the time in question, the pockets, as well as all the other discharging facilities of the Grand Trunk Railway Company, were discharging all classes of cargo directly upon cars: and that this was true not merely of coal belonging to the Grand Trunk Railway Company and Dominion Coal Company, but it was true also of commercial cargoes which at that time were arriving both by foreign steamers and by coastwise vessels; and that the Grand Trunk Railway Company, through Mr. Scott, its local agent, acted on the understanding that its wharves were private wharves, and, therefore, that the railway would not guarantee berths for the discharging of coal to commercial people, who, like S. D. Warren & Co., the consignees, were without any contractual relations, but that the railway compelled them to take their chances of finding a The discharge of commercial cargoes was avowedly made by the Grand Trunk Railway Company in such a way as would cause it the least inconvenience and the least interruption to its business. And it does not appear that any regard was paid to the contracts under which the schooners of the libelants were carrying their cargoes. I must hold that the reasons which actuated the Grand Trunk Railway Company, and which they frankly admit, are no justification for the violation of the contracts which existed between the libelants and the consignees of these two schooners.

- (b) Claimants contend that there were vessels enumerated by them in the third class arriving with coal cargoes which had been ordered by the railway company, and which were vitally necessary for the operation of its road. Such vessels were necessarily docked wherever there were appropriate facilities for the discharge of cargo, the use of which the contractual relations of the Grand Trunk Railway Company with the transatlantic steamship companies did not forbid. The learned proctor for the claimants urges that to have caused this class of vessels to wait in the stream before discharging their much-needed coal would have resulted in a reversal of the business of the Grand Trunk Railway. The same reasons which I have just stated in reference to class 2 prevail, and are conclusive as to class 3. When the bills of lading were made, there was nothing to call the attention of the contracting parties to the facts that these conditions existed, or would exist in the future. The parties cannot be held to have contracted with reference to them. They were not physical and actual conditions apparent to shippers, as in the case of the discharging facilities at the port of discharge. If the charterers desired to be relieved of precedence for this class of vessels, they should have so stipulated in the contracts.
- (c) The other classes of vessels which are claimed to have properly received precedence are cases where the agent of the Grand Trunk Railway, in acting as the agent of the consignees, to adopt the language of the learned proctor of the claimants, "used his best judgment as to the vessel that could be discharged without interference with its contract with the Dominion Coal Company." The evidence fails to present any reasons which justify the granting of precedence to any vessels other than those which are covered by the conclusions which I have stated. If the agent of the consignees used his judgment as to giving precedence in docking, such use of individual judgment can be no defense. If the consignees, or their agents, have given any precedence within the inhibition of the bills of lading, and within the conclusions to which I have arrived, then they have incurred the penalty of a double rate of discharge. All these matters are for the consideration of the assessor.
- 4. I find, then, that the consignees detained the two schooners, Helen W. Martin and Van Allens Boughton, in violation of their contract. I hold, therefore, that the libelants in each of these cases are entitled to recover. An interlocutory decree, therefore, may be entered for the libelants. An assessor may be appointed to report the damages sustained by the libelants in each case.

UNITED STATES V. STEARNS SALT & LUMBER CO.

(District Court, W. D. Michigan, S. D. November 16, 1908.)

Carriers (§ 38*)—Shippers—Offenses—Rebates.

Defendant was indicted in 20 counts, each charging the unlawful receipt of a rebate on an interstate shipment of a car load of lumber between certain points. Each count charged that the lawful freight rate was 11 cents, and that defendant, knowing such fact, delivered the lumber to the railroad's receiver for transportation and delivery to the consignee; that the lawful rate of 11 cents was charged to and collected from the consignee in the form of a freight rate of 7 cents, plus a fictitious advance charge of 4 cents, and that later at the end of the month such fictitious advance charge was returned to defendant as a rebate, and that defendant thereby accepted and received on the date of the payment of the rebate a concession, rebate, and discrimination of 4 cents per hundred. Held that, it being conceded that while there were 20 shipments there were but 6 relate payments, in accordance with monthly settlements, defendant was only guilty under such indictment of 6 offenses.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 38.*]

George G. Covell, Dist. Atty., and Wm. K. Clute, Asst. Dist. Atty., for the United States.

Victor M. Gore and Jacob Kleinhans, for defendant.

On Motion for New Trial.

KNAPPEN, District Judge. The respondent pleaded guilty to an indictment containing 20 counts, each charging the unlawful receipt of a rebate upon a shipment of a car load of lumber from Ludington, Mich., to Toledo, Ohio. A fine of \$20,000 was imposed as a punishment under the indictment as an entirety.

A new trial is asked upon the ground that the plea of guilty was entered under a misapprehension of law and fact on the part of the respondent, in that, while the shipments were 20 in number, there were in fact but 6 payments; the rebates on account of shipments during the current month being paid simultaneously in one item and by one draft at the end of the month. This fact is admitted by counsel for the government. The question is thus raised whether, under the indictment, the respondent could properly be convicted of more than six violations of the interstate commerce law.

The indictment alleges, in each count, that the published and lawful freight rate on lumber in car load lots from Ludington to Toledo was 11 cents, and that defendant knew it; that the lumber was delivered by defendant to the railroad's receiver for transportation and delivery to the consignee; that the lawful rate of 11 cents was charged to and collected from the consignee in the form of a freight rate of 7 cents, plus a fictitious advance charge of 4 cents; that later, and at the end of the month, the fictitious advance charge of 4 cents was returned to defendant as a rebate, and that thereby defendant accepted and received, at the date of the payment of said rebate, a "concession, rebate and discrimination" of 4 cents per 100 pounds. It will be noted

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the indictment does not in terms charge the commission by defendant of any offense in accepting or receiving a discrimination or concession with respect to the transportation of the lumber, except as such discrimination and concession is involved in the payment at the end of the month of the rebate in question.

It is thus not necessary to decide what the rule would be in case the indictment had in terms charged the acceptance of a discrimination at the time of the shipment (by way of agreement for the return and acceptance of the rebate, followed by such subsequent return and acceptance) although the decision of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of United States v. Standard Oil Company, 164 Fed. 376, apparently favors the proposition that even in such case the offense is not committed until the payment and receipt of the rebates, and that each payment constitutes but one offense. I am, however, constrained to hold (in accordance with the decisions of Judge Hough in the cases of United States v. Great Northern Ry. Co. [C. C.] 157 Fed. 288, and United States v. Central Vermont Ry. Co. [C. C.] Id. 291) that under the indictment as framed, and the admitted facts respecting the method of payment and settlement, the defendant was properly subject to conviction of but six violations.

In view of the conceded violations to this extent, the motion for new trial should not be granted. The conviction and judgment thereon will, however, be set aside upon condition that simultaneously therewith the defendant in open court formally plead guilty to six counts of the indictment, and submit to sentence thereon.

UNITED STATES v. BUNCH.

(District Court, E. D. Arkansas. December 14, 1908.)

No. 2,879.

1. Carriers (§ 38*)—Illegal Concessions—Construction of Statute.

Section 1 of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), in providing that "it shall be unlawful for any person, persons or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce," etc., describes three separate and distinct correlative offenses on the part each of carrier and shipper, to wit: (1) The offering or soliciting of a rebate, concession, or discrimination; (2) the granting or accepting of a rebate, concession, or discrimination; and (3) the giving or receiving of a rebate, concession, or discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 96; Dec. Dig. § 38.*]

2. Carriers (§ 38*)—Offenses by Shipper—Receiving Rebates—Elements of Offense.

To warrant a conviction of a shipper for receiving rebates in violation of section 1 of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), the fact of the payment of such rebate by or on behalf of the carrier, and its receipt by or on behalf of defendant, must

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be proved, and each payment constitutes but one offense, although it may cover more than one shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 96; Dec. Dig. § 38.*]

On Plea of Guilty.

Defendant was indicted for violation of the act of Congress approved February 19, 1903 (chapter 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), generally known as the "Elkins act." The indictment contains 58 counts, each of the counts charging that the defendant, a shipper, "did then and there, knowingly, willfully, and unlawfully accept and receive from certain railroad companies, common carriers engaged in interstate commerce, a rebate on a shipment made in a certain car," each count describing the car in which the shipment was made, the place whence shipped, as well as the place of destination, the published rate which was paid by the defendant, and the sum of money repaid to him as a rebate on each car. The defendant entered a special plea of guilty to counts 1, 12, 14, 15, 20, 21, 24, 25, 26 and 31, which plea is as follows:

"The defendant Tilghman H. Bunch for his special plea of guilty to counts 1, 12, 14, 15, 20, 21, 24, 25, 26, and 31, contained in said indictment, says that he is guilty as charged in counts 12, 14, 15, and 20; that each of said counts represents a separate shipment made on different dates; that the rebate, paid to defendant as alleged in the indictment represented by each of said four counts was made in one settlement, based upon one application and paid in one check, constituting one settlement in payment for four separate shipments, and, defendant claims, under the law, constituting but one offense: that he is guilty as charged in counts 21, 24, 25, 26, and 31; that each of said counts represents a separate shipment made on different dates from different places; that the rebate paid to defendant as alleged in the indictment represented by each of said five counts was made in one settlement, based upon one application and paid in one check, constituting one settlement in payment for five separate shipments, and, defendant claims, under the law, constituting but one offense."

The government accepted this plea, in writing, which is as follows:

"Comes the United States and accepts the defendant's plea of guilty on the aforesaid counts, and says that the facts stated in said special plea as to the number of shipments and the payment in settlement made by said Bunch in said count is true, but the government denies that said counts 12, 14, 15, and 20 constitute but one offense. As to counts 21, 24, 25, 26, and 31, the United States also concedes that the facts stated in regard to shipments and settlement in payment are true, but it maintains and avers that each one of said counts constitutes a separate and distinct offense."

As to the other 48 counts of the indictment, the government entered a

nol. pros.

This leaves, as the sole question to be determined by the court, whether under this indictment, which charges only the receipt of a rebate by the defendant when there were a number of shipments, but only one payment, in one draft, the government may split that one payment into as many offenses as there were separate transactions of carriage.

Wm. G. Whipple, U. S. Atty., Powell Clayton, Asst. U. S. Atty., and Edwin P. Grosvenor, Special Asst. U. S. Atty.

Moore, Smith & Moore, for defendant.

TRIEBER, District Judge (after stating the facts as above). The part of the Elkins act, under which this indictment is drawn, is as follows:

"And it shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive, any rebate, concession or dis-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes $165~\mathrm{F.}{-47}$

crimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to the said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination practiced. Every person or corporation who shall offer, grant, or give, solicit, accept or receive any such rebates, concessions or discriminations shall be deemed guilty of a misdemeanor," etc.

In the opinion of the court this act, in so far as it applies to the shipper, creates three distinct offenses: First, the soliciting of a rebate, concession, or discrimination in respect of the transportation of property in interstate or foreign commerce; second, the acceptance of any such rebate, concession, or discrimination; third, the receipt of such rebate, concession, or discrimination.

For a shipper to ask for a concession or rebate, although it may not be granted by the carrier, constitutes the offense of soliciting. The object of this part of the act clearly was to put a stop to the evil of shippers soliciting favors which would give them a concession, and thereby discriminate in their favor as against other shippers. Large shippers of freight, presuming on that fact, would approach freight agents or other officers of the carrier asking for concessions in rates, sometimes by direct, and at other times indirect, methods, whereby there would be discrimination in their favor as against other shippers, and threaten the withdrawal of their business if refused. In many instances carriers yielded to these solicitations rather than take the chance of losing valuable business. This is what is meant by solicit-

ing rebates and concessions which the statute seeks to forbid.

The prohibition to accept was intended to cure another evil. Freight agents, anxious to secure business for their road, and at the same time build up reputations for themselves as men able to secure large shipments, would offer concessions to large shippers, sometimes agreeing to pay the rebates or concessions out of their own salaries or commissions. Congress, in order to prevent such discriminations, which could only benefit the large shippers—for the business of the small shipper was not sufficient to justify such offers—not only made it an offense for the carrier to offer them, but also made it an offense for their employés to make the offer and the shipper to accept them. In order to make the prohibition more effective and prevent the carrier from enjoying the fruits of these acts by disclaiming all knowledge of the unlawful acts of its agents, who, it might be claimed, paid such rebates out of their own salaries, and, no doubt, also for the purpose of removing any doubt as to the construction to be placed on the statute, Congress, in the act, provided for the construction of this part of the act by inserting the following provision:

"In construing and enforcing the provisions of this section the act, omission or failure of any officer, agent or other person acting for, or employed by, any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as that of the person."

To warrant a conviction on a charge of accepting a rebate, concession, or discrimination, it is unnecessary to charge or prove the pay-

ment or receipt thereof. As I construe that part of the act, it is sufficient if it is shown that the concession was offered by the carrier, or his agent, and by the shipper accepted. The fact that the carrier, after the offer had been made by it and accepted by the shipper, refused to make payment of the rebates, would not prevent a conviction under an indictment charging the shipper with the acceptance of such an offer, the acceptance of the offer being the gist of the offense.

The third offense is that of receiving a rebate or concession. Under this provision it is wholly immaterial whether the rebate was paid in pursuance of a former agreement or without such understanding. The offense is completed when the shipper receives a rebate or concession from the published rates. In Standard Oil Company v. United States (C. C. A.) 164 Fed. 376, the Circuit Court of Appeals for the Seventh Circuit, upon an indictment which charged the defendant with "accepting and receiving a concession," the court held that until the consummation of the agreement there is no offense. The high regard and deference which the opinions of the learned judges of that court command have invoked a careful and deliberate consideration of the reasons they give for their views, but if these reasons are not convincing their conclusions are not conclusive on this court. Judge Grosscup, who delivered the opinion of the court, in the course of it, in so far as it is applicable to the second proposition hereinbefore stated, said:

"Manifestly, the offense of accepting a rebate is not committed until the shipper has taken part of the freight money whereby his property has been transported at less than the lawful rate. Proof that he agreed to accept a return of a part of the full rate, stopping there, would not support an indictment for accepting a rebate. Such agreement is not binding, and at any time before its complete fulfillment the shipper may repent and insist upon the carrier's keeping the whole amount. The concession differs from the rebate only in this: that in the concession the shipper, instead of paying the full rate and receiving back part, merely settles for the difference. The result is the same—the property is transported for the same net amount less than the lawful rate. And there is no basis in the statute for holding that in the case of accepting a concession the transaction is consummated, and the door of repentance is closed, at any earlier moment than in the case of accepting a rebate. So proof that a shipper has agreed to accept a concession—stopping there—whether the proof be embodied in waybills, or by the entries, or formal contracts, will not support an indictment for accepting a concession until the intended wrong becomes an accomplished fact."

Judge Baker, in his concurring opinion in that case, said on that point:

"Does any ambiguity arise because the words 'to give' and 'to receive' are also used? "To offer' and 'to solicit' characterize the inchoate act. The completed act that is condemned is for the carrier 'to grant or give' and the shipper 'to accept or receive.' Ordinary and accepted meanings of 'give' and 'receive' are synonymous with those of 'grant' and 'accept.' As all those words appear in the same phrase of the same sentence, the principle of ejusdem generis forbids their being taken to indicate acts of antagonistic quality."

If this is a correct construction of the act, then the words "offer," "grant," and "solicit" are superfluous, and are not to be considered in the enforcement of this statute. Such an interpretation is in violation of the well-settled maxim that "all the words of a law must have effect rather than part should perish by construction." Platt v. Union

Pacific R. R. Co., 99 U. S. 48, 58, 25 L. Ed. 424; Montelair Twp. v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431; Knox County v. Morton, 15 C. C. A. 671, 675, 68 Fed. 787, 790; Wrightman v. Boone County, 31 C. C. A. 570, 572, 88 Fed. 435, 437; United States v. Ninety-Nine Diamonds, 72 C. C. A. 9, 139 Fed. 961, 963.

In Platt v. Union Pacific R. R. Co. it was held:

"Congress is not to be presumed to have used words for no purpose.

* * * But the admitted rules of statutory construction declare that a Legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute."

In Armour Packing Company v. United States, 82 C. C. A. 143, 151, 153 Fed. 1, 9, 14 L. R. A. (N. S.) 400, although the indictment was not for the same offense as is charged in this case, Judge Sanborn, who delivered the opinion of the court, said:

"But the fact is noted in passing that the giving or receiving a concession whereby property is transported at a less rate than that established is not the only offense created by this act, but also the giving or receiving any concession whereby any other advantage is given or discrimination practiced."

And the Supreme Court, when reviewing the same case, although declining to pass upon that phase of the act, saying, "We are not now concerned with the construction of the act in making provision for punishing the carrier or shipper for offering, granting or giving, or soliciting, accepting or receiving rebates, concessions, or discriminations irrespective of actual transportation," expressly held that:

"The penal section is not only aimed at offenses whereby property is transported in interstate commerce at lower than published rates, but in terms covers the offering, granting, giving, soliciting, accepting, or receiving of rebates, concessions, or discriminations whereby any other advantage is given or discrimination is practiced in respect of interstate transportation." 209 U. S. 56, 74, 28 Sup. Ct. 428, 432, 52 L. Ed. 681.

The counts of this indictment to which pleas of guilty have been entered all charge the defendant with accepting and receiving certain sums of money as rebates; each count specifying the exact amount paid in accordance with the published tariff rates, and the amount thereafter refunded; each count covers one car load of merchandise shipped on a certain day from one place to another. Although these shipments were made at different times, the plea alleges, and the government admits, that the payments of the rebates for the shipments set out in counts 12, 14, 15, and 20, and for the shipments set out in counts 21, 24, 25, 26, and 31, were each made at one time and by one check—that for the shipments in counts 12, 14, 15, and 20 on the 9th day of October, 1905, and on the other counts, 21, 24, 25, 26, and 31, on the 21st day of September, 1905.

As the gravamen of the offense charged in all of the counts is the acceptance and receipt of the money paid as a rebate, and not the acceptance of a concession, there could be no violation of that part of the act until it is shown that the money intended as a rebate was actually paid. If the railroad company had refused to pay the rebate, although it had expressly agreed to do so, the defendant clearly could not have been convicted of receiving a rebate, although he might be guilty of the act of having solicited it or accepted a proposition to have his ship-

ments carried at a concession, and the payment of a rebate to be paid after the carriage of his shipment had been completed and the published tariff charges paid. That the rebate was solicited, or an agreement entered into to accept rebates on shipments when made, are immaterial, for none of these counts charges such violation of the statute. To sustain a conviction for receiving rebates, the fact of the payment by or in behalf of the carrier, and the receipt of it by or for the use and benefit of the defendant, must be established. As there were only two payments to the defendant on these nine counts, and he only received two rebate checks, there were only two offenses committed under the indictment as framed, charging the receiving of rebates.

While the Supreme Court has never directly passed upon this question, yet this conclusion may be deduced from what was said in Armour Packing Co. v. United States, supra. One of the issues in that case was, in what district the prosecution should have been instituted. The statute permitted a prosecution in "any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted." It was contended that the offense could only be tried in the courts of the districts of the termini of the shipment, but this was overruled by the court, the court saying:

"It does not follow from this view of the character of the offense that a single transportation of goods can be made the basis of repeated separate criminal charges in each of the districts through which the transportation at an illegal rate is had. Take the case at bar. The charge is of a single, continuous carriage from Kansas City to New York at a concession from the legal rate for the part of the carriage between the Mississippi river and New York of 12 cents for each 100 pounds so transported. This is a single, continuing offense, not a series of offenses, although it is continuously committed in each district through which the transportation is received at the prohibited rate." 209 U. S. 76, 77, 28 Sup. Ct. 433, 52 L. Ed. 681.

So in the case at bar, each shipment under agreement or promise of rebate might probably be treated as a separate offense, and prosecuted as such under that provision of the act which prohibits the acceptance of a concession or rebate. But when the pleader sees proper to charge the receipt of a rebate, which means the receipt of the payment of the rebate after the carriage had been concluded and the published rate paid by the shipper, then each payment constitutes an offense, and, although each payment includes a number of concessions, it is only a single offense. Supposing that the government had been unable to prove the payment and its receipt by the defendant, or to some person for his use; could it be contended that there could be a conviction under an indictment charging, as this indictment does, "that the defendant received and accepted a certain sum of money as a rebate on a certain shipment," even if there was evidence of an agreement between the shipper and carrier for a rebate or concession, and the shipments had been made under that agreement? Clearly not, for in that event the defendant would be convicted of an offense with which he was not charged in the indictment.

In United States v. Great Northern R. R. (C. C.) 157 Fed. 288, and United States v. Central Vermont Ry. Co. (C. C.) 157 Fed. 291, Judge Hough had before him this same question, and he held in the

first case that each separate payment is properly the subject of a separate indictment or count; and in the second case:

"If there was, in fact, but one payment, although many items of goods carried, I adhere to the opinion that there should be but one penalty inflicted for the illegal transaction, i. e., the ultimate offense of unlawful payment."

The same conclusion was reached by Judge Knappen in the Western district of Michigan in United States v. Stearns Salt & Lumber Co. (D. C.; decided November 16, 1908) 165 Fed. 735. In that case the facts were practically identical with those in the case at bar. There were two shipments, but the rebates were paid simultaneously in one draft. Judge Knappen, in his opinion, calls attention to the same distinction made herein. He said:

"It will be noted that the indictment does not in terms charge any commission by defendant of any offense in accepting or receiving a discrimination or concession with respect to the transportation of the lumber, except as such discrimination or concession is involved in the payment at the end of the month of the rebate in question. It is thus unnecessary to decide what the rule would be in case the indictment had in terms charged the acceptance of a discrimination at the time of the shipment by way of agreement for the return and acceptance of the rebate, followed by such subsequent return and acceptance."

These decisions meet with my approbation, and therefore I hold that the defendant can only be held guilty of three offenses under his plea to the first count, one offense on counts 12, 14, 15, and 20, and one offense on counts 21, 24, 25, 26, and 31.

UNITED STATES v. NEW YORK, N. H. & H. R. CO. et al.

(Circuit Court, D. Massachusetts. December 4, 1908.)

No. 483.

1. CONSTITUTIONAL LAW (§ 209*)—"DUE PROCESS OF LAW"—"EQUAL PROTECTION OF LAWS."

There is a substantial distinction between the fifth amendment of the federal Constitution, which is obligatory only on the United States, and secures due process of law, and the fourteenth amendment, which is obligatory on the states and prohibits the denial of the equal protection of the laws; the latter expression being broader than the former, though the mere denial of equal protection of the laws may run into the other limitation. Mere discrimination, however, does not necessarily have that effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 678, 727; Dec. Dig. § 209.*

For other definitions, see Words and Phrases, vol. 3, pp. 2227–2256, 2423–2426; vol. 8, p. 7644.]

2. CONSTITUTIONAL LAW (§ 314*)—COURTS—ESTABLISHMENT—DUE PROCESS OF LAW.

Act Cong. Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951), providing that in any equity suit, in any federal Circuit Court, to protect trade and commerce against unlawful restraints and monopolies, the Attorney General may file a certificate of importance, whereupon the case shall be given precedence, and shall be heard by not

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

less than three Circuit Judges, or, if there are only two Circuit Judges in the circuit, then before them and such District Judge as they select, though discriminatory, is not unconstitutional.

Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 934; Dec. Dig. § 314.*]

3. Constitutional Law (§ 259*)—Due Process of Law.

"Due process of law" does not prohibit the establishment of special commissions or the assignment of special judges for the trial of a specific offender, so long as there is a compliance otherwise with the rules of the common law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 259.*]

4. Constitutional Law (§ 251*)—"Due Process of Law"—"Law of the LAND.

The expressions "due process of law" and "the law of the land" are synonymous.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 732; Dec. Dig. § 251.*

For other definitions, see Words and Phrases, vol. 8, pp. 7701, 7702.]

In Equity.

Asa. P. French, U. S. Atty., and Wade H. Ellis, Asst. Atty. Gen., for the United States.

Henry W. Beal, for defendants, New York, N. H. & H. R. Co., Consolidated Ry. Co., and Providence Securities Co.

Coolidge & Hight and Edgar T. Rich, for defendant Boston & M. **R**. R.

- F. A. Farnham, for defendant Providence Securities Co.
- J. H. Benton, for defendants New York, N. H. & H. R. Co. and Providence Securities Co.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This is a bill filed by the United States by virtue of the provisions of the act approved July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), commonly known as the "Sherman" or "Anti-Trust Act," and perhaps of statutes in amendment thereof. After the bill had been filed and the subpæna issued, and certain demurrers and pleas filed by the whole or a portion of the respondents, and on October 1, 1908, the Attorney General filed the following certificate:

"In the Circuit Court of the United States for the District of Massachusetts. "No. 483, In Equity.

"The United States, Petitioner, v. The New York, New Haven and Hartford Railroad Company et al.

"I hereby certify that, in my opinion, the above-entitled case is of general public importance, and request that the same be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day before not less than three Circuit Judges of the First Judicial Circuit. [Signed] Charles J. Bonaparte. "Attorney General of the United States."

^{*}For other cases see same topic & \ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thereupon, and with sufficient promptness, to wit, on October 20, 1908, the respondents filed the following paper, namely:

"Circuit Court of the United States for the District of Massachusetts.
"No. 483, In Equity.

"The United States of America, Complainant, v. The New York, New Haven and Hartford Railroad Company, and others, Defendants.

"Objection to hearing this case before not less than three Circuit Judges of the First Judicial Circuit,' as requested by the Attorney General of the United States.

"The defendants object to the hearing of this case 'before not less than three Circuit Judges of the First Judicial Circuit,' as requested by the Attorney General of the United States in his certificate filed October 1, 1908, for the following, among other, reasons:

"First. Because such three Judges sitting for the hearing of this case, as thus requested, will not be an inferior court ordained and established by the Congress of the United States, within the meaning of the Constitution of the United States. and especially within the meaning of section 1, art. 3, Constitution of the United States.

"Second. Because it is not competent for the Congress under the provisions of the Constitution of the United States to authorize the hearing and determination of this cause by three Circuit Judges in the manner requested by the Attorney General in his said certificate.

"Third. Because the three Circuit Judges who are requested by the Attorney General to hear and determine this cause have no jurisdiction thus

to hear and determine it.

"Fourth. Because this cause being brought and now pending in the Circuit Court of the United States, and the parties being by proper pleadings at issue therein, the same cannot be transferred to the jurisdiction of three Circuit Judges and be by them tried as a special tribunal upon the discretionary request of the Attorney General of the United States."

The proceedings with reference to determining the jurisdiction and organization of the courts of the United States are so simple and informal that we need not consider at all whether there is any particular method by which the respondents should raise the propositions which the paper copied seeks to raise, beyond stating that there is no question that none of the issues have been waived, or lost, either by express or implied estoppel, or otherwise.

The statute by virtue of which this certificate of the Attorney General was filed, namely, section 1 of the act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951), reads as follows:

"That in any suit in equity pending or hereafter brought in any Circuit Court of the United States under the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An act to regulate commerce,' approved February 4, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the Circuit Judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the Circuit Judges of said circuit, if there be three or more; and if there be not more than two Circuit Judges, then before them and such District Judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme

Court for review in like manner as if taken there by appeal as hereinafter provided."

In order that the issues may be understood, we will state that the respondents do not maintain that a statute having a general application, providing that for certain purposes the Circuit Court may sit with three judges, would be invalid. Their proposition is that the statute in question is so framed that it is limited to a particular class of cases, and operative only at the request of the United States, and can never be called on by a respondent, and never by either party in suits brought by others than the United States. There can be no question that this makes an apparent discrimination, yet we are unable to perceive that it is injurious to the respondents, or any other possible respondents, in any legal sense of the word. The interests involved under the Sherman anti-trust act and its amendments are liable to include exceedingly extensive pecuniary values; and the possible remedies given thereby, which combine, with the rest, the powers, express or implied, of issuing injunctions, and of appointing receivers, and declaring forfeitures, all relating to vast properties, are of so radical a character that a hasty or inapt administration of the statute by a single judge might inevitably embarrass industries as wide as the continent, and even practically destroy them, before an appellate tribunal could be reached. Therefore, we say the statute under which the Attorney General filed his certificate is not injurious, because, on the whole, when availed of, it operates for the protection of the interests of respondents more than for those of the United States. From the standpoint of the substantial effect of the statute, the only complaint that could apparently be made is that it is meritorious, but does not go so far as it might. Nevertheless, in the eyes of the law, when legislation is discriminatory, if it is both discriminatory and unconstitutional, it is the right of parties litigant to determine for themselves what their interests are, and object to it if they see fit so to do.

It certainly cannot be maintained that the statute under which the Attorney General acted is unconstitutional merely because it is discriminatory. We can find neither in the Constitution, nor in the fundamental principles which underlie free government where the English language is spoken, any inhibition on Congress with reference to the matter now before us, unless it be in that part of the fifth amendment which secures "due process of law." Even if there were any constitutional provision applying to Congress like the fourteenth amendment. which in terms prohibited the United States from denying "the equal protection of the laws," nevertheless, even then it would follow that there might be legislation discriminatory on its face, yet constitutional because of the broad rules which have been admitted by the Supreme Court with reference to legislation sustainable by reason of classification. It is, however, necessary to observe the substantial distinction between the fifth amendment, which is obligatory only on the United States, and the fourteenth amendment, which is obligatory only on the The limitation in the former is "without due process of law." In the fourteenth amendment this limitation is accompanied with a prohibition of the denial of the "equal protection of the laws." Of course, the latter expression is broader than the former, although it must be

conceded that the mere denial of the "equal protection of the laws" might run into the other limitation. It is plain, nevertheless, that mere discrimination in certain particulars does not necessarily have this ef-"Due process of law," as understood when the Constitution was adopted, did not prohibit the establishment of special commissions or the assignment of special judges for trying specific offenders so long as there was compliance otherwise with the rules of the common law. Neither does it always entitle persons claiming mere civil rights to adjudications by strictly judicial tribunals. This was established as early as Murray's Lessee v. Hoboken Land Improvement Company, 18 How. 272, 15 L. Ed. 372, and indeed earlier, followed by Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70; and, finally, by the extreme case of United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. There are still other decisions of the Supreme Court of the same class, which, with those cited, show that the expression "due process of law" may cover a great variety of tribunals, judicial and quasi judicial. So it is clear that there may be a great variety of methods of procedure. Nevertheless, that there is somewhere a limitation is brought out in a marked way by a citation from Mr. Justice Catron of expressions used by him when sitting in the Supreme Court of Tennessee, and, of course, before the adoption of the fourteenth amendment, and approved in Cotting v. Kansas City Stockyards Company, 183 U. S. 79, 105, 22 Sup. Ct. 30, 41, 46 L. Ed. 92, as follows:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law by another."

Of course, there is a middle ground, which it may not always be easy to find, because there may be, as intimated in the quotation from Mr. Justice Catron, circumstances under which what appears to be in form a mere change of procedure would in fact discriminate in a manner which did direct injustice, or which operated in an injurious way to burden or obstruct the obtaining of justice by a particular individual or corporation. Yet, in the fourth edition of Story on the Constitution, in the sections added to cover the late amendments, the language of Mr. Webster was quoted as follows:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

It is settled that the expressions "due process of law" and "the law of the land" go strictly hand in hand. We understand this quotation from Mr. Webster appeared first in section 1944 of the fourth edition of Mr. Justice Story's work, and that this section was drafted by Judge Cooley, who knew as well as any one what was fit language for this purpose. We can safely adopt it for the purposes of this case.

In Twining v. New Jersey (in an opinion announced November 9, 1908), 29 Sup. Ct. 14, 53 L. Ed. — Mr. Justice Moody has considered

thoroughly, from both historical and legal points, the meaning of the expression "due process of law"; but we have no occasion for this case to quote from him.

Following out the limitations expressed by Mr. Webster pro and con, whatever might be said if the special organization of the court required by the statute here discriminated against the respondents, or other individuals or corporations situated in a similar condition, to such an extent, or in such way, as to be injurious in the eye of the law, or as to burden the defense thus injuriously, it might well be regarded as such a denial of equality that it would amount in a constitutional sense to a denial of "due process of law." As, however we can see nothing here of this nature but in lieu thereof as we have already said, a partial, if not complete, protection to all concerned against hasty or indiscreet judgments of courts consisting of a single judge, we can find nothing which, in a constitutional sense, distinguishes this from the ordinary class of legislation by virtue of which federal courts may be held by one or two judges, or even by judges out of the district.

Coming to authorities bearing more directly on the situation before us, we call attention to Cincinnati Street Railway Company v. Snell, 193 U. S. 30, 24 Sup. Ct. 319, 48 L. Ed. 604, which seems to be so strictly analogous to the case at bar that we are unable to distinguish them so far as any substantial question is concerned. The case arose under the fourteenth amendment, broader in its limitations than the fifth amendment, and yet it involved a discrimination of precisely the character which we have here. There, as explained at pages 33 and 34 of 193 U. S., at page 821 of 24 Sup. Ct. (48 L. Ed. 604), the statute provided that the venue might be changed on the mere motion of the plaintiff in a suit against a corporation, accompanied with a purely ex parte affidavit of five persons residing in the county, while the corporation had no corresponding right, and no corresponding right existed in behalf of any plaintiff in any suit against individuals. The constitutionality of the law was sustained, and several cases cited as furnishing analogies which we need not explain in detail. It seems impossible here to escape the conclusions of the principal case, or like conclusions in United States v. Union Pacific Railroad Company, 98 U. S. 569, 25 L. Ed. 143, where there were very sweeping provisions for the exercise of a peculiar jurisdiction, limited entirely to that particular suit. The legislation was sustained, and, at page 607 of 98 U. S. (25 L. Ed. 143), the following is found in the opinion:

"But whatever be the relief asked, it could only, by the express terms of the act, be granted to that party who was in equity thereunto entitled. It is very plain that there was here no new right established, no new cause of equitable relief, no new rule for determining what were the rights of the parties. That was to be decided by the principles of equity, not new principles of equity, but the existing principles of equitable jurisprudence."

This was not in any sense a dictum, but it was necessary to the decision of the case, which seems to us to fully sustain the statute in question here, so far as it is now before us.

Some propositions made by the respondents can only be accepted as maintaining that the statute before us in effect covers an attempt to create a special court. This would not necessarily raise any question

as to "due process of law," because, as we have said, special courts were everywhere known under the common law of England; yet it would, of course, involve a peculiar question arising solely under the Constitution of the United States—that of the power of Congress to establish a special court for a particular case or a particular class of cases. If this proposition is now insisted on, it is decided against the respondents by In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409, wherein was brought in question the constitutionality of a statute providing that the Circuit Court for the Southern District of New York might be held by three judges for the purpose of determining criminal cases. If the present statute creates a special tribunal, so did that statute; and there is no fundamental difference between the nature of the legislation so far as that particular topic is concerned. We find no word in the statute indicating such an intention here. We are clear in reference to this point.

On the whole, while the legislation is apparently discriminatory, it seems plain to us that it does not contravene any provision of the Constitution of the United States limiting the powers of Congress, and especially that it does not in any way deprive the respondents of "due

process of law."

The attorneys for the United States have cited to us several cases where a certificate has been filed by the Attorney General like that before us, and in which three or more judges have sat as provided in the statute under investigation. The most important of them all was Northern Securities Company v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. This case was one involving vast interests, and was argued by very eminent counsel, including Mr. Attorney General Knox in person. In none was there any suggestion of any difficulty like that now brought to our attention. It is true that this could hardly be regarded as an authoritative fact, because no issue was made in reference thereto; but it enables us to rest more easily on the conclusion which we have reached.

The court having considered the certificate of the Attorney General filed on October 1, 1908, and the suggestions of the respondents in reference thereto, filed on October 29, 1908:

It is ordered that this case proceed in accordance with the certificate of the Attorney General, filed on October 1, 1908, pursuant to the first section of chapter 544 of the act approved on February 11, 1903, so far as that statute relates to the personality and the number of the judges to sit therein.

NOTE BY THE COURT.—While this opinion was in preparation the decision of the Circuit Court for the Third Circuit in United States v. Delaware & H. Co., 164 Fed. 215, came to hand. This decision related to several cases which were proceedings by the United States, under the so-called "commodities clause" of the interstate commerce statutes, against the various coal-carrying railroads in Pennsylvania. Three Circuit Judges sat, namely, Dallas, Gray, and Buffington; and a statement made by Judge Gray in his opinion in behalf of the court illustrates in a striking manner the vast interests which may be involved in this class of litigation, and the great detriment which

would come, not only to corporate property, but to the public at large, by an inapt decision, and particularly the reason for a requirement that Congress should give to respondents in proceedings by the United States a like right of demanding a conservative tribunal of three judges which is now given to the Attorney General. The opinion, at page 225 of 164 Fed., said as follows:

"It results, therefore, that the coal described in the foregoing categories is outlawed in interstate commerce, and must remain so, unless the defendants can divest themselves of all title or interest in the coal, coal lands, or coal companies from which the markets in other states have been so largely supplied. The enforcement of the act must, of necessity, result, either in the defendants holding their coal properties and refraining from transporting coal to other states, and confining themselves to the mining of such coal as may be used in the state of Pennsylvania, or in their divesting themselves of all title or interest, direct or indirect, in said properties, by sale or surrender thereof, as they may be able to accomplish the same. The population of the region, outside of Pennsylvania, absolutely dependent upon the use of anthracite coal for domestic or industrial purposes, is very large, and has been, no doubt moderately, estimated at from 12,000,000 to 15,000,000. The adoption of the former alternative, therefore, would entail, while it continued, an amount of suffering and deprivation that it is hard to forecast or appreciate, while the forced resort to the other would necessarily inflict upon the defendants and their stockholders a most disastrous sacrifice and pecuniary loss."

In re F. DOBERT & SON.

(District Court, W. D. Texas, Austin Division. December 18, 1908.)

No. 472.

1. PARTNERSHIP (§ 244*)—DEATH OF PARTNER—DUTY OF SURVIVING PARTNER.

The death of a partner dissolves the firm, and it is the duty of the surviving partner to close out the business and pay the firm debts, accounting to the heirs or representatives of the deceased partner for their interest in the surplus assets.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 509–513; Dec. Dig. § 244.*]

2. Partnership (§ 245*)—Dissolution—Possession of Assets.

A surviving partner is entitled to the exclusive possession and administration of the firm assets.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 514-518; Dec. Dig. § 245.*]

3. Partnership (§ 244*)—Assets—Representatives of Deceased Partner.

Neither the heirs nor personal representatives of a deceased partner are entitled to any part of the partnership assets until after payment of firm debts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 511; Dec. Dig. § 244.*]

4. EXECUTORS AND ADMINISTRATORS (§ 44*) — ASSETS—INTEREST OF DECEASED PARTNER.

The administration of a partnership estate being confided to the surviving partner, the county court in the administration of the deceased partner's estate has no control over the partnership assets.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 295; Dec. Dig. § 44.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. EXECUTORS AND ADMINISTRATORS (§ 181*) — PARTNERSHIP ASSETS — ALLOW-ANCE TO WIDOW AND CHILDREN.

The county court has no jurisdiction to set aside allowances to the widow and children of a deceased partner out of any part of the partnership assets, except the residue after payment of firm debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 681; Dec. Dig. § 181.*]

6. PARTNERSHIP (§ 249*)-DISSOLUTION-INTEREST OF DECEASED PARTNER.

A deceased partner's estate is entitled to the same interest in the residue after payment of firm debts as the deceased partner had in the firm in his lifetime.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 529-535; Dec. Dig. § 249.*]

7. EXECUTORS AND ADMINISTRATORS (§ 181*) — ALLOWANCES TO WIDOW AND CHILDREN.

Under Rev. St. Tex. 1895, arts. 2037–2062, providing for allowances to the widow and children of a decedent, such allowances can be made only out of property, inventoried and appraised and under the control of the county court, which it is authorized to sell.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685; Dec. Dig. § 181.*]

8. BANKRUPTCY (§ 149*)—BANKRUPT FIRM—RIGHTS OF PARTNER.

Since, under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565, 566 (U. S. Comp. St. 1901, p. 3451), on an adjudication of bankruptcy against a firm, the firm property vests in the trustee in bankruptcy, the surviving partner thereafter has no power to consent to an allowance to the widow and children of the deceased partner out of the assets of the firm prior to the payment of the firm debts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. § 149.*]

In Bankruptcy.

Mrs. Albertina Dobert, for herself and children, has filed a petition to review the order of the referee, declining to set aside to them, as the widow and children of Frank Dobert, deceased, certain statutory allowances. The following opinion of the referee, Franz Fiset, Esquire, embodies the material facts of the case:

"An involuntary petition in bankruptcy was filed on February 3, 1908, against the firm of F. Dobert & Son, and against Frank Dobert and Joseph Dobert, its members, as individuals. On February 5th the said partnership, and its members as individuals, filed a voluntary petition. Frank Dobert died on February 6, 1908. On February 13, 1908, an adjudication of the firm and its members was had on the voluntary petition. Albertina Dobert, the widow of Frank Dobert, deceased, seasonably filed an application for an allowance for herself and minor children for one year's support, and, in behalf of herself, minor children, and an adult unmarried daughter residing with the family, for an allowance in lieu of certain personal property exempted by the laws of Texas to a family, but not on hand at the time of the death of Frank Dobert.

"In addition to the foregoing, the following facts are pertinent to the disposition of said application: The partnership owns assets, but wholly insufficient to pay the partnership debts. Joseph Dobert has no individual estate, aside from exemptions. Frank Dobert left no individual estate except a homestead exempt by the laws of Texas, and certain of the personal property also exempted by the laws of Texas. Such exempt personal property as he did not own is of the reasonable value of \$500. Frank Dobert at the time of his death left surviving him, as constituent members of and residing with the family, Albertina Dobert, his widow, and their four children: Frank, age 21 years on April 21, 1908; Will, 18 years old; Lillie, 16 years of age;

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and Bettie, age 24 years and single. The widow, by the death of her husband, became entitled to \$9,000 from life insurance, \$3,000 of which has been collected at the time of filing of the application for allowances. At the hearing that part of the application praying for a year's support for the widow was abandoned.

"Will Dobert owns a wage priority claim against the bankrupt firm of \$150, and an unsecured claim for \$182.10. Otherwise the children own no individual property. Frank and Will Dobert had been clerking prior to the death of their father, and were emancipated from his control over their earnings. The sum of \$25 per month for the support of Will Dobert, and \$30 for Lillie Dobert, is a reasonable amount. Frank Dobert, it is agreed, is only entitled to support to the time of his majority on April 21, 1908; and \$25 per month to that time is reasonable. The application prays for an allowance of \$500

in lieu of exempt property, and for support as above indicated.

"The application for said allowances is based on section 8 of the bankruptcy act, which reads: 'The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: Provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrunt's residence.' The probate laws of the state of Texas with reference to allowances require that the court shall fix an allowance for the support of the widow and minor children of the deceased of not exceeding \$1,000, but in an amount sufficient for their maintenance for a term of one year from the time of the death of the testator of intestate (articles 2037, 2038, Rev. St. Tex. 1895), and that it be paid in preference to all other debts or charges against the estate, except the laneral expenses and expenses of last sickness of deceased. * * Article 2044, Rev. St. Tex. Under articles 2046 and 2047, Rev. St. Tex., it is the further duty of the court to set apart for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased all such property of the estate as may be exempt from execution or forced sale, and to make a reasonable allowance in lieu of such of the specific articles so exempted which are not among the effects of the de-

"The estate of Frank Dobert has no assets out of which any of the statutory allowances above mentioned and now applied for might be made. The partrership of Frank Dobert & Son, bankrupts, owns a sufficiency of assets to pay the amounts prayed for, but only at the expense of, and to the serious detriment of the partnership creditors. The surviving partner, Joseph Dobert, bankrupt, agrees, by instrument filed, that the allowances may be made out of the firm assets.

"The only question to be determined is, whether or not the assets of the firm of Frank Dobert & Son, bankrupts, may be resorted to for the purpose of making the allowances in the application contended for. The statutes of the state of Texas are silent on the subject, and it does not appear that any judicial decision has ever directly settled the point involved, although it has been held that allowances must be raised solely from the estate of the decedent, and from no other estate. Hoffman v. Hoffman, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471.

"The fundamental law, as recognized in Texas, concerning partnership property, and particularly its status at the time of the death of one of the partners, will indicate where the ownership of that property lies, and what rights, if any, the heirs or representatives of the deceased partner may assert against it. Bates on Partnership says: 'A partner has no specific interest in any particular chattel or asset or part of the property of the firm; his only interest is in a proper proportion of the surplus of the whole after payment of debts, including the amounts due the other partners.' Bates, par. 180. 'The capital, in whatever shape contributed, becomes at once the property of the firm, and is no longer individual property.' Bates, par. 256. 'A partner owns the partnership property, and all of it, but subject to a like ownership on the part of all the other partners.' Bates, par. 274. This doctrine is recognized in Texas in the case of Moore v. Steele, 67 Tex. 435 (439) 3 S. W. 448; Warren v. Wallis, 38 Tex. 228. The individual exclusive dominion over property ceases

on the formation by the owner of a partnership to which it is contributed, and each partner is then given the same right in and dominion over all the partnership property that the respective owners had prior to the time it became partnership property. The notion of a partnership as a distinct entity clarifies the peculiar character of possession and ownership, as we readily understand from it that the original individual rights to property are yielded up to the new entity, the partnership. While the formation of a partnership creates the ownership and dominion as stated, yet during the life of all the partners the ownership of the property does not, under all circumstances, remain so inflexibly. The partnership exists under and by virtue of a contract, and such contract, like any other, may be changed, and property may be added to or taken away from the firm assets. To this inherent right of the partners inter sese we will refer again presently. When a partnership is dissolved by the death of a member, other distinct fundamental principles are, eo instante, brought into operation. As the original formation of a partnership is based on the delectus personarum, the law provides that on the death of one partner no heir or legal representative of the decedent shall take his place in the partnership, but the surviving partner for the purpose of winding up its affairs is at once vested fully and completely with the legal title and ownership of all the property theretofore owned by the partnership. The duty of the survivor is to take exclusive, sole possession of all the partnership property, to realize on it, and to apply its proceeds first to the payment of all partnership debts, and then to account to the representatives of the deceased partner for the share of the decedent in the net surplus of the property, based on the original net interests of the partners in the firm. The right of the survivor is to perform these obligations untrammeled by the interference of probate court, heirs or legal representatives. The only right of the heirs and legal representatives against the surviving partner is to have an accounting after the payment of all debts. The above propositions are those of the text-books, and are approved by the courts generally, including those of Texas. Bates on Partnership, par. 718-731; Woerner's American Law of Administration, par. 124; Rogers v. Flournoy, 21 Tex. Civ. App. 556, 54 S. W. 386; Akin v. Jefferson, 65 Tex. 137 (144); Crescent Insurance Co. v. Camp, 64 Tex. 521 (527, 528); Shields v. Fuller, 4 Wis. 102, 65 Am. Dec. p. 293, and note on page 295; Bush v. Clark, 127 Mass. 111.

"Applying the foregoing to the case at bar: Joseph Dobert, as surviving partner, succeeded to the title and the possession of all the partnership property for the purpose of paying all partnership debts and accounting to the representatives of the deceased partner for the pro rata of the surplus, if any was due them. The assets as such, prior to the payment of debts and prior to the accounting, are no part of the estate of the decedent. Neither are claims for allowances in any sense debts against the firm. Consequently, no allowances can be made out of the partnership assets prior to the time that, on final accounting by the survivor, a net surplus over and above all partnership debts is found to be due and owing to the estate of the decedent—an eventuality that cannot occur, the partnership being insolvent. See Woerner, Am. Law of Administration, par. 127, p. 293.

"The holder of collateral security or pledge given by a decedent in his lifetime, under repeated decisions in Texas, has the right to satisfy his debt out of the collateral or pledge before he can be required to enter or yield up to the probate court his security for any purpose. See Huyler v. Dahoney, 48 Tex. 234; Williams v. Lumpkin, 74 Tex. 601, 12 S. W. 488; also Andrews v. Union Cent. Life Ins. Co., 92 Tex. 584, 50 S. W. 572; Fulton v. National Bank of Denison, 26 Tex. Civ. App. 115, 62 S. W. 84. This recognizes the severance of the collateral or pledge, by delivery, from the estate of the debtor. It belongs, sub modo, to the holder. The applicability of this doctrine to partnership property in the hands of the survivor is obvious and cogent. No act on part of the survivor in agreeing to an allowance to be made out of the partnership property, as is attempted by the instrument filed in this case by Joseph Dobert, can change the obligation of the survivor; he cannot denude himself of the trust which is primarily in favor of the creditors, and he cannot divert the trust funds. See Rogers v. Flournoy, 21 Tex. Civ. App. 556, 54

S. W. 387. The conclusion reached, therefore, is that none of the allowances in this proceeding prayed for can be made out of the partnership property.

"But it is insisted that the case of Swearingen v. Bassett, 65 Tex. 267, leads to a different conclusion. This does not seem to be the effect of that case. The court holds in that case that a partner in a solvent firm may destinate his interest in partnership realty as a part of his homestead and thus secure it from forced sale. The court bases this conclusion on the acknowledged right of the partners to change their contract of partnership, to add to or take away from the property of the firm, and to make such changes by express agreement or by implication. In this manner the homestead of one partner in partnership realty was acquired. The decision, on the ground it rests, is entirely consistent with the general rues of the law of partnership, particularly as the creditors, as long as the firm is and remains solvent, have no right to complain about the action of partners in withdrawing from or adding to the available assets. But the case does not intimate, nor can it be contended, that the logical result of said decision is to change the fundamental law of partnership whereby all the partnership property, at the dissolution by death, is cast upon the survivor for the purposes of paying the debts and accounting only.

"The case of St. Louis Type, etc., Co. v. Company, 74 Tex. 651, 12 S. W. 842, 15 Am. St. Rep. 870, is also cited in support of the application for allowance out of the partnership assets, but this case is inapplicable because it only holds that the statutory exemptions are such not only for individuals who hold such property in severalty, but that the exemption covers also property belonging to the partners as such. As, under liberal construction of the exemption laws, partnership personal property is thus held to be exempt, such property is not an asset of the partnership subject to execution, and at the death of a partner his interest in such specific exemptions is subject to the disposition thereof by the probate court. This is the final result of the deci-Exemptions existing at the time the trust is cast form no part of the trust fund. But the trust property cannot thereafter be interfered with by burdening it with prior claims not existent under the law at the time of the creation of the trust.

"The Texas decisions freeing collateral from demands of the probate court, as above shown, are applicable to the property of a partnership in the hands of the survivor. The basic rights of the pledgee and partnership creditors are identical. What the law grants to the one it must grant to the other. It will not protect the pledgee and take away from the partnership property. If this be correct, then the contention of applicant that the St. Louis Type, etc., Co. v. Company points to the correct decision of this case is still further refuted than it is by reason of the fact that it is not in point and does not tend to establish the liability of the partnership fund as insisted on by applicant.

"It follows from the foregoing that the application for allowances to the widow and children out of the partnership assets of the bankrupt firm must be denied, and judgment is entered on this date in conformity with this conclusion."

N. A. Rector, for petitioner.

D. K. Woodward, Jr., for trustee.

MAXEY, District Judge (after stating the facts as above). It appears from the record that, at the death of Frank Dobert, neither he nor Joseph Dobert had an individual estate. The assets of the partnership are wholly insufficient to pay partnership debts. Whether, under such circumstances, the statutory allowances claimed by the widow and children of Frank Dobert may be set apart to them from the assets of the firm of F. Dobert & Son, will depend upon a proper construction of the state statutes, providing for the administration of estates of deceased persons. In a matter of this kind the laws of the state furnish the guide to federal courts; and if by the laws of Texas the allowance be authorized, then, in obedience to section 8 of the act of bankruptcy (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425]), it should be set apart to the widow and children in this proceeding. Unfortunately the courts of this state have not decided the precise question involved in the present case, but we may deduce, from the principles announced by the Supreme Court in several cases, in which similar articles of the Revised Statutes of the state in relation to the "Estates of Decedents" have been construed, the correct rule to be applied here.

It is thought that the ultimate decision of the question must depend upon the extent of the control which the probate or county court may lawfully exercise over partnership estates where one of the constituents has died. In other words, if the probate court is without jurisdiction to administer upon a partnership estate, it follows that it would be powerless to set aside any of the partnership assets to satisfy the statutory allowances of the widow and children of a deceased partner. Thus it was said by Mr. Justice West, as the organ of the court in Clift v. Kaufman & Runge, 60 Tex. 66:

"The homestead allowance, if set apart at all by the probate court for the surviving widow, must be set apart, alone, from the estate of the decedent, over which that court has jurisdiction. It is only over the property of the estate that the probate court can exercise control."

See, also, Hoffman v. Hoffman, 79 Tex. 192, 193, 14 S. W. 915, 15 S. W. 471.

Has, then, the probate court (which may be referred to indifferently as the probate or county court), under the laws of Texas, jurisdiction to administer upon a partnership estate, upon the death of a constituent of the firm? Upon this point the Supreme Court has spoken in unambiguous language in the case of Altgelt v. National Bank, 98 Tex. 252–267, 83 S. W. 6. It is true that in the Altgelt Case the court was not construing the articles of the statute involved in this case, but what was there said applies with equal force to the articles under which the widow and children of Frank Dobert claim an allowance. Altgelt v. Alamo Nat. Bank, at page 260 of 98 Tex., at page 9 of 83 S. W., article 1867 of the Revised Statutes of 1895 is quoted, as follows:

"The rights, powers and duties of executors and administrators shall be governed by the principles of the common law, when the same do not conflict with any of the provisions of the statutes of this state."

The court, speaking through Mr. Justice Brown, proceeded:

"By the common law the death of one partner dissolves the partnership and terminates the powers of the survivors as partners; but the law imposes upon the surviving partners the duty to close up the business and pay the debts of the partnership, accounting to the personal representatives or heirs of the deceased partner for their interest in what shall remain after paying the debts, for which purposes the surviving partner holds the assets as a trustee, and, to enable him to perform the trust imposed, the law gives to him the right and enjoins it as a duty to take the exclusive possession of the assets of the partnership and to administer them for the purposes before stated. The rule is thus stated: "The right of survivorship in partner-

ship estates is not a beneficial right. The assets are taken by the surviving partner, charged with the trust or quasi trust to pay the firm debts and wind up its affairs, and it is his duty to account to the representatives of his deceased partner for all partnership assets.' 22 Am. & Eng. Enc. of Law, p. 96. Again, it is said: 'The survivors have the exclusive right and duty to act in the settlement of a partnership, and personal representatives of the deceased partner cannot interfere.' Neither can the surviving partner consent to a participation in the business by such representative. 22 Am. & Eng. Enc. of Law, p. 220; Rogers v. Flournoy, 21 Tex. Civ. App. 558, 54 S. W. 386."

See, also, Moore v. Steele, 67 Tex. 439, 3 S. W. 448; Fulton v. Thompson, 18 Tex. 287.

The court then quotes with approval the following excerpt from the opinion of Judge Garrett in Rogers v. Flournoy, 21 Tex. Civ. App. 557, 558, 54 S. W. 386, 387:

"Upon the death of Thomas McGuill his surviving partner, Martin McGuill, became vested with the legal title to the partnership assets as trustee primarily for the benefit of the creditors of the firm and ultimately for the benefit of the representatives and heirs of the deceased partner. Shields v. Fuller, 4 Wis. 102, 65 Am. Dec. 295, and note.

"Partners may agree upon a dissolution and defeat the derivative equity of creditors to have the partnership assets applied to their debts. Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939. But the survivor of a deceased partner cannot denude himself of the trust with which he becomes clothed by the death of his partner by an agreement with the administrator either to partition the property or to admit him into joint possession and control, recognizing his title to the deceased partner's share thereof. The duty of the survivor is to administer the trust and wind up the estate, and after paying off the debts to deliver the share of the estate in the residue to the heirs and representatives. The partnership of Thos. McGuill & Son was dissolved by the death of Thos. McGuill, and not by agreement with the administrator. The administrator could make no agreement for the division of the assets to the detriment of creditors."

In construing article 1984 of the Revised Statutes, Mr. Justice Brown propounded the question:

"Did the Legislature, in enacting article 1984, intend to repeal the common law as to the administration of partnership estates?" Page 262.

And, continuing, it was said at page 263 of 98 Tex., at page 10 of 83 S. W.:

"Before the adoption of the Revised Statutes of 1879, the common law prescribed the powers of executors and administrators in reference to both individual and partnership business of the testator or intestate, and, except by authority conferred by will or partnership contract, neither class of business could be continued by an executor or administrator. In making the amendment to article 1984 the Legislature used language applicable to the individual business of the deceased which cannot be applied to partnership business without adding thereto; therefore, under the rule quoted, the language used must be restricted to the individual business of the deceased."

After further discussion, the court continued (pages 264, 265 of 98 Tex., page 11 of 83 S. W.):

"By article 1965 every executor is required, with the aid of the commissioners appointed by the court, to make and file 'a full inventory and appraisement of all the estate of the testator or intestate.' The interest of the deceased partner in the assets of the firm cannot be inventoried and appraised by the administrator or executor as required by that provision of the statute, because the surviving partner is entitled to the exclusive possession and con-

trol of the assets of the partnership, free from the interference of the executor or administrator of the deceased partner. Am. & Eng. Enc. of Law, p. 857. The estate of the deceased partner has an interest only in that which remains after the payment of the debts of the firm, and has no right to any specific part of the property employed in the enterprise; it would be impossible to make an inventory and appraisement of such interest, therefore the interest of the deceased partner in the firm assets is not a part of the estate to be administered.

"Again, an administrator cannot sell the property of his intestate's estate, except by the order of the court. Rev. St. art. 2113. The court can regularly order the sale of property only after it has been inventoried and appraised as required by law, hence the administrator could not get an order of the court to sell property which could not be placed upon the inventory of an estate; therefore partnership property which is not subject to be sold by the administrator or executor is not included in the terms of article 1984.

"The terms of article 1984 commit the question of continuing the 'business' to the judgment and discretion of the executor or administrator, without any intimation that another person shall be consulted, which excludes the idea that the surviving partner may participate in the business continued. If the common law applies, the probate court could have no control of partnership estates; but by article 1985 that court may control the action of the executor or administrator 'in regard to such business'—that is, the business to be continued; and, the Legislature having failed to prescribe any rules for the administration of partnership property, the terms of the law are not applicable to partnership business."

From the views expressed in the opinions referred to, the following conclusions are logically deducible: (1) Under existing law in this state, which is merely a restatement of a principle of the common law, the death of a partner dissolves the partnership, and it then becomes the duty of the surviving partner to close out the business and pay the debts of the partnership, accounting to the personal representatives or heirs of the deceased partner for their interest in the assets remaining after the payment of debts; (2) to enable the surviving partner to discharge the trust imposed upon him, the law gives him the right and enjoins it as a duty to take the exclusive possession of the assets and to administer them for the purposes stated.

As necessary corollaries it follows (1) that neither the heirs nor personal representatives of the deceased partner are entitled to any part of the partnership estate until after the payment of partnership debts, and, (2) the administration of partnership estates being confided exclusively to the surviving partner, the county court has no control over partnership assets, and hence is without authority to set aside allowances to the widow and children from such assets, and can only do so out of any residue coming to the heirs or personal representatives after the payment of partnership debts. The estate of the deceased partner in such residue must be measured by the interest which the decedent, during his life, had in the partnership, the extent of which is ascertainable by reference to the articles between the partners. This opinion would be unduly extended by analyzing articles 2037 to 2062 of the Revised Statutes of the state, which provide for allowances to the widow and children of a decedent and regulate the procedure in reference thereto. But an examination of those articles will disclose that it is only the estate of the decedent out of which the allowance may be set aside—an estate which may be inventoried and appraised. and one which is under the control and supervision of the county court.

and one which that court is authorized to sell—the individual estate of the decedent, and not an undefined and unascertainable interest in the partnership assets. Indeed, in the articles of the statutes referred to there is no mention of "partnership," or "partnership property," or of "partnership estates," thus supplying further evidence, if it were needed, that it was not the purpose of the Legislature that the administration of partnership estates should be included within the terms of the statute. The winding up of the partnership business remains, where the common law left it, in the hands of the surviving partner; and it is only in the residue remaining after the payment of partnership debts that the estate of a deceased constituent is interested, and it is only out of such residue, assignable to the heirs or personal representatives of the deceased, that the allowance to the widow and children may be set apart.

The consent of the surviving partner in the present case to setting aside the allowance, if effective under any circumstances, is deprived of vitality and efficacy here, since his consent was given about two months after the title to his interest in the partnership property had vested in the trustee in bankruptcy. Bankruptcy Act, § 70.

The court is of the opinion that the order of the referee, declining to set aside the allowance to the widow and children of Frank Dobert, deceased, was correct, and it is therefore affirmed.

CAYLOR v. COOPER et al.

(Circuit Court, S. D. New York. December 22, 1908.)

1. Trusts (§ 123*)—Trustees—Title.

Where a deed of trust stipulated that the trustees named were to hold the property for a certain period, one of them to have physical possession and the evidence of ownership, subject to periodical examinations by the other, the trustees held the legal title jointly.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 167; Dec. Dig. § 123.*]

2. Trusts (§ 257*)—Actions—Parties.

When two or more trustees hold property jointly, both or all in general are necessary and indispensable parties to any action concerning it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 363, 368; Dec. Dig. § 257.*]

3. Parties (§ 35*)-Refusal to Join as Plaintiff-Making Defendant.

Where two trustees hold the title to trust property jointly, if litigation is necessary and one refuses to be a complainant, he may be made a defendant.

[Ed. Note.—For other cases, see Parties, Cent. Dig. \S 54; Dec. Dig. \S 35.*]

4. Parties (§ 78*)---Nonjoinder-Trustees.

Where one of two joint trustees refuses to be a complainant in litigation involving the trust property, the fact that he is joined as a defendant does not create a nonjoinder of parties complainant.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 122; Dec. Dig. § 78.*]

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. Courts (§ 307*)—Jurisdiction—Citizenship—Necessary and "Indispensable Parties."

For jurisdictional purposes, federal courts divide parties into formal, necessary, and indispensable parties; indispensable parties being those having an interest in the controversy of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 307.* For other definitions, see Words and Phrases, vol. 4, p. 3559.]

6. TRUSTS (§ 257*)-ACTIONS-PARTIES.

Two or more trustees under the same instrument are treated as one and the same person, so that where both are sued, except for a wrong or devastavit committed by one alone, all are indispensable parties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 368; Dec. Dig. § 257.*]

7. Courts (§ 308*)-Jurisdiction-Parties-Citizenship.

Complainant and defendant C. were joint trustees under a certain deed of trust, complainant being a citizen of Illinois, while C. and the other defendants were citizens of New York. *Held*, that in the absence of an allegation that C. was requested to join complainant in a suit for instructions as to the disposition of the trust funds, and refused, there was a nonjoinder of parties complainant, and since if C. was made a complainant, it would defeat federal jurisdiction, such jurisdiction was not shown.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 855; Dec. Dig. § 808.*

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

In Equity.

James B. Curtis, for complainant.

Richard S. Newcombe, for defendants Buckley, Nightingale and Mae Cooper.

Austin E. Pressinger, for defendant Mae Cooper, individually.

RAY, District Judge. The bill of complaint shows that the complainant, Worth E. Caylor, resides at the city of Chicago, state of Illinois, and is a citizen of that state. The defendants are all residents and citizens of the state of New York. April 25, 1904, Frank H. Cooper, William H. Cooper, Edward C. Cooper, Charles A. Cooper, Garrett D. Cooper, Eda R. Wolff, and Wallace B. Wolff severally made and executed their certain written indenture or deed of trust, a copy of which is set out in the bill of complaint, whereby they, as parties of the first part, made and constituted Charles A. Cooper and Worth E. Caylor trustees of certain property therein mentioned and described, and transferred such property to them as trustees upon certain trusts specified in such deed of trust.

The property is described in certain schedules. Schedule A described property of Frank H. Cooper; schedule B described property of William H. Cooper; schedule C described the property of Edward C. Cooper; schedule D described the property of Charles A. Cooper; schedule E described the property of Garrett D. Cooper; and schedule F described the property of Eda R. Wolff. The deed of trust provided that Charles A. Cooper and Worth E. Caylor, trustees, were to hold

^{*}For other cases see same topic & \ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such property during the period of the lives of William H. Cooper and Edward C. Cooper, and to continue and endure until the time of the death of the surviving one of the said William H. Cooper and Edward C. Cooper, it being understood that, on either or both of said persons living and surviving for a period of five years from the date of such deed of trust, at the time of the expiration of said five years the trust should cease and determine.

It was further provided that physical possession of the funds, and the evidence of ownership of the real and personal property constituting the trust estate, should be held by Charles A. Cooper as trustee; that Worth E. Caylor, trustee, should examine into the condition of things every two months, and upon the first sign of negligence or fraud on the part of his co-trustee take possession of all the trust property. The property was all turned over to the possession of said Charles A. Coo-

per and Worth E. Caylor, as trustees, who accepted the trust.

Edward C. Cooper died February 23, 1907, and left him surviving Mae Cooper, his widow, but no issue. He left a last will and testament, which is set out in the bill of complaint. He made certain gifts, and the rest, residue, and remainder of his estate he gave to his wife, Mae Cooper, and the defendants Buckley and Nightingale and Mae Cooper, upon certain trusts. The bill of complaint alleges that said Edward C. Cooper in his lifetime, and after the execution of said deed of trust and pursuant thereto, designated Charles A. Cooper to take, for the uses and purposes mentioned in his declaration, all the property which the person designated would be entitled to take from the trustees named in said deed of trust: and further alleges that the said Charles A. Cooper now claims to take and receive from the said trustees named in the deed of trust under the same by virtue of the said declaration. The bill of complaint also alleges that Mae Cooper, Buckley, and Nightingale claim that said Edward C. Cooper designated them to take all of such property.

The bill of complaint then alleges that the complainant, Worth E. Caylor, trustee, and the defendant Charles A. Cooper, trustee, now desire to distribute and pay the sum of \$10,000 out of the funds in their possession as trustees as aforesaid to said Charles A. Cooper, or to Mac Cooper, Dennis P. Buckley, and William Nightingale, or whichever person or persons is lawfully encoded to receive the same because of the declarations of the said Edward C. Cooper. The bill alleges that because of these conflicting claims the complainant is unable to determine who is entitled to receive that part of the trust estate formerly belonging to Edward C. Cooper of which the complainant is one of the trustees. Presumably, I think the sum ready to be distributed consists of income, rents, and profits, as the trust is not ended and the trust

term has not expired.

By the third subdivision of the deed of trust the trustees were to pay to Frank H. Cooper in quarterly payments the sum of \$25,000, annually from the incomes, etc., and to make other small payments; and by the fourth subdivision of the deed of trust said trustees were to pay during the life of the trust one-fifth part of the remaining net income and profits of the trust estate to each of the following: William H. Cooper, Edward C. Cooper, Charles A. Cooper, Garrett D. Cooper,

and Eda Wolff. It may fairly be assumed that the amount in controversy is this sum of \$10,000, which the trustees named in the deed of trust desire to pay over to the ones entitled thereto. The actual controversy seems to be between Charles A. Cooper, on the one hand, and Mae Cooper, Dennis P. Buckley, and William Nightingale, on the other. Edward C. Cooper in his lifetime seems to have made conflicting designations as to the disposition of that part of the rents and incomes to which he or his estate was or should become entitled. Mae Cooper, Dennis P. Buckley, and William Nightingale claim as executors and trustees under the will of Edward C. Cooper. Charles A. Cooper claims under another instrument. The actual or real controversy is between citizens of the state of New York. However, both sets of claimants to the funds claim same of and from the complainant here, Worth E. Caylor, and Charles A. Cooper, as trustees under the deed of trust. But Charles A. Cooper individually lays claim to the \$10,000, as against the complainant Worth E. Caylor, as well as against himself as trustee. While Mae Cooper, Buckley, and Nightingale claim the fund as against Charles A. Cooper individually, they also lay claim to the same as against the complainant Worth E. Caylor, as trustee, and Charles A. Cooper, as trustee.

Not knowing or being certain who is entitled to the \$10,000, the complainant brings this suit to have it determined whether Charles A. Cooper is entitled to the \$10,000, or whether the same should be paid to Mae Cooper, Buckley, and Nightingale, as executors and trustees

under the will of Edward C. Cooper.

The jurisdiction of this court is denied. It is claimed that for purposes of jurisdiction this court is to align the parties complainant and defendant as complainants or defendants according to their interests, irrespective of the place given them by the complainant in his bill of complaint, and that, so aligning them, the complainant, Worth E. Caylor, trustee, and the defendant Charles A. Cooper, trustee, are in fact complainants, and should be so considered, and that therefore, as all the complainants are not residents of a different state from that of all the defendants, there is not the necessary diversity of citizenship. If this be so, it is contended we have a citizen of Illinois, a plaintiff, and a citizen of New York, also a necessary plaintiff, with all the defendants citizens of New York, and the diversity of citizenship necessary and indispensable to the jurisdiction of the Circuit Court no longer exists. I find no allegation in the bill of complaint that Charles A. Cooper, trustee, has been requested to bring or to join in bringing an action to settle the existing controversy. It is contended that, therefore, he, as trustee, is not a necessary or a proper party defendant, but is a necessary and indispensable party complainant. Where two executors or trustees have the right, and it is their duty, to bring an action or institute a suit, and one refuses to join as plaintiff or complainant, the other may bring the suit or action making his coexecutor or co-trustee a party defendant. This question was presented in Venner v. Great Northern Railway and James J. Hill, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666, decided by the Supreme Court of the United States February 24, 1908, where the railway company, made defendant, refused to bring suit, and hence the complainant Venner, a stockholder, commenced the action, making the railway company a defendant. It was contended that as the railway company had the interests of a complainant, was pecuniarily interested in the recovery, it must be aligned as a complainant, and that so aligning it there would be a citizen of New York and a citizen of Minnesota (the railway being a citizen of Minnesota, where its president, defendant James J. Hill, also resided) plaintiffs, and a citizen of Minnesota defendant, and the necessary diversity of citizenship did not exist. The court held that, assuming Venner had the right to bring and maintain the suit as stockholder (the railway company having refused so to do), the railway company must be regarded and considered as a defendant. The court said:

"It would doubtless be for the financial interests of the defendant railroad that the plaintiff should prevail. But that is not enough. Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant. Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; Central Railroad Company v. Mills, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949; Railroad v. Grayson, 119 U. S. 240, 7 Sup. Ct. 190, 30 L. Ed. 382; Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606; Groel v. United Electric Co. (C. C.) 132 Fed. 252; and see Chicago v. Mills, 204 U. S. 321, 27 Sup. Ct. 286, 51 L. Ed. 504. The case of Doctor v. Harrington is precisely in point on this branch of the case, and is conclusive. In that case the plaintiffs, stock-holders in a corporation, brought an action in the Circuit Court against the corporation and Harrington, another stockholder, 'who directed the management of the affairs of the corporation, dictated its policy, and selected its directors.' It was alleged that Harrington fraudulently caused the corporation to make its promissory note without consideration, obtained a judgment on the note, and sold, on execution, for much less than their real value, the assets of the corporation to persons acting for his benefit. On the face of the pleadings there was the necessary diversity of citizenship, but it was insisted that the corporation, because its interest was the same as that of the plaintiff, should be regarded as a plaintiff. The court below so aligned the corporation defendant, and, as that destroyed the diversity of citizenship, dismissed the suit for want of jurisdiction. This court reversed the decree, saying, page 587 of 196 U. S., page 357 of 25 Sup. Ct. (49 L. Ed. 606): 'The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in the federal court."

But the bill here fails to allege or show that defendant Charles A. Cooper, trustee, has refused to bring suit or join as a party complainant. It does appear, however, that Charles A. Cooper, individually, claims this fund of \$10,000 by appointment of or from Edward C. Cooper. He claims it as against Worth E. Caylor, trustee, and Buckley and Nightingale and Mae Cooper, who claim by appointment or declaration of Edward C. Cooper. It is evident that Charles A. Cooper cannot decide between himself as trustee and himself as an individual. As trustee he might perhaps sue himself as an individual, and also the other claimants, to settle this dispute in court, where only it can be settled. But with this dispute existing and this pe-

culiar condition existing, cannot Worth E. Caylor, the other trustee, institute and maintain the suit alone, making all interested persons parties? To deny this is to deny that this present suit may be maintained at all, for, so far as appears, Charles A. Cooper, trustee, has not refused or even been invited to become a party complainant. If it can be maintained by Worth E. Caylor alone, then, within Venner v. Great Northern Railway, supra, Charles A. Cooper is a proper party defendant, and is not a necessary or indispensable party complainant, and the necessary diversity of citizenship exists. In that case the railway company might have maintained the action, was requested to commence it, and refused. Here Caylor commences the action, and the only reason for making Charles A. Cooper a defendant, and not asking him to be a plaintiff as trustee, is his personal interest in and claim to the fund.

I do not understand it to be the policy of the law or of Congress to discourage or prevent litigation in the federal courts when a proper case is presented. Congress has created and defined the jurisdiction of the Circuit Courts, and wisely placed limitations thereon, but this was not for the purpose of discouraging litigation in the federal courts.

Worth E. Caylor and Charles A. Cooper, as trustees under this deed of trust, have the legal title to all this property jointly. But Charles A. Cooper was to have, and presumably has, the actual physical possession of this \$10,000, as well as of the other personal property, and also the evidences of title to the real estate wherever situated. The general rule is that, when two or more trustees hold property jointly, both or all are necessary and indispensable parties in any action concerning it. See McRea v. Branch Bank, 19 How. 376, 15 L. Ed. 688; O'Hara v. MacConnell, 93 U. S. 150, 23 L. Ed. 840; Thayer v. Life Association, 112 U. S. 717, 5 Sup. Ct. 355, 28 L. Ed. 864; American B. S. v. Price, 110 U. S. 61, 3 Sup. Ct. 440, 28 L. Ed. 70; Billings v. Aspen, etc., 51 Fed. 338, 2 C. C. A. 252.

In Thayer v. Life Association, supra, it was held:

"Two citizens of West Virginia conveyed to a trustee certain real property in that state to secure the payment of notes executed by them to a Missouri corporation, which was subsequently dissolved and its assets placed in the hands of a citizen of the latter state. Upon default in the payment of the notes, the trustee, under authority given by the deed, advertised the property for sale. The grantors thereupon instituted a suit in equity in one of the courts of West Virginia to enjoin the sale, making the trustee, the Missouri corporation, and the person who held its assets, defendants. Upon the joint petition of that corporation and the defendant holding its assets, the cause was removed to the Circuit Court of the United States, and was there finally determined. Held that, since the trustee was an indispensable party, his citizenship was material in determining the jurisdiction of the Circuit Court; and as that was not averred, and did not otherwise affirmatively appear to be such as gave the right of removal, the decree must be reversed and the cause remanded to the state court."

If litigation is necessary, and one refuses to be a complainant, he may be made a party defendant and the action proceed. In such case there is no nonjoinder of parties complainant, and in such case one of the trustees holding jointly may maintain the action. This shows that all are not necessary and indispensable parties complain-

ant under all circumstances and conditions. That case is an exception to the general rule that all the trustees must be complainants.

In 1 Foster's Federal Practice, 182, § 59, we find the following:

"Relaxation of rule as to parties in special cases.—The rules upon the subject of parties are, however, very loose, and the questions arising under them are decided largely in the discretion of the court. "The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever.' A court of equity adapts its decrees to the necessities of each case; and should a suit, brought by a single complainant concerning a matter in which others as well as himself were interested, terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other persons similarly situated with the plaintiff, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation.' The discretion as to the joinder or omission of parties is, however, one which, when properly raised, is subject to review upon appeal. An act of Congress relaxing or extending the rules as to parties in a particular case is constitutional."

Can it be held that this case presents another exception to the general rule? I find no case so holding. One trustee, the one who holds the physical possession of the trust property, claims to be entitled to take and have paid to him individually a part of the trust fund as his own. Other persons claim to take and to have paid to them the same part of the trust fund as their own. The trustee claiming as an individual having possession has no reason to move at all. The other persons claiming may move against both trustees. They make their demand. Can, or cannot, the trustee who has no actual physical possession, who makes no personal claim to the fund, come into a court of equity, present the facts, and ask for instructions and directions, and ask to have the dispute determined? I see no good reason why he should not be permitted to do so, under such circumstances, except that the court has adopted certain rules, and we have the statute and Constitution confronting us.

If Charles A. Cooper, as trustee, had joined in this bill as a party complainant, as he had the right to do and as he has not refused to do, this court would find itself without jurisdiction, as the necessary diversity of citizenship would be lacking. Could the complainant, Caylor, give this court jurisdiction by voluntarily making Charles A. Cooper a party defendant in his capacity as trustee? The directions and instructions of the court must be directed to both trustees and must guide both. Charles A. Cooper as trustee and Charles A. Cooper as an individual are distinct persons. Equity rules 22 and 47 have no application here. Charles A. Cooper, trustee, is not only a necessary party, but he is within the jurisdiction of this court, and an actual party as shown by the record. The complainant has voluntarily made him a party.

Again, there is no necessity for a departure from the ordinary rules and practice. The property and all the parties are within the jurisdiction of the courts of the state of New York, and its courts are open and have jurisdiction of the subject-matter. Still, for jurisdictional purposes our courts divide parties into formal, necessary, and

indispensable parties, and I think this case turns on the question whether or not Charles A. Cooper, trustee, is an indispensable party complainant. "Indispensable parties are those having an interest in the controversy of such a nature that final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." 1 Rose's Code of Federal Proc. § 817b, p. 744; Shields v. Barrow, 17 How. 130, 15 L. Ed. 160; Donovan v. Campion, 85 Fed. 71, 29 C. C. A. 30. It is the general rule that two or more executors under the same instrument, appointed by the court of the same state, or two or more trustees, are one and the same person. Where two are sued, and an accounting is demanded, unless it relates to a wrong or devastavit committed by one alone, all are regarded as indispensable parties. Blake v. McKim, 103 U. S. 336, 338, 26 L. Ed. 563; Conolly v. Wells (C. C.) 33 Fed. 205, and see the many cases there cited and commented on. This being so, the absence of an allegation that Charles A. Cooper, trustee, was requested to join in the suit and refused, leaves a nonjoinder of parties complainant. If we treat the actual and real controversy or dispute as one between Charles A. Cooper individually and the executors and trustees of Edward C. Cooper, it is not a controversy between citizens of different states. If we regard it as a controversy between the trustees under the deed of trust and the rival claimants to the \$10,000. then it is not a controversy wholly between citizens of different states, for Caylor and Charles A. Cooper, trustees, are citizens, the one of Illinois and the other of New York, where all the defendants reside. It seems to me that Coal Company v. Blatchford, 11 Wall. 172, 20 L. Ed. 179, is quite decisive of this case. In that case:

"The bill stated that the defendant was a corporation created and organized under the laws of the state of Pennsylvania; that the plaintiff, Blatchford, was a citizen of the state of New York; that the plaintiff Newman was a citizen of the state of Pennsylvania; and that they as trustees sued solely for the use of Henry Beckett, an alien and a subject of the Queen of Great Britain, and Joseph Loyd, a citizen of New Jersey, both residing in New Jersey. The defendant demurred to the bill on the ground that the plaintiff Newman and the defendant corporation, being citizens of the same state, the court had not jurisdiction of the cause. The court overruled the demurrer, and, an answer and replication having been filed, the case was heard on the pleadings, and a decree rendered for the plaintiffs. From this decree the appeal was taken; and the question presented for consideration here was whether the jurisdiction of the federal court depended upon the citizenship of the trustees, who were the plaintiffs, or of the parties for whose benefit the suit was averred to have been brought."

The Supreme Court of the United States reversed the decree, and directed that the bill be dismissed for want of jurisdiction.

The demurrer must be sustained on the ground there is a nonjoinder of indispensable parties complainant, and that this court is without jurisdiction, for the reason there is not a controversy wholly between citizens of different states.

RYAN v. MARTIN et al.

(Circuit Court, S. D. New York. December 18, 1908.)

1. Corporations (§ 131*)—Stock—Transfer.

A person who has become the equitable owner of corporate stock belonging to another may compel its delivery and transfer on the books of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 490; Dec. Dig. § 131.*]

2. CORPORATIONS (§ 131*)—BROKER'S SERVICES—TRANSFER OF STOCK—SPECIFIC PERFORMANCE.

Défendant M., representing that he owned or controlled certain mining claims, employed complainant to procure capital to purchase and operate them, whereupon complainant procured defendant L. to advance money under a contract between M. and L. for the conveyance of the claims to a corporation which they formed; it being agreed that a portion of the stock should be issued to M. in consideration of a transfer of the claims to the corporation, and that a portion of M.'s stock so issued should be transferred to L. in payment for the money which he advanced, both M. and L. agreeing that plaintiff should receive \$50,000 of such stock for his commissions. M. in fact never purchased or conveyed any claims to the corporation with money furnished by L., but squandered such money, and no stock was issued to him therefor. *Held* that, while complainant under such facts had a cause of action at law for his services against M. and L., he could not maintain a bill in equity against the corporation or either M. or L. to compel a transfer of \$50,000 of the corporation's stock to him; also held, that specific performance of Martin's agreement to convey the mining claims to the corporation could not be decreed, as it did not appear that Martin had title thereto, but the contrary, and that neither Martin nor Ryan nor Lewis had equitable title to the stock which belonged to the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 490; Dec. Dig. § 131.*]

3. CANCELLATION OF INSTRUMENTS (§ 37*)—COMPLAINT.

A complaint to set aside a stock-pooling receipt or agreement which was not set out either according to its legal effect or otherwise, and which did not state the time, place, and circumstances of its execution and delivery, nor allege the parties thereto, or that it was accepted without consideration was insufficient.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 70; Dec. Dig. § 37.*]

4. Equity (§ 39*)—Jurisdiction of Part—Effect.

Where equitable jurisdiction of a material part of a cause of action appears, equity will assume jurisdiction to determine the entire controversy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 104; Dec. Dig. § 39.*]

5. EQUITY (§ 150*)-BILL-MULTIFARIOUSNESS.

A bill against a corporation and two of its promoters to compel specific performance of a contract to cause to be transferred to complainant \$50,000 of the corporation's stock in consideration of his services was not multifarious.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 150.*]

In Equity. Separate demurrers by defendants, Tom Moore Gold Mining Company and Arthur B. Lewis, to bill of complaint.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Michael J. Kelly, for complainant. John Baptist Marshall, for defendant Arthur B. Lewis. Philip Carpenter, for defendant Tom Moore Gold Min. Co.

RAY, District Judge. The demurrers challenge the sufficiency of the complaint in two regards: (1) The Tom Moore Gold Mining Company says that several separate and distinct and independent matters are involved and charged with which it has no concern and in which it ought not to be implicated; (2) that complainant has not complied with rule 94 of Equity Practice; and (3) that complainant has not stated facts entitling him to any of the relief demanded; and Lewis says that complainant has not stated any such case as entitles him

to any such relief as is demanded in the bill.

The complainant, Dennis Ryan, is a citizen of the state of Minnesota; defendant Martin is a citizen of the state of Colorado; defendant Lewis is a citizen of the state of New York, and an inhabitant of the Southern district; while the defendant Tom Moore Gold Mining Company was organized under the laws of the state of Maine, but has its principal office or place of business in the city of New York. The defendant Title Guarantee & Trust Company is a corporation of the state of New York. The bill of complaint alleges that the defendant "Samuel G. Martin, desiring to procure money to purchase and work a certain group of mines, mining claims and property," describing them, and which properties the bill of complaint alleges, except perhaps Crown Mountain group, then belonged to the Tom Moore Mining & Milling Company, a corporation of the state of Colorado, represented to the complainant that:

"He was the owner of said mines, mining claims, and mine property, which he claimed to be very valuable, either individually, or as a stockholder owning almost all the capital stock of the said Tom Moore Mining & Milling Company, a corporation organized under the laws of the state of Colorado, and what capital stock of said company he did not own he could purchase by the use of the money or capital he desired to procure, and would purchase the said Crown Mountain group of mines from a receiver who had been appointed in some court in Colorado, the name of which is unknown to your orator, to take possession of the Crown Mountain group of mines, and who had taken possession of them, and had offered or was about to offer them for sale by means of said money or capital so desired by him, if it were procured."

That thereupon, and on or about December 24, 1906, the said Martin at the time of making such representations "retained and employed" the complainant "to procure said money or capital" for the purposes stated, and promised to pay the complainant for his services in procuring said money or capital if he were successful in procuring the money. That on or about January 3, 1907, the complainant introduced Martin to Lewis, a capitalist or person able to furnish and supply the money desired, and negotiated with Lewis for his supplying and furnishing the said money, and "was the procuring cause in obtaining said money or capital which the said Arthur B. Lewis agreed to supply and furnish and did supply and furnish" to the extent set forth in the bill, and "until prevented from continuing to so supply and furnish said money or capital by the actions of said Martin." That in pursuance of such negotiations and services of the complain-

ant, and through him as the procuring cause, the said Lewis and Martin entered into a written agreement, set out in full in the bill, which recites the desire of Martin to procure the money for the purposes above mentioned, and contains the following agreements, viz.:

- (1) Lewis agrees to incorporate at his own expense, under the laws of the state of Maine, a company with a capital stock of \$10,000,000, divided into 1,000,000 shares of \$10 per share, par, face value, fully paid, which company is to be called and entitled "The Tom Moore Gold Mining Company," to be organized forthwith with a board of directors of five members, and when organized and in existence Martin agrees with Lewis to grant and convey, or cause to be granted and conveyed, to the said company, by good and sufficient deeds, all of the said properties described therein, being the same mentioned between Martin and Ryan, for and in consideration of 999,995 shares, all but 5 shares of the said stock of the said company to be formed.
- (2) Martin agrees with Lewis to deposit as an escrow in the Title Guarantee & Trust Company of the city of New York 600,000 shares of the said stock when issued and allotted to him, Martin, to be delivered to Lewis or his assigns from time to time on payment to the trust company, for the benefit of the treasury of the Tom Moore Gold Mining Company, of the sum of \$600,000 to be paid by Lewis, viz., \$10,000 on or before February 1, 1907, when Lewis may draw 10,000 shares of the stock; \$10,000 each and every month thereafter, provided that on or before February 1, 1908, Lewis will have deposited at least \$250,000, for which Lewis will be entitled to draw from time to time shares of stock at the rate of \$1 per share net to the said mining company; and after February 1, 1908, Lewis is to deposit \$350,000 to the credit of the treasury of the mining company, and the shares are to be delivered to Lewis on such deposits being made from time to time at the same rate. The minimum to be paid in is \$10,000 per month, and time is made, by express words, of the essence of the contract; and, if Lewis fails to fulfill on his part, Martin may declare the agreement null and void, and any of the 600,000 shares not then taken over under the provisions of the agreement are to remain as treasury shares of the said mining company, and be disposed of by the board of directors at not less than \$1 net per share to the mining company.

Lewis agrees to organize the company, to make the payments, to furnish the money to purchase the said Crown Mountain group of mines, a part of the property before mentioned, and he is to withdraw stock at the rate of \$1 per share for whatever sum he pays for such property. This is the condition on which said Martin agrees to convey

that part of the property to the mining company.

(3) It is agreed that 500,001 shares of the stock of the mining company is to be deposited with the Title Guarantee & Trust Company, that being a controlling interest in such mining company, to be held in trust for two years "or during the existence of this option," and same is not to be subject to withdrawal by either Martin or Lewis. Of this 500,001 shares Martin is to deposit 350,000 shares and Lewis the balance; Martin, Lewis, and a third person to be selected by them are to vote these shares. The trustees are to issue certificates showing

the interests of the parties to the agreement, which should be transferable.

The bill of complaint then alleges that the mining company was organized and incorporated January 23, 1907; that said Arthur B. Lewis is its president, Dennis Ryan, complainant, vice president, William J. Donaldson, assistant treasurer and secretary, and that said

Lewis, Martin, Donaldson, and Ryan are its directors.

The bill then alleges, on information and belief, as follows: That no meeting of the stockholders of the mining company has ever been held; that no meeting of the directors has ever been held except for the purpose of organization and the election of officers; that the 500,-001 shares of stock have been deposited and are now held by the title company; that although Martin has received between \$70,000 and \$100,000 from Lewis, under said agreement, he has wholly failed, neglected, and refused to make, execute, and deliver the deeds or a deed of the property, or to account for the disposition of said funds to the company or to said Lewis, and that such funds were not placed in the treasury of the mining company, as they should have been, but that Martin has spent same extravagantly, wastefully, without accountability, and without consultation or approval or supervision by the officers or directors of the corporation, and not for the development of said mines, mining claims, and mining properties, but has, notwithstanding all this, been suffered and permitted to obtain and keep all of the capital stock of said company, except said 500,001 shares that is, 499,999 shares of same; that no part of its capital stock has ever been issued to the company or deposited in its treasury or delivered to its treasurer; that Martin has not purchased the Crown Mountain group of mines, although furnished by Lewis with sufficient funds to do so. The bill then alleges that prior to the incorporation of the said Tom Moore Gold Mining Company "it was agreed by said Samuel G. Martin and said Arthur B. Lewis that your orator (the complainant) should receive as a consideration for his services fifty thousand shares (50,000) of the capital stock fully paid, and nonassessable of the company about to be incorporated and organized or caused to be incorporated and organized by said Arthur B. Lewis under said agreement," and that neither said 50,000 shares nor any part of same have ever been delivered to the complainant, or noted, recorded, or placed in complainant's name upon any of the books of the company. The bill then charges that the apparent or ostensible reason why said shares have not been delivered to complainant is that "he received or accepted a certain pooling receipt or memorandum which pretended or assumed to tie up or lock up his said stock for two years from on or about January 17, 1907, and which your orator is informed and believes and alleges is wholly nugatory and void and without consideration and of no avail as against your orator."

The bill then alleges that the amount in controversy exceeds \$2,000, exclusive of interest and costs, and demands a decree:

(a) That Martin be required and compelled to execute and deliver to the mining company deeds of the said properties.

(b) That he be required and compelled to account to the company

for the funds and moneys paid him by Lewis, and furnish vouchers for his expenditures thereof.

(c) That he be required to return to the company all the shares of

stock he is not entitled to or does not own.

(d) That the Tom Moore Gold Mining Company be enjoined from transferring on the books of the company all shares of stock which Martin has become possessed of without right until he accounts, etc.

(e) That the Title Guarantee & Trust Company be enjoined from surrendering or delivering to Martin and Lewis individually any part of the stock held by it, but that it be compelled to deliver same to the said Tom Moore Gold Mining Company to await the delivery of good

and sufficient deeds of said properties.

(f) That complainant is entitled for his said services and is the owner of 50,000 shares of the stock of said Tom Moore Gold Mining Company; that same may be placed, noted, recorded, or registered in the books of the said company in his name as its owner, and that the said number of shares of said stock may be delivered to him for his said services.

(g) That the said pooling receipt or memorandum may be declared nugatory and void, and without consideration, and unavailing as

against the complainant and all others similarly situated.

(h) That Lewis be enjoined from surrendering or delivering to Martin any capital stock of said company belonging to said company, or complainant, or to any other person, or any books or vouchers belonging to said Tom Moore Company until said Martin has accounted for moneys received and executed and delivered deeds of said properties.

(i) That Martin be enjoined from entering on or working mines, etc., on said properties, or removing ores, etc., therefrom, until he has executed and delivered deeds of said properties to said company.

(j) That the defendants and each of them make discovery and exhibit to this court all contracts, agreements, options, pooling memoranda, etc., made by or between them or any of them relating to the

subject-matters of the bill of complaint.

I find no allegation in the bill of complaint that Samuel G. Martin ever was, or that he has ever become, the owner of the properties described in the bill of complaint, or of any of them, or of any part of same. The allegation, as to all but the Crown Mountain group, is that they were owned by a Colorado corporation, but that Martin represented to the complainant either that he was the owner of same, or that he owned most all of the stock of said corporation, and that what of the stock he did not own he would purchase by the use of capital he desired to secure, and that he would also purchase the Crown Mountain group of mines from a receiver who had been appointed by some court in Colorado. It will be remarked that the most of these representations are promissory, and there is no charge that any of them were actually false or fraudulent or made with intent to defraud, or that they did mislead any one. The fair inference is perhaps that Martin represented that he owned some of them individually, and the others by owning most of the stock of the company which did own them. However this may be, the allegations are that Martin did not own any of them, and there is no allegation that he now owns or ever

has owned any of these mining properties.

There is no allegation in the bill that complainant is a stockholder in the defendant corporation, or that he ever paid it anything by way of services, cash, or otherwise, or that it has ever agreed to deliver or issue to him any of its stock; or that the corporation, the Tom Moore Gold Mining Company, has ever in any way ratified or assented to the agreement made by defendants Martin and Lewis to give complainant shares of its stock in compensation for his services to them in bringing about conditions which resulted in the organization and incorporation of the company, or that it has ever agreed to carry out that agreement. The complainant performed services in securing money or capital at the request of and for Martin, who agreed to pay him therefor, and subsequently, and before the defendant company was ever organized or incorporated, Martin and Lewis, who had agreed to form the company, agreed that complainant should receive for his said services and as a consideration therefor 50,000 shares of the capital stock of the company to be organized and incorporated. This agreement has not been kept or performed. No one has ever assumed the obligation, so far as appears. These allegations seem to constitute a good cause of action either at law or in equity against both Martin and Lewis, for Lewis, having shared in the transaction and reaped its benefits and received value, agreed that complainant should have these shares of stock as his compensation. However, he never agreed to pay in any other way, mode, or manner. I do not see that Lewis is liable to Ryan, the complainant in an action at law. Martin is clearly liable in an action at law for damages for breach of his contract. Has a case been stated for equitable relief as against Martin and Lewis, or as against Lewis? Has Lewis become the owner of any of this stock, or has Ryan, the complainant, become the equitable owner of any of it? If so, Ryan may compel its delivery. and transfer on the books of the company, and having the case before it, perchance, the court may dispose of the whole matter and do full equity in the premises. If not so, this suit cannot be maintained, for clearly it is not a stockholder's action, and the moment we resolve it into one we are confronted by equity rule 94, and the bill is devoid of equity and may be demurred to. Venner v. Great Northern Railway, 209 U. S. 24, 35, 28 Sup. Ct. 328, 52 L. Ed. 666; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827.

The company, when incorporated by agreement between Martin and Lewis, was to have a deed or deeds from Martin of all the properties mentioned, who was to receive all the capital stock, except 5 shares, as the consideration therefor. As Martin has never conveyed the properties mentioned, or any of them, and so far as appears, has never become the owner of same, or of any part thereof, it is difficult to understand how Martin has become the owner in law or in equity of a single share of this stock. As Lewis was to get his shares of stock from Martin, it is difficult to understand by what right Lewis is entitled to a single share of this stock from the company. He has never paid it anything, and it has never agreed to deliver him any of the stock. For a court of equity to compel Martin to deliver stock

of this company, which he does not own and in and to which he has no legal or equitable title, to the complainant, Dennis Ryan, in payment of a debt owing to him by Martin and in execution of an agreement made by Martin and Lewis, who, so far as appears, are engaged in some sort of fraud, would seem most unjust to the company and to the public, who might be induced to take or purchase the stock and part with good money. It is not alleged that the certificates for shares of stock in the hands of Martin and those placed with the Title Guarantee & Trust Company, or either, were issued for a consideration, and no fact is stated indicating that it ought to go out of their hands unless to be returned to the company itself. In fact, the exact contrary appears on the face of the bill. The certificates of stock ought to be with the treasurer of the company, and ought not to be issued to any one until Martin conveys the properties to it. It is true that the bill alleges that Lewis has paid between seventy and one hundred thousand dollars to Martin, but this money has not gone into the treasury of the company or to any of its officers, or in payment for stock, or for the benefit of the company. The bill charges that Martin has misappropriated, misapplied, and wasted same. This fact does not give Martin or Lewis title, legal or equitable, to this stock, so far as appears. But it is said that if Martin is compelled to deed these properties to the Tom Moore Gold Mining Company, then Martin will become the owner of the stock, and Lewis will be entitled to his share thereof, and that then complainant will be entitled to his 50,000 shares from Martin; that complainant has an equitable right to have all this done; that is, that he may compel specific performance of the agreement between Martin and Lewis, which should inure for and to the benefit of the Tom Moore Gold Mining Company and to the benefit of Martin, by giving him title to the stock, and thus to the benefit of complainant, who thereby, through the exercise of the equitable power of the court, would get his pay for his services.

But how is a court of equity to compel Martin to convey property which he does not own to the Tom Moore Gold Mining Company? This court could not compel the execution of its decree, should it make one containing such a provision. It is well settled that a court of equity cannot decree the specific performance of a contract to convey property to which the defendant has no title, and a bill by the vendee against the vendor for specific performance which does not show title in the defendant is bad on demurrer. Kennedy v. Hazelton, 128 U. S. 667, 671, 9 Sup. Ct. 202, 32 L. Ed. 576, and cases there cited; Howe v. Howe, etc., 154 Fed. 820, 828, 83 C. C. A. 536; Hildreth v. Thibodeau (C. C.) 117 Fed. 146, 148; Hann v. Culver, 73 Hun (N. Y.) 109, 25 N. Y. Supp. 880; Stevenson v. Buxton, 15 Abb. Prac. (N. Y.) 352; Id., 37 Barb. (N. Y.) 13, reversing 8 Abb. Prac. (N. Y.) 414.

In Kennedy v. Hazelton, supra, the Supreme Court of the United States, per Gray, giving the opinion, said:

"A court of chancery cannot decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title. A bill by vendee against vendor for specific performance, which does not show any title in the defendant, is bad on demurrer. And if it appears,

by the bill or otherwise, that the want of title (even if caused by the defendant's own act, as by his conveyance to a bona fide purchaser) was known to the plaintiff at the time of beginning the suit, the bill will not be retained for assessment of damages, but must be dismissed, and the plaintiff left to his remedy at law. Columbine v. Chichester, 2 Phillips, 27; s. c., 1 Coop temp. Cottenham, 295; Ferguson v. Wilson, L. R. 2 Ch. 77; Kempshall v. Stone, 5 Johns. Ch. (N. Y.) 193; Morss v. Elmendorf, 11 Paige (N. Y.) 277; Milkman v. Ordway, 106 Mass. 232, 256."

This, it seems to me, ends this case, as the complainant has ample remedy at law against Martin to recover damages for breach of contract or to recover the value of his services, and this stock of the company ought not to issue to any one unless it first has the property or cash is paid for the stock. There is no privity of contract between the complainant and the defendant Tom Moore Gold Mining Company, no contractual relations whatever. It seems that something like 5 shares of this stock may be owned somewhere. Possibly they were issued to the complainants, Ryan, Lewis, Donaldson, and Martin to enable them to become directors. But, as stated, this is not a stockholders' action. If Ryan is a stockholder, he can demand action by the corporation, and, if it refuses to proceed in a proper action, he may sue in his own behalf and of all similarly situated, making the corporation a party defendant, and so enforce the rights of the corporation and of all interested. As the bill of complaint stands, Ryan is not a stockholder, for he alleges that no part of the 50,000 shares has been delivered to him or put in his name; that 500,001 shares are with the Title Guarantee & Trust Company, and that Martin has "been suffered and permitted to obtain and keep all of the capital stock of said company, except said 500,001 shares; that is, 499,999 shares of same." What right has Ryan to ask the court to compel Martin to account to the company for the money paid Martin by Lewis pursuant to their agreement, and to which complainant was not a party? Or to ask the court to compel Martin to return to the company the shares of stock he, Martin, does not own, or to ask the court to enjoin the company from transferring stock to Martin on the books of the company, or to enjoin the Title Guarantee & Trust Company from surrendering, or delivering stock to Martin and Lewis, or either of them, or to enjoin Martin from entering on the properties mentioned not owned by any party to this action legally or equitably? Can this court as a court of equity decree that the complainant is entitled for his services to 50,000 shares of the capital stock of the Tom Moore Gold Mining Company, and is the owner of same, and that the same shall be registered in his name on the books of said company and be delivered to him, when the bill discloses that the right of Martin to the stock, and of Martin and Lewis to stock, from whom complainant is entitled to receive it. if from any one, depends on conditions not fulfilled, and the company does not owe complainant anything, and it also appears that this court is powerless to compel performance of the agreement to convey the mining properties to the company, so that Martin, or Lewis, or both, would be entitled to the stock? It seems to me that each of these questions answers itself in view of the facts stated and alleged.

The complainant asks this court to declare nugatory, void, and with-

out consideration a pooling receipt or memorandum which the bill impliedly states the complainant accepted. This receipt or memorandum is neither set out in the bill, nor is the legal purport or effect of its contents stated, nor is its substance stated. The time, place, and circumstances of its execution and delivery are not stated. It is not even alleged that it was in fact accepted by complainant without consideration. The parties to it, if there be parties, are not stated. It is not attached to the bill. This part of the bill is altogether too indefinite and uncertain to set a court of equity in motion, and no facts regarding that pooling receipt or memorandum are stated upon which a court of equity can base or frame an intelligent decree. The complainant contends that this case is substantially on all fours with Rogers et al. v. Penobscot Mining Company et al., 154 Fed. 606, 83 C. C. A. 380. I take the facts from the syllabus:

"The bill set forth these facts: B. and M. agreed that B. should procure options to purchase certain mining claims in M.'s name; that they should organize a corporation with 500,000 shares of stock; that this stock should be issued to M., who should place 300,000 shares of it in the treasury of the corporation, transfer 50,000 shares to B., convey the options to the corporation and furnish the money, either by loans to the corporation or by purchase of the capital stock, to pay the unpaid balances of the purchase prices of the mining claims. B. procured the options. The corporation, the P. Co., was organized. M. conveyed the options to it, took the 500,000 shares of stock, and placed 300,000 shares in the treasury. The P. Co. paid the unpaid balances of the purchase prices of the mining claims, and M. took the deeds thereof to himself. The complainants were the assigns of 11,300 of the 50,000 shares of stock M. agreed to transfer to B., and they brought suit in equity against M. and the P. Co. to compel him to convey the mining claims to the corporation."

There M. had become and was the owner of the premises and property which it was sought to compel him to transfer to the corporation, and the facts disclosed that the stock was properly issued, and that complainants were the equitable owners of the stock assigned to them.

The complainant also relies upon Ryan v. Seaboard & R. R. Co. et al. (C. C.) 89 Fed. 397. There the court held:

"A bill alleging that plaintiff purchased from the owner certain shares of stock in defendant corporation, represented by a certificate which had been placed in the hands of another defendant under a pooling arrangement between stockholders, but that such defendant had surrendered said certificate and fraudulently procured its cancellation and the issuance of a new certificate to himself in lieu thereof, and praying the cancellation of such new certificate and the establishment of plaintiff's rights as a stockholder, states matters giving a court of equity jurisdiction."

That case was rightly decided, but it does not help the complainant here.

If I could find equitable jurisdiction—that is, allegations of fact upon which a court of equity will grant equitable relief—I would overrule the demurrer and allow the court in equity to settle the whole controversy, which it may do where it has equitable jurisdiction of a part involving the principles upon which the whole depends, or where a material part is within its equitable jurisdiction. Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Clarke v. White, 12 Pet. 178, 9 L. Ed. 1046; Hepburn v. Dunlop, 1 Wheat. 179, 4 L. Ed. 65; Dewing v. Perdicaries, 96 U. S. 193, 24 L. Ed. 654.

I do not think this bill is multifarious, but, on the facts stated, this court cannot properly grant complainant any of the relief demanded, or any relief, and the demurrer is sustained on that ground, with costs, but with leave to amend in 30 days on payment of such costs.

MONARCH TOBACCO WORKS v. AMERICAN TOBACCO CO. et al.

(Circuit Court, W. D. Kentucky. December 21, 1908.)

1. Monopolies (§ 12*)—Interstate Trade-Statutes.

Act Cong. July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, is illegal, and every person who shall make any such contract, or engage in any such conspiracy, etc., on conviction shall be fined. Section 2 declares that every person who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize, any part of the interstate trade or commerce, on conviction shall be punished, etc. Held, that such sections referred to and made illegal two different things: Section 1, combinations in restraint of interstate trade and commerce; and section 2, combinations or conspiracies to monopolize, or to attempt to monopolize, interstate trade and commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

2. Monopolies (§ 23*)—Private Injuries—Action.

Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), declares that any person who shall be injured in his business or property by any other person, or corporation, by anything forbidden or declared to be unlawful by the act which prohibits combinations in restraint of interstate trade and commerce, and combinations or conspiracies to monopolize, etc., may sue therefor in any federal court in which the defendant resides or is found, and may recover threefold damages, etc. Held, that it is only necessary to support an action under such section that complainant's business or property has been in some way injured by reason of defendant's illegal scheme.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 16; Dec. Dig. § 23.*]

3. Monopolies (§ 28*)—Conspiracies to Monopolize Interstate Commerce—Res Inter Alias Acta.

In an action for damages to plaintiff by defendant's alleged combination to monopolize or attempt to monopolize interstate commerce in to-bacco, in violation of Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3200), prohibiting conspiracies to monopolize or attempts to monopolize interstate commerce, defendant's acts and conduct prior to plaintiff's organization and entering the business were immaterial as res inter alios acta.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

4. Monopolies (§ 28*)—Conspiracy to Monopolize—Civil Damages—Petition—Construction.

Act Cong. July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibits combinations in restraint of interstate trade and commerce, and section 2 prohibits conspiracies to monopolize or attempts to monopolize interstate trade and commerce. Section 7 provides that any person injured by a violation of either section may sue for and recover treble damages. *Held* that, in an action brought for such damages in a

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

federal court sitting in Kentucky, it was not necessary that the petition should state the facts showing a right of action with the particularity of an indictment, but that it was sufficient if the facts constituting a cause of action were stated as concisely as possible consistent with clearness, as required by Civ. Code Prac. Ky. §§ 90, 115.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

5. Monopolies (§ 28*)—Combination of Monopolies—Damages.

Where, as a result of conspiracy or combination in restraint of interstate commerce, prohibited by Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), a person is injured by being compelled to pay a higher price for any article affected thereby than he would otherwise be compelled to pay, he may recover treble the amount of the damages sustained.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

6. Monopolies (§ 24*)—Unlawful Combinations—Restraint of Trade—Injunction.

Combinations may be enjoined if the objects of the association are such as to violate Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting combinations in restraint of interstate commerce, and combinations and conspiracies to monopolize interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

7. Monopolies (§ 14*)—Combinations—Manufacture of Article of Necessity.

A combination, the sole object of which is to manufacture an article of common necessity, is not, without more, a violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting combinations in restraint of interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.*]

8. Monopolies (§ 12*)—Conspiracies in Restraint of Trade—Separate Acts.

A combination or conspiracy to monopolize or to attempt to monopolize interstate commerce, in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), was not immune because it was carried into effect by a series of separate acts, each one of which taken alone, was not objectionable, where the direct object and result of all was the perfection of a combination agreement whereby the free flow of commerce between the states, or the liberty of the trader, was obstructed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

9. Monopolies (§ 12*)—Interstate Commerce—Restraint—Extent.

It is not necessary that restraint of interstate trade and commerce should be so complete as to amount to total destruction in order to constitute a violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U.S. Comp. St. 1901, p. 3200), prohibiting combinations and conspiracies in restraint of interstate trade and commerce, or to monopolize or attempt to monopolize the same.

[Ed. Note,—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

10. Monopolies (§ 28*)—Civil Damages—Parties.

Where a complaint for conspiracy to monopolize interstate trade and commerce charged all the defendants jointly with having entered each of the alleged combinations and conspiracies complained of, and all the acts were alleged to have been done pursuant to a common design, plain-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiff was not required to elect because some of the defendants were charged with doing one act and others with another.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

11. DAMAGES (§ 142*)—PLEADING—SPECIFICATION.

Civ. Code Prac. Ky. § 134, provides that, if the allegations of the petition are so indefinite or uncertain that the precise nature of the claim does not appear, the court may require that it be made more definite and certain by amendment. Held, that under the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) a petition for treble damages to plaintiff because of defendants' alleged unlawful combination or conspiracy to monopolize interstate commerce in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), sufficiently charged general damages by an allegation that, by virtue of defendant's alleged unlawful acts, plaintiff had sustained damages in the sum of \$500,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 413; Dec. Dig. § 142.*]

Helm Bruce and O'Neal & O'Neal, for plaintiffs. Gibson, Marshall & Gibson, for American Tobacco Co. Carroll & Middleton, for Nall & Williams Tobacco Co. Humphrey, Davie & Humphrey, for Mengel Box Co.

EVANS, District Judge. An act to protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), provides as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

It will be seen that section 1 makes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, illegal; and that section 2 provides that every person who shall monopolize or attempt to monopolize, or combine or conspire with any person or persons to monopolize, any part of the trade or commerce among the several states, shall be deemed guilty of a misdemeanor. It is obvious that the two sections refer-

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

red to make illegal two different, though nearly allied, things, namely, section 1 refers to combinations in restraint of interstate trade and commerce, and section 2 refers to combinations or conspiracies to monopolize, or to attempt to monopolize, interstate trade and commerce. Prima facie these two sections deal with the criminal features of certain conduct, but section 7 gives a right of action for the recovery of damages to any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared by the act to be unlawful. The language of each of the three sections is very general, that of the seventh section in no wise detailing or limiting in terms the character of injuries for which a right to sue is given. All that is necessary to support the action is that the business or property of the plaintiff shall have been in some way injur-

ed by reason of the illegal scheme.

The petition shows that the plaintiff is a corporation which was organized in 1901, and that by the coming in of the year 1903, by the expenditure of large sums of money, it had laid the foundation for, and in fact had built up, a good trade in tobacco, which it was then selling in large quantities. The petition also contains a long, general statement as to how the defendant, the American Tobacco Company, had theretofore built itself up into a gigantic corporation with immense capital, and makes evident the fact that this was done by a series of acts and a course of conduct with which its codefendants had nothing to do. and in which the plaintiff could not have had an interest, it not then being in existence. Indeed, the pleading makes manifest the fact that such acts and conduct on the part of the American Tobacco Company were res inter alios acta. Passing all such averments by as not material nor pertinent to any cause of action in plaintiff's favor, which must depend upon the combination of the defendants, we come to those allegations of the petition which bear upon the complaint made against them and growing out of their conduct in cooperation one with the other. Stated generally, the pleading avers that after plaintiff had been organized in 1901, and had, as we have indicated, by 1903 built up a fairly good trade, the defendants combined and conspired with each other, and with various other persons unknown, in the form of a trust or otherwise to restrain trade and commerce in tobacco among the several states; and, further, that the defendants combined and conspired to monopolize, and have attempted to monopolize, trade and commerce in tobacco among the several states. Such are the charges of the plaintiff against the defendant, and in general terms they come within the language of sections 1 and 2 of the act. The petition then undertakes to specify the acts of the defendants, whereby it sustained the injuries complained of. It is alleged that in 1903 the American Tobacco Company acquired control of the Nall & Williams Tobacco Company by purchasing a large majority of its capital stock, which fact it kept secret; that the Nall & Williams Tobacco Company had theretofore been an independent concern hostile to the American Tobacco Company; and that by falsely pretending that the Nall & Williams Tobacco Company remained independent, and by other means set forth, the defendants carried out and put into operation the conspiracies and combinations alleged in the petition, and competed under false pre-

tenses with plaintiff in Indianapolis, Ind., in Minneapolis, Minn., in Cumberland, Md., and in Louisville, Ky., greatly to plaintiff's injury. Some details of these transactions in the cities named are set forth in the petition, and it is also averred that the defendant the Mengel Box Company was a party to the combinations and conspiracies referred to; that it had a contract to furnish the plaintiff with boxes for all the tobacco it put up, and that the contract contained a stipulation whereby the Mengel Box Company agreed to keep entirely secret its transactions with the plaintiff and the number of boxes plaintiff purchased, but that in order to carry out the alleged combinations and conspiracies, and to put them into operative effect, the American Tobacco Company acquired a controlling interest in the Mengel Box Company, exposed plaintiff's said secret, and, having acquired knowledge of plaintiff's affairs in this way, was enabled to materially aid in carrying into effect the conspiracies and combinations of which the plaintiff complains. The plaintiff then avers that "by the aforesaid unlawful acts of defendants, and those conspiring and combining with them, plaintiff has been injured in its business and property, and has thereby sustained damages in the sum of five hundred thousand dollars." The prayer of the petition is for the recovery against the three defendants of three times the amount of the alleged damages, namely, \$1,500,000, and the costs of the suit, including a reasonable attorney's fee.

Each of the defendants has filed a general demurrer to the petition; each of them, in one form or another, has moved the court to require the plaintiff to make its allegations of "damages" more definite and certain; and the American Tobacco Company and the Mengel Box Company, insisting that two separate causes of action not affecting all of the parties defendant are set up in the petition, have, under section 83 of the Civil Code of Practice of Kentucky, moved the court to require the plaintiff to elect whether it will prosecute the action against the American Tobacco Company and the Nall & Williams Tobacco Company alone, or whether it will prosecute it against the American To-

bacco Company and the Mengel Box Company alone.

The Demurrers.

The general demurrers to the petition raise an important and interesting question, as to which, after very careful consideration, the court has not been able altogether to free itself from doubt. It goes without saying that the act should be so construed as to effectuate the purposes for which it was enacted, but the language of section 7 is very brief and very general, prescribing no limits, except the broad one that the suits it authorizes shall be for injuries which have been suffered by any person in his business or property at the hands of any person or corporation by reason of anything forbidden or declared to be unlawful by the act. As applied to this case, the statutory factors of the right to recover may be stated to be: First, that there has been a combination and conspiracy to restrain interstate trade and commerce in tobacco; second, that there has been a combination and conspiracy to monopolize, or at least to attempt to monopolize, interstate trade and commerce in tobacco; and, third, that, by reason of one or the other, or both,

of these combinations or conspiracies, the plaintiff has been injured in

its business and property.

At the outset it is urged that the petition, which, it is contended, is based upon a highly penal statute, should state the facts showing a right of action with all the fullness and particularity required in an indictment charging a criminal offense. If the pecuniary penalties prescribed for any violation of the act could be recovered by the United States in a civil action instead of by indictment, as Congress might have enacted, there would be plausibility in the contention, for sections 1 and 2 are expressly penal, but it cannot be conceded that section 7 is penal in any such sense as to support the argument. It gives any individual the right to a civil action for certain injuries he may sustain, and this, like other civil actions, as to the pleadings therein, must be governed by the provisions of the Civil Code of Practice of Kentucky when the suit is brought here; and those provisions demand, not that the rules of pleading in criminal cases shall be observed, but sections 115 and 90 of the Code require that the petition must, in language "as concise as possible consistently with clearness," state "facts which constitute a cause of action." By this rule the pleading in this case must

The statute has many times been before the courts, and certain questions have been definitely settled. It has been adjudged that where, as the result of such combinations as the act makes unlawful, one is injured by being compelled to pay a higher price for any article affected thereby, he may recover triple the amount of the damages sustained. Chattanooga Foundry v Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241. See, also, Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608. It has been settled that combinations may be enjoined by a court of equity if the objects of the association be such as violate the provisions of the act. Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. If, however, the sole object of the combination be to manufacture an article of common necessity, it has been held that that of itself is not interstate commerce, and that the act is not thereby violated. United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. If useful, we might refer to many other cases, but for the present we content ourselves with the summary of them made by the Chief Justice in Loewe v. Lawlor, 208 U. S., at page 293, 28 Sup. Ct. 301, at page 303, 52 L. Ed. 488, when, in delivering the opinion of the court upholding the complaint in that case, he said that the conclusion rested "on many judgments of this court to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or obstructs in that regard the liberty of a trader to engage in business."

The demurrer admits as true the averments of the petition, which, in the language of the act, show the existence of just such combinations and conspiracies as the act condemns. The demurrer must, therefore, be overruled unless the specified details of the acts by which the objects of the combinations and conspiracies were carried into effect obviate or destroy the force and effect of the admitted existence of the combinations themselves. The effect of this proposition, if

sound, would be that the illegal conspiracies and combinations which were entered into by the defendants gave the plaintiff no cause of action, because, though they were in fact carried into effect, it was done by a series of separate acts, each one of which, when taken alone, was within the rights of the defendant. That this, while plausible, is not sound, would seem to be indicated with sufficient clearness by what the Supreme Court said in Swift & Co. v. United States, 196 U. S., where, at page 396, 25 Sup. Ct. 279, 49 L. Ed. 518, Mr. Justice Holmes, speaking for the court, used this language:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as different charges they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. Aikens v. Wisconsin, 195 U. S. 194, 206, 25 Sup. Ct. 3, 49 L. Ed. 154."

In Chattanooga Foundry v. Atlanta, 203 U. S. 397, 27 Sup. Ct. 66, 51 L. Ed. 241, the same learned justice said:

"Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful, in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong."

These views were reiterated and strongly enforced in Loewe v. Lawlor, 208 U. S. 298-299, 28 Sup. Ct 301, 52 L. Ed. 488. The reasons for the rule do not seem to lie very deep, it being conceivable that the object of every such combination could, and probably would, be consummated by acts which would be perfectly lawful if not done with the design to put the unlawful scheme into successful operation. The conspiracy and combination, though themselves unlawful, cannot injure any person either in his business or property so as to give him a cause of action under section 7, unless something be done to make the combination and conspiracy effective; but whatever is done by those engaged in the scheme or plot with the motive and intent to carry out the unlawful purpose itself becomes tainted with the illegality of the scheme, however innocent it might otherwise have been, the separate acts becoming thereby so interwoven with the unlawful scheme as to cause the injury "by reason" of the combination, within the language of section 7. It therefore seems that a series of acts, each of which may be innocent in itself, may be wrongful if the direct object, purpose, and result thereof be to carry into effect a combination agreement whereby the free flow of commerce between the states or the liberty of a trader to carry on his business be obstructed. It may be that nothing was in fact done in either one of the four cities mentioned in the petition which related in the direct sense to interstate commerce. Yet the plaintiff was engaged in interstate commerce, and if it be true that one object of the combination was to interfere unlawfully with that business, even though it were done locally, it might give him a right of recovery for the consequent injuries. Sometimes an unlawful act may be done by means that appear to be lawful, just as a lawful

act may be accomplished by means that are manifestly unlawful. It must be confessed, however, that many of the material averments of the petition are expressed in somewhat vague and general terms, making it difficult to tell what are the real elements of the injuries complained of, so as to enable us definitely to say whether the infliction of those injuries was through conduct condemned by the act. It is certain that monopoly in interstate trade and commerce respecting tobacco was not made complete, and only the attempt to create the monopoly is complained of, attempt alone being also within the act. act does not appear to require that the restraint of interstate trade and commerce shall be so complete as to amount to total destruction. Nor, indeed, would that be essential, as injury to the business or property of the plaintiff might result although the objects of the illegal combination were only partially accomplished. It was contended that it was not unlawful merely to keep one's business affairs secret, nor for one corporation to obtain a controlling interest in another, nor merely to compete with a rival for trade and by mere competition to drive him out of business, nor to offer better terms and inducements than a rival in business offered, and we are by no means inclined to deny either of those propositions in the abstract, for neither is in terms forbidden by the act, nor, possibly, by any moral consideration; but, as we have seen, the seventh section of the act, in most general language, provides that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act" shall have a right to recover therefor, and the rulings of the Supreme Court to which we have called attention seem clearly to show that even lawful acts may become agencies of wrongdoing if the motive of doing those acts be to carry into effect a combination made illegal under the statute, and particularly if doing them does in fact effectuate the purposes of the unlawful scheme.

In the case of Whitwell v. Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, cited for the defendants, the plaintiff sued to recover triple damages, as plaintiff has done in this case; but the conduct of the defendant in that case consisted solely of a single course of business, and the court, holding, as we construe its opinion, that that particular course of business was not unlawful, and did not of itself constitute an unlawful combination, denied the plaintiff's right to recover. If we dissect the petition in this case so far as it gives specifications of the operations of the defendants in carrying their combinations and conspiracies into effect, and look separately at each act charged, we might conclude that at least some of them were strictly within defendants' rights, and if the plaintiff at the trial shall prove the existence of the conspiracy, then what may be the result when further testimony shall fully show the exact situation, as distinguished from what we merely assume to be true on demurrer, we cannot now undertake to determine; but as the existence of the illegal combinations and conspiracies to restrain and monopolize interstate trade and commerce in tobacco is admitted by the demurrer. we have concluded that the petition states a cause of action under the statute, and that, whatever may be the case as to each of the separate lines of conduct to which the defendants resorted in the four cities named to carry such combinations and conspiracies into effect, that conduct, when taken together, may show not only how plaintiff was injured, but the motive of the defendants in doing the things complained of. The demurrers will be overruled.

Election.

We have no doubt that all the defendants are jointly charged with having entered into each of the alleged combinations and conspiracies complained of, and, while one is charged with doing one thing and one another, all of these acts, we think, are sufficiently alleged to have been done in pursuance of the common design, and for that reason the motions to require an election are overruled.

Motions to Make the Petition More Definite.

In one form or another each of these motions seeks to have the plaintiff's averments as to "damages" made more definite and certain. The motions in terms all relate to the "damages," as distinguished from a statement of the injury plaintiff claims to have suffered. We conceive the injury to be one thing, and the damages resulting from the injury to be another. Section 134 of the Civil Code of Practice provides that the court may at any time, in furtherance of justice, cause or permit a petition to be amended, and, if its allegations be so indefinite or uncertain that the precise nature of the claim is not apparent, the court may require the pleading to be made definite and certain by amendment; and the practice act (section 914, Rev. St. [U. S. Comp. St. 1901, p. 684]) requires the practice, pleadings, and forms and modes of proceeding in common-law actions in the federal courts to conform as near as may be to those of the state.

As already pointed out, the petition asserts that by reason of the alleged unlawful acts of the defendants it was damaged in the sum of \$500,000, and these motions are made in order that plaintiff may be required to show more definitely and in more detail the elements of the "damages" said to have been inflicted so that the defendants can know what they are to meet. The general rule is accurately stated in Section 1001 of Bates on Federal Procedure, where it is said:

"The damages are either general or special. General damages are such as naturally arise out of, or are connected with, and which the law implies or presumes to have accrued from, the injury complained of; and special damages are such as really accrued and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, and they must be specially alleged." Tidd's Prac. (1807) 389-400; 1 Chitty, Pl. (12th Am. Ed.) 395-399.

In Kentucky it is well settled that, if the damages claimed are such as would usually or naturally accompany or follow or be included in the results of the injuries complained of, they may be stated and claimed in general terms, but that other and further damages can neither be proved nor recovered unless expressly averred and shown. A familiar illustration of the difference between the two may be found in suits for damages for libel or slander. The damages usually or

naturally resulting from incriminating publications may be stated in general terms and proved at the trial; but if, in addition, the plaintiff had been prevented by the publication from obtaining or continuing to hold profitable employment, such result not usually following a slanderous or libelous statement, there must be a special averment showing the special injury, or otherwise damages therefor can neither be proved nor recovered in the action. The rule is entirely familiar that to entitle a plaintiff to prove special damages he must allege in his petition the facts causing them. Many other illustrations might be given, but we think it sufficient to say that in our opinion the damages claimed in the petition in this case are not special damages within the rules distinguishing them from those which may be supposed usually or naturally to flow from the conduct complained of. The plaintiff in a suit for damages for personal injuries, for example, is never required to give a bill of particulars or an analytical statement showing in detail how much one bone or one limb or one organ suffered, and what portion of the damages claimed should be apportioned and attributed to each, and this suggestion will serve to illustrate the idea of the court in this case as to specifying the elements of the damages claimed. The universal practice in Kentucky is to allege damages, when claimed as such, in general terms, in much the same way as was done by the plaintiff in the petition in this case, unless special damages are sought to be recovered. The Kentucky practice may be illogical and not the best or fairest way for giving the defendant notice of what he is to meet, but, being the rule in Kentucky, we must conform to it.

For these reasons, the motions to require the petition to be made more definite and certain as to the "damages" claimed will all be

overruled.

UNITED STATES V. CERTAIN LAND IN TOWN OF NEW CASTLE, ROCKINGHAM COUNTY.

(Circuit Court, D. New Hampshire. November 21, 1908.)

No. 552.

1. COURTS (§ 414*)—UNITED STATES COURTS—CIRCUIT COURTS—JURISDICTION—CONDEMNATION PROCEEDINGS—"COURT HAVING JURISDICTION."

Act Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516), provides that in every case in which the Secretary of the Treasury or any other officer of the government has been or shall be authorized to procure real estate for the erection of a public building or other public uses he shall be authorized to acquire the same by condemnation by proceedings in the federal Circuit or District Court in the district, in which the practice, pleadings, forms, and modes of proceedings shall conform, "as near as may be," to those existing at the time in like causes in the courts of the state. Act Aug. 18, 1890, c. 797, 26 Stat. 315, 316 (U. S. Comp. St. 1901, p. 2518), provides that "hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land or right pertaining thereto needed for the site * * * for fortifications and coast defences, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted." Held.

^{*}For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that by virtue of the earlier statute a Circuit Court of the United States is a "court having jurisdiction" of proceedings under the later act; that the provision of the latter that the proceedings shall be prosecuted in accordance with the laws of the state cannot be construed literally so as to oust the federal court of jurisdiction, where the state statute designates a special tribunal for such proceedings, but only requires a general conformity to the state practice as a whole.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1108; Dec. Dig. § 414.*]

2. JURISDICTION.

All other questions as to jurisdiction and form of proceedings disposed of by following United States v. Gettysburg Electric R. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576, Chappell v. United States, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510, and Hingham v. United States (C. C. A.) 161 Fed. 295.

3. EMINENT DOMAIN (§ 47*)—PROCEEDINGS BY UNITED STATES—PROPERTY PRE-VIOUSLY DEVOTED TO PUBLIC USE.

Query, whether property already lawfully taken and held for the uses of the state as a public way can be taken for the uses of the United States without express authority from Congress therefor, or under a statute authorizing in general terms the condemnation of land for such use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 107; Dec. Dig. § 47.*

Nature and extent of power of United States to condemn property for public use, see note to Town of Nahant v. United States, 70 C. C. A. 653.}

Proceedings by the United States to condemn property for fortification purposes. On plea and motion to dismiss.

C. W. Hoitt, U. S. Atty.

J. W. Kelley and W. D. Turner, for Town of New Castle. Frink, Marvin & Batchelder, for Mary B. Wendell and others.

PUTNAM, Circuit Judge. This is a petition by the United States for the condemnation of lands in the town of New Castle, alleged to be "needed for the site, location and construction of an artillery post for the use of the war establishment of the United States." The petition is signed in behalf of the United States by the Attorney General, and contains a proper representation that what is sought to be condemned is, in the judgment and opinion of the Secretary of War, needed for the purposes we have stated, and that in his opinion it is necessary and advantageous for the United States to acquire the same therefor. It also contains the following:

"(3) That the Secretary of War representing the United States and acting in pursuance of the authority vested in him by the aforesaid act of Congress, has been unable to agree with the persons owning or having an interest in said lands for the purchase of the same at a fair and reasonable valuation for the uses and purposes aforesaid.

"(4) That in pursuance of the authority vested in him by the aforesaid act the Secretary of War, on the second day of January A. D. 1908, made application to the Attorney General of the United States to cause proceedings to be commenced for the condemnation of said lands hereinafter described, for the

uses and purposes aforesaid."

The petition clearly identifies the boundaries of the land, although with it there is a map, which is not referred to in the petition so far as we can discover, and which therefore we are compelled to reject.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

However, so far as the mere formalities required by the statutes are concerned, the petition is correct; but in its original form it referred only to the statute of April 21, 1904, which we will explain hereafter, and which statute alone clearly would not support the proceeding. Subsequently, the petition was amended by inserting references to various other statutes, which we will explain. This amendment was under the ordinary rules of law allowable, as especially held in United States v. Gettysburg Railway Company, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576. Therefore it was allowed.

The statutes now relied on are as follows:

We have already referred to the act of April 21, 1904, c. 1407, found in 33 Stat. 234, described in the petition as the act of April 27, 1904. The portion relied on is simply the general appropriation of \$100,000 for the procurement of land "or right pertaining thereto" for works for fortifications and coast defenses. This clearly contains no authority to proceed to take the property in question here by the right of eminent domain.

The next act referred to is that of April 24, 1888, c. 194, 25 Stat. 94 (U. S. Comp. St. 1901, p. 3525), which we need not recite because it is superseded by the act of August 1, 1888, c. 728, 25 Stat. 357 (U.

S. Comp. St. 1901, p. 2516), which reads as follows:

"In every case in which the Secretary of the Treasury or any other officer of the government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building, or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever, in his opinion it is necessary or advantageous to the government to do so, and the United States Circuit or District Courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States upon application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings for such condemnation, within thirty days from the receipt of the application at the Department of Justice.

"Sec. 2. The practice, pleadings, forms, and modes of proceedings in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstand-

ing."

This act vests no authority in any executive officer to procure real estate by condemnation, but vests jurisdiction in the federal courts, and establishes methods of procedure, whenever authority has been or might thereafter be given, referring those courts to some other law for such authorization. That authorization, so far as the present case is concerned, is found only in the act of August 18, 1890, c. 797, § 1, 26 Stat. 315, 316 (U. S. Comp. St. 1901, p. 2518). The paragraph commences with an appropriation of \$500,000, or so much thereof as may be necessary "for the procurement of land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defences," and then proceeds as follows:

"Hereafter the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such 165 F.—50

proceedings, for the acquirement, by condemnation, of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defences, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted."

Then there is an authorization to the Secretary to purchase "land, or rights pertaining thereto," at a reasonable price, or to accept donations thereof. Then there is a provision that nothing therein should be construed to authorize an expenditure or involve the government in contracts for the future payment of money in excess of the sums ap-

propriated.

There was an order of notice permitting all parties interested to answer. Thereupon, Mary B. Wendell and others, who are concededly interested in the lands sought to be taken, and the town of New Castle by its selectmen, came in as respondents. Each of them filed pleadings, somewhat different in their form and entitled somewhat differently, but both amounting in a proceeding of this kind to a general demurrer, except that the town of New Castle also alleges an interest on the ground that a taking as asked for by the United States would include the extinguishment of certain public ways for the care of which the town is responsible under the statutes of New Hampshire, and in which the inhabitants of that town have, of course, a peculiar interest. Aside from the questions which arise from this claim made by the town of New Castle as to the public ways, and aside from a single question to which we will refer separately, every proposition made by the respondents has been disposed of in Chappell v. United States, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510, and United States v. Gettysburg Railway Company, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576. It would be a vain thing for us to discuss these topics. We note especially, however, that United States v. Gettsburg Railway Company disposes of all questions arising out of the claim that there was no sufficient appropriation by Congress with reference to the subject-matter involved in these proceedings. Indeed, inasmuch as it is apparently now settled that the condemnation is not complete until payment is made, the appropriation may as well follow the decree of condemnation as precede it. Hingham v. United States (C. C. A.) 161 Fed. 295, decided by the Circuit Court of Appeals for this circuit on April 9, 1908.

The single question to which we refer arises out of the peculiar phraseology of the act of August 18, 1890. This act seems to be the only statute which gives color of authority in the Secretary of War for these particular proceedings. It is broad in its terms, but, under the decisions of the Supreme Court to which we refer, is undoubtedly sufficient for the present purpose so far as mere authority is concerned. It contains the following peculiar expressions: "In any court having jurisdiction of such proceedings;" also, "in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted." These expressions compel us first to find any law giving the Circuit Court jurisdiction of proceedings of this character. That is found in the act of August 1, 1888, which we have already quoted, so that the difficulty is out of the way.

Thus this act of 1890, and that of August 1, 1888, furnished the authority, and also the tribunal.

This leaves only the peculiar expression at the close of the act of 1890 which we have cited. This is different in form from what is found in the previous statutes. For example, the act of August 1. 1888, which superseded the act of April 24, 1888, provided in the second section that the practice, and so forth, should conform "as near as may be" to the practice, and so forth, of the courts of record of the state within which the proceedings necessarily take place. The act of 1890, which furnishes the only authority to the Secretary of War in this particular case, departs from the words "as near as may be," and uses the words "in accordance with the laws" of the state wherein the proceedings must be instituted. Mary B. Wendell, and those associated with her, rely on this expression in connection with Pub. St. N. H. 1901, c. 1, § 3, which expressly provides that, when the United States cannot obtain by purchase land required by it for public uses, it shall commence proceedings by petition to the selectment of the town where the land is situated for an assessment of the damages, with an appeal, according to section 4, from the selectmen to the Supreme Court of the state of New Hampshire. If the letter of the statute is to be obeyed, and if in accordance with the letter the proceeding must be in the form especially pointed out by the Public Statutes of New Hampshire, then the Congress of the United States has consented that the jurisdiction of the courts of the United States shall be ousted, and has consented to proceed solely before local tribunals, the first one of which is constituted of the same party or parties adversely interested in the proceedings. It is not a reasonable construction of the statutes of the United States to give to them effect of this character. Nevertheless, none of the cases decided by the Supreme Court concern a condemnation of land relying for its support on the act of August 18, 1890; and there are no decisions of any satisfactory authority construing that act, if there are any at all. This seems, therefore, to be for us a new case, but we deem the proposition easily disposed of. It is well settled that where, under previous statutes, a proceeding of this character must be in accordance with the laws of any particular state, this does not mean that the proceeding must be in accordance with a law of the character relied on by Mary B. Wendell, and those associated with her, which contemplates a peculiar proceeding for a peculiar purpose. It means at the most that the statutes as a whole are to be looked through, and that, where those statutes are not harmonious with reference to details, the proceedings in the federal courts are to be in accordance with the underlying spirit of the whole of them. For example, in this particular proceeding are we to be governed by the peculiar statute relied on by Mary B. Wendell. and those associated with her, or are we to take the statutes in relation to sewers (Pub. St. 1901, c. 50, § 8), which provide for a proceeding commencing with the mayor and aldermen, or chapter 142. § 13, with reference to land taken for flowage rights, where the proceedings commence with a petition to the Supreme Court, or chapter 158, § 7, with reference to land taken for railroads, where the proceedings commence before the railroad commissioners? We are fully satisfied that the requirement that the proceedings shall be in accordance with the laws of New Hampshire is accomplished if the proceedings are held in the federal court, where the records show clearly what has occurred to protect the rights of all parties, and where the damages are assessed by a competent and indifferent body of men, acting under the supervision of the court, whether they be commissioners or a jury.

We now look at the interposition of the town of New Castle by its selectmen. As this intervention is only for the purpose of seeking a dismissal of the proceedings, and as we cannot dismiss them on the record here, we are not called on to inquire whether the selectmen are authorized to contest this proceeding without a special vote of the town. We shall postpone further proceedings to enable the town to pass such a vote, if it is advised so to do. So far as we can discover, the only ground of interference by the town would be to protect the public ways running through this tract, if there are any. The plan of which we have spoken shows an indication that there are such; but, as we have said, the plan is no part of the record, and the record nowhere indicates anything of this nature. Consequently, on this record the town has no standing; nevertheless, we deem it advisable to make two observations: First, in accordance with the decisions of the Circuit Court of Appeals for this circuit in Nahant v. United States, 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723, decided March 20, 1905, in United States v. Nahant, 153 Fed. 520, 82 C. C. A. 470, decided February 1, 1907, and in Hingham v. United States (C. C. A.) 161 Fed. 295, decided April 9, 1908, the condition may be essentially different from what it would be if the proceedings were directly authorized by the state of New Hampshire in behalf of itself or of some quasi corporation established by it. Whatever may be the sovereign rights of the state of New Hampshire in the public ways in the town of New Castle, the United States have none, but they come in as a stranger, and must accept the position of one setting up an absolutely adverse interest, resistance against which must be made by the town of New Castle so long as the state of New Hampshire makes no superior claim in reference thereto. On settled rules, a mere possessory right, or a mere color of title, is sufficient to maintain a proceeding so long as the owner of the fee or otherwise of the body of the property does not interpose.

There is also a serious question whether property already lawfully taken and held for the uses of the state as a public way can be taken for the uses of the United States without express authority therefor. Of course, defense against a public enemy is of a higher character than the matter of going and coming on foot or with teams, so that it cannot be denied that the United States would have a right to take public ways for the purposes of fortification. The difficulty arises out of the question whether such a right can be inferred from mere general phraseology like that of the act of August 18, 1890. It would be unreasonable to assume that Congress intended that federal officials should assert jurisdiction to interfere with the public purposes of sov-

ereign states without express authority therefor. The presumption is that authorized public uses are not to be interfered with under mere general terms of federal or state legislation. The trend of the authorities would seem to show that, with reference to the present case, something more than the general phraseology of the act of August 18, 1890, is required before public ways can be closed by the Secretary of the Treasury or under his direction. As we cannot on this record determine the questions which the town of New Castle has brought to our attention by its briefs, we will only refer on this topic to Lewis' Eminent Domain (2d Ed.) §§ 272 and 272a, and the notes referred to therein, and to the reasoning and authorities appearing in Old Colony Railroad Company v. Framingham Water Company, 153 Mass. 561, 563, 27 N. E. 662, 13 L. R. A. 332, and in Easthampton v. County Commissioners of Hampshire, 154 Mass. 424, 425, 28 N. E. 298, 13 L. R. A. 157, and sequence. Of course, all these suggestions about the town of New Castle are made without prejudice until the record is complete.

The so-called "plea" of Mary B. Wendell, and those associated with her, filed on May 5, 1908, and the so-called "motion to dismiss" of the town of New Castle, filed on May 5, 1908, as amended on May 29, 1908, are overruled, and the respondents will answer to the merits

on or before the 1st day of January, 1909.

In re WYOMING VALLEY ICE CO.

(District Court, M. D. Pennsylvania. December 14, 1908.)

No. 558, in Bankruptcy.

1. Taxation (§ 454*)--Corporations-Resettlement-Statutes.

Act Pa. March 30, 1811 (5 Smith's Laws, p. 231) § 16, declares that the Auditor General and State Treasurer, at the request of each other or of the party, shall revise any settlements made by them, except such as have been appealed from, or which, by any other proceeding had been taken out of their offices, if any request be made within 12 months of the date of settlement; but after that time no settlement on which a final discharge has been granted shall be opened, but the same shall be quieted and finally closed. Held, that the officers, either of their own motion or at the instance of the party, may revise taxes which have been settled but not taken out of their hands by appeal or otherwise, provided action is taken within the time specified and a final discharge has not been allowed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 810; Dec. Dig. § 454.*]

2. Taxation (§ 530*)—Settlements—Final Discharge.

Where, after taxes had been settled against a corporation by the Auditor General and State Treasurer, the corporation became a bankrupt, and on petition the taxes were resettled and reduced both on corporate loans and on capital stock, which amounts were allowed by the referee and the tax on capital stock was paid by the trustee, but the tax on loans was reversed, on appeal, the payment of the tax on the capital stock constituted a discharge as to them.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 985; Dec. Dig. § 530.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. TAXATION (§ 478*)—CORPORATIONS—RESETTLEMENT.

Act Pa. March 30, 1811 (5 Smith's Laws, p. 231) § 16, authorizes the Auditor General and State Treasurer to revise tax settlements made by them, except such as have been appealed from or which by any other proceedings have been taken out of their offices, if such request be made within 12 months from the date of settlement; but after that time no settlement on which a final discharge has been granted shall be opened, but the same shall be quieted and finally closed. Held that, in order to prevent a resettlement of taxes assessed against a corporation, the taxes must have been paid and 12 months also have elapsed from the date of settlement without any attempt to resettle.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 852; Dec. Dig. § 478.*]

4. LIMITATION OF ACTIONS (§ 11*)—LIMITATIONS AGAINST STATE.

Time does not run against the commonwealth except in case there is something to raise an estoppel, or the law so expressly provides.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 36; Dec. Dig. § 11.*]

In Bankruptcy. On certificate from E. Foster Heller, referee.

Joseph E. Fleitz, for the Commonwealth.

W. S. McLean, for trustee.

ARCHBALD, District Judge. The question is how far in Pennsylvania a state tax on capital stock, which has been once settled and paid, can be resettled and enlarged. This depends of course on the local law. On January 11, 1905, the Auditor General and State Treasurer of Pennsylvania, as fiscal officers of the commonwealth, settled against the respondent corporation a capital stock tax of \$497.50 for each of the years from 1901 to 1904, inclusive, amounting in the aggregate to \$1.990. These were estimated settlements, based on the supposed value of the stock according to the best information obtainable, the company having failed to make the annual reports required by law, by which they might otherwise have been guided. Certified copies of these settlements were subsequently filed in the prothonotary's office of the proper county on April 19, 1905, whereby preferred liens were acquired on the franchises and property of the corporation. There was also at the same time, and in the same way, a settlement of taxes against the company on corporate loans to the amount of \$1,408.34, for which liens were likewise entered. Meantime, however, on March 17, 1905, the company was forced into bankruptcy; and following this a petition was presented on behalf of the commonwealth for the preferred payment out of the bankrupt estate of both these sets of taxes, which was sent to the referee for consideration. Pending the disposition of it on February 16, 1906, on representations made to the accounting officers and a plea of poverty, there was a reconsideration and resettlement of these taxes, the one being reduced to \$610, and the other to \$900. Both, as so reduced, were allowed by the referee, and, the liability for the tax on capital stock being conceded, it was paid by the trustee, March 22, 1906, on the referee's order. But on appeal to the court as to the taxes on corporate loans, it was held that, being due in reality from bondholders, the company being merely a collector,

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

they were not a tax as to it, but merely a liability arising out of the duty to collect imposed by the statute, and were not, therefore, entitled to the priority of payment contended for. In re Wyoming Valley Ice Company (D. C.) 16 Am. Bankr. Rep. 594, 145 Fed. 267. Disappointed at this outcome, and confessedly because of it, the accounting officers of the commonwealth, although payment had been made of the reduced amount at which the taxes on the capital stock had been resettled, undertook to reopen the matter, and on April 26, 1906, another settlement was made, which went back to and restored the original amount of \$1,990. Crediting on this, as a payment on account, the \$610 received, claim is now made on behalf of the commonwealth for the balance. The referee denied the claim, holding that there had been a final acquittance, in the face of which the attempted resettlement was invalid, and the case now comes up on exceptions to his report.

The right to revise and resettle a state tax in Pennsylvania is governed by Act March 30, 1811 (5 Smith's Laws, p. 231) § 16, which

provides as follows:

"The Auditor General and State Treasurer at the request of each other or of the party, shall revise any settlements made by them, except such as have been appealed from or which by any other proceedings have been taken out of their offices, if such request be made within twelve months of the date of settlement; but after that time no settlement on which a final discharge has been granted shall be opened, but the same shall be quieted and finally closed."

The construction of this statute is plain. Under it, either of their own motion or at the instance of a party interested, taxes which have been settled, but not, by appeal or otherwise, taken out of their hands, may be re-examined and revised by the accounting officers referred to, provided that action be taken within the time specified and a final discharge has not been allowed. Where, however, 12 months have elapsed after the original settlement, and there has been a discharge of the taxes by payment meantime, by the express terms of the statute there can be no reopening of the question, but the settlement stands as made. That was the law under the previous statute. Respublica v. Sergeant, 3 Yeates (Pa.) 544. And except as to the matter of intermediate payment there has been no change.

That the payment of the taxes by order of the referee in the present instance, on petition of the accounting officers of the commonwealth, based on the reduced settlement, amounted to a final discharge within the meaning of the law, there can be no doubt. Whether so intended or not, that was the necessary result. It does not matter that a receipt in full was not given, if that indeed was the fact, nor that the reduction of the capital stock tax was made in anticipation that the tax on corporate loans would be paid. Except that both were against the same party, the two had no connection. Nor is it like the case where there has been an entire omission of the tax, or an acceptance of less than the whole; where the commonwealth is not to be prejudiced by the action of the accounting officers. Easton Bank v. Commonwealth, 10 Pa. 442; Delaware Canal Company v. Commonwealth, 50 Pa. 399. The original settlement here was revised and reduced, and, the commonwealth having petitioned for preferred pay-

ment, the taxes were allowed and paid. Clearly, after that, any attempted revision would have to take that into account.

But unfortunately for the general creditors, that is not all that is required for a bar. Not only must the tax have been discharged, but the time limited by the statute must also have elapsed. Conceding—contrary to what seems to be decided in Commonwealth v. Pennsylvania Co., 145 Pa. 266, 23 Atl. 549—that this begins to run not from the time of payment, but from the time when the settlement which is revised was made, the settlement here upon which the taxes were paid was February 16, 1906, and the resettlement on which the present claim is based was April 26th following, the two being only a little over two months apart.

It is not as though the settlement of April, 1906, was a resettlement of that of January, 1905, with a payment in between. The settlement that was revised was the reduced one of February, 1906, and the two are not to be confused. Neither is the settlement here in question to be identified with the one of January, 1905, because it goes back to and adopts the figures which there obtain. Nor is any stress to be laid on the fact that the liens which had been entered on the original remain unsatisfied. If tied to or identified with that, the present settlement, being more than 12 months afterwards, could not be sustained. It is only as it undertakes to revise the reduced settlement

of February, 1906, that it is brought within the law.

The referee is of opinion that the commonwealth, having come into court and asserted and been allowed preferred payment on the basis of the reduced settlement, thereby confirmed it beyond recall, and thus took the case out of the hands of the Auditor General and State Treasurer, within the meaning of the law. There is nothing, however, to sustain this view. In so doing, the commonwealth was merely pursuing the orderly method provided for enforcing and collecting the taxes, and there is nothing to prevent it, because of this, from asserting its right to a further sum when the proper steps have been taken to make this due. Nor is it of any account that it has waited over two years to do so. Time does not run against the commonwealth, except as there is something to raise an estoppel, or the law so expressly provides; which cannot be alleged here.

The exceptions are sustained, and the case is sent back to the ref-

eree with directions to allow the balance of taxes claimed.

THADDEUS DAVIDS CO. v. DAVIDS et al.

(Circuit Court, S. D. New York. December 15, 1908.)

1. Courts (§ 292*)-Federal Courts-Jurisdiction.

Where there is no diversity of citizenship in an action in the federal court for infringement of trade-mark and unfair competition, jurisdiction can only be sustained in case there is a cause of action for infringement of a valid trade-mark.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. § 292.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. Trade-Marks and Trade-Names (§ 10*)-Validity-Statutes.

Act Cong. Feb. 20, 1905, c. 592, § 1, 33 Stat. 724 (U. S. Comp. St. Supp. 1907, p. 1008), regulating trade-marks, and providing (section 2) that nothing shall prevent the registration of any trade-mark used by the applicant or his predecessors or assigns in commerce, etc., for 10 years next preceding the passage of the act, did not make a surname a valid trade-mark which did not before constitute a valid trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 14; Dec. Dig. § 10.*]

3. Trade-Marks and Trade-Names (§ 10*) — Family Surname — Subject of Trade-Mark.

Since every man is entitled to use his name reasonably and honestly in every way, and cannot be obliged to abandon or unreasonably restrict such use, a family surname is not the subject of a valid trade-mark as against others of the same name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 14; Dec. Dig. § 10.*

Right to use one's own name, see notes to R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 17 C. C. A. 579; Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co., 27 C. C. A. 357.]

4. Trade-Marks and Trade-Names (§ 10*)—Family Name—Subject of Trade-Mark.

Complainant corporation, the Thaddeus Davids Company, and its predecessors, owned and controlled by persons whose family name was Davids, had used the word "Davids" as a trade-mark in connection with the sale of inks, mucilage, etc., for 25 years. They registered this name as a trade-mark, and placed it at the top of the label, near the middle of which was a word or words indicating the character of the goods as "ink" or "mucilage," and at the bottom the words "Thaddeus Davids Company, New York." Defendant, also composed of persons whose surname was Davids, adopted it as a trade-name, and the corporate name, "Davids Manufacturing Company," using the name "Davids" in a similar manner, except that the words "Davids Manufacturing Company" were placed in prominent type at the bottom of their label. *Held* that, the word "Davids" not being a proper subject of a trade-mark, defendant's use of the name was not objectionable.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 14; Dec. Dig. § 10.*]

In Equity. Demurrer to bill of complaint in action for infringement of complainant's alleged trade-mark.

W. P. Preble, Jr., for complainant. Emerson R. Newell, for defendants.

RAY, District Judge. As both the complainant and defendants are citizens and residents of the state of New York, this action cannot be sustained as one for unfair competition in trade solely. Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 672, 677, 21 Sup. Ct. 270, 45 L. Ed. 365; Burt v. Smith, 71 Fed. 161, 17 C. C. A. 573; Leschen & Co. v. Broderick & Co., 201 U. S. 166, 167, 172, 26 Sup. Ct. 425, 50 L. Ed. 710; Hopkins, Unfair Trade, 216.

Jurisdiction here depends on a cause of action being stated for infringement of a valid trade-mark. The defendants appear specially and raise the question properly. July 10, 1906, the complainant company filed its application for registration of its alleged trade-mark consisting of the single word "Davids," printed in ordinary large type,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and not interwoven or connected in any distinctive or particular manner, or printed in connection with any portrait. It was registered January 22, 1907. The statement, which is accompanied by the usual declaration under oath, reads as follows:

"To All Whom It May Concern:

"Be it known that the Thaddeus Davids Company, a corporation organized under the laws of the state of New York, located and doing business in New York City, county of New York, in the state of New York, has adopted for its use the trade-mark shown in the accompanying drawing.

"This mark has been continuously used in the business of said corporation

and its predecessor, Thaddeus Davids, since about 1825.

"The general class of merchandise to which the mark is appropriated is class 60, inks and inking materials, and the particular description of goods comprised in such class upon which it is used is writing-inks of all varieties, hectograph-ink, show-card, indelible and stamping ink, and stamp-pads.

"It is customary to print the mark upon latels which are attached to the

receptacles containing the goods. Thaddeus Davids Company, "By E. W. Davids. Secy."

This name "Davids" is the surname of the members of complainant's company and of each of the defendants. Thaddeus Davids, who first adopted it as a trade-name, was the predecessor of Thaddeus Davids Company. The bill of complaint alleges that complainant company and its predecessor have used it for 25 years. The contention of the complainant is that under the so-called "ten years clause" of the trademark act of February 20, 1905, c. 592, § 1, 33 Stat. 724 (U. S. Comp. St. Supp. 1907, p. 1008), the complainant has a valid trade-mark in the name "Davids" given by that statute, it having made registration thereof, and it and its predecessor having had the word "in actual and exclusive use as a trade-mark" for 10 years next preceding the passage of that act.

Section 1 of the act provides that the owner of a trade-mark may obtain registration by complying with the provisions of the act. Section 5 (33 Stat. 725 [U. S. Comp. St. Supp. 1907, p. 1010]) provides that "no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark" consists of immoral or scandalous matter; consists of a flag, coat of arms, or a design or picture adopted by a fraternal society. It then provides that trade-marks so identical with or so closely resembling others that confusion would result shall not be registered. It then provides that:

"No mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed or woven in some particular or distinctive manner or in association with a portrait of the individual or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term shall be registered under the terms of this act."

This absolutely excludes the complainant's alleged trade-mark from registration. But two provisos follow: (1) no portrait of a living individual is to be registered as a trade-mark except with his consent in writing; and (2):

"That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is de-

rived, in commerce with foreign nations, or among the several states, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from which he derest ed title, for ten years next preceding the passage of this act."

It must have been a trade-mark and a lawful trade-mark, recognized as such by the law prior to the passage of the act. It must have been the subject of ownership and owned by the applicant, or by his predecessor "from whom he derived title." The proviso means that nothing in the act is to "prevent" the registration of a trade-mark theretofore valid as such if it had been in use, etc., 10 years. It does not purport to validate anything as a trade-mark, or to make a valid trade-mark out of a surname not before constituting a valid trade-mark. See In re American Glue Co., 123 O. G. 999. Was this surname "Dayids," the name of many different individuals, the subject of a valid trade-mark? Could it, prior to the passage of the act, have been appropriated as such? The name "Davids" is a personal name, an ordinary family surname, and is the family surname of the defendants. Every man has the right to use his name reasonably and honestly in every way, and he cannot be obliged to abandon the use of his name or to unreasonably restrict its use. Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 135, 137, 138, 139, 25 Sup. Ct. 612 (49 L. Ed. 972). And in the same case it is held, expressly decided,

"A personal name, an ordinary family surname, such as Remington, cannot be exclusively appropriated by any one as against others having a right to use it. It is manifestly incapable of exclusive appropriation as a valid trade-mark, and its registration as such cannot in itself give it validity."

In Elgin National Watch Co. v. Illinois Watch Case Company, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365, it was held:

"The term 'trade-mark' means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others.

"As its office is to point out distinctively the origin or ownership of the articles to which it is affixed, no sign or form of words can be appropriated as a valid trade-mark which from the fact conveyed by its primary mean-

articles to which it is affixed, no sign or form of words can be appropriated as a valid trade-mark, which, from the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose. * * *

"The parties to this suit being all citizens of the same state and the word in controversy being a geographical name, which could not be properly registered as a valid trade-mark under the statute, the Circuit Court had no jurisdiction."

It follows, it seems to me, that the word "Davids" alone is not the subect of a valid trade-mark, at least as against these defendants.

The bill of complaint states that the manner in which complainant applies his said trade-mark, of which profert was made on the argument is to place such word "Davids" in prominent letters on the label pasted on the bottle containing the goods. The said word is placed near the top of the label, and the word or words indicating the character of the goods is placed near the middle of the label, as "Ink" or "Mucilage," and at or near the bottom of the label is placed the words "Thaddeus Davids Company, New York," so that the mark stood out as, for example, says the bill, "Davids Blue Ink. Thaddeus

Davids Company." This, of course, plainly indicates that the ink

or mucilage is manufactured by Thaddeus Davids Company.

The infringement charged is that defendants adopted as a trademark the firm name and style "Davids Manufacturing Company," and put on the market inks, mucilage, and paste in bottles on which were pasted labels at the top of which, in prominent type, was the word "Davids," at the middle of the label the word "ink" or "mucilage" or "paste," as the case might be, and at the bottom of the label the words "Davids Manufacturing Company" in prominent type, and sold and offered for sale same as "Davids Ink," "Davids Paste," or "Davids Mucilage."

The bill of complaint then says:

"(13) That the specific act of infringement herein complained of as affecting your orator's said registered trade-mark consisted, not in the mere use of the word 'Davids' without otherwise labeling their goods to produce confusion (your orator having no objection to the mere use of the name 'C. I. Davids' on defendants' goods), but in setting said word 'Davids' in prominent type at the top of the label, the word 'Ink,' 'Paste,' or 'Mucilage' also in prominent type near the middle of the label, and the arbitrarily adopted trade-name of 'Davids Manufacturing Company' in imitation of your orator's trade-name 'Thaddeus Davids Company' at the bottom of the label."

The bill then states that these acts constitute not only an infringement of the complainant's trade-mark, but unfair competition in trade. I am of opinion that the defendants had the right to use their own name in this way, in adopting the firm or business name under which they would do business. "Thaddeus Davids Company" is sufficiently distinguished from "Davids Manufacturing Company." If the variance in name is not broad enough, it is difficult to see how the defendants can use their own surname at all. There is no lie or misrepresentation in saying "Davids Ink," or "Davids Carmine Ink," or "Davids Mucilage." Immediately thereunder are the words, in large type, "Davids Manufacturing Company." This is a plain statement to all dealers, purchasers, and users that the ink, mucilage, or paste contained in the bottle is manufactured by Davids Manufacturing Company, and not by "Thaddeus Davids Company."

In Howe Scale Co. v. Wyckoff, Seaman & Benedict, 198 U. S., at page 140, 25 Sup. Ct., at page 614 (49 L. Ed. 972) the court said:

"We hold that, in the absence of contract, fraud, or estoppel, any man may use his own name in all legitimate ways, and as a whole or a part of a corporate name."

There is no allegation that the labels imitate those of complainant in size, design, or color, or that either label has any peculiar or particular characteristics. In McLean v. Fleming, 96 U. S. 245, 252, 253, 24 L. Ed. 828, the court said:

"Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trademark without his consent and authority. Decided cases to that effect are quite numerous, and it is doubtless correct to say that a person may have a right in his own name as a trade-mark as against a trader or dealer of a dif-

ferent name; but the better opinion is that such a party is not, in general, entitled to the exclusive use of a name, merely as such, without more. Millington v. Fox, 3 Myl. & Cr. 338; Dent v. Turpin, 2 Johns. & Hein. 139; Meneely et al. v. Meneely, 62 N. Y. 427 (20 Am. Rep. 489).

"Instead of that, he cannot have such a right, even in his own name, as against another person of the same name, unless such other person uses a form of stamp or label so like that used by the complaining party as to represent that the goods of the former are of the latter's manufacture. Nor will any other name, merely as such, confer any such exclusive right, unless the name is printed in some particular manner in a label of some peculiar characteristics, so that it becomes, to some extent, identified with a particular kind of goods, or when the name is used by the party, in connection with his place of business, in such manner that it assumes the character of a trademark within the legal meaning of that term, and as such entitles the party to the protection of a court of equity, to prevent others from infringing the proprietor's exclusive right. Gilman v. Hunnewell, 122 Mass. 139; Colladay v. Baird, 4 Phil. (Pa.) 139; Sykes v. Sykes, 3 B. & C. 541; Croft v. Day, 7 Beav. 89; Burgess v. Burgess, 3 De G., M. & G. 896; Holloway v. Holloway, 13 Beav. 209; Rogers and Others v. Taintor, 97 Mass. 291."

Here is a plain statement that even when a person may have (if he ever has) a right to the use of his own name solely as a trade-mark, as against those of a different name, he is not entitled to it, "the exclusive use of a name, merely as such, without more"; that is, it must be used with some other peculiar and distinctive mark such as are prescribed by and written into the act of February 20, 1905; that is, it must be "written, printed, impressed or woven in some particular or distinctive manner, or in association with a portrait of the individual." This was the law prior to 1905, and is still the law, as I understand it.

Demurrer sustained, with costs.

CLEMINSHAW v. INTERNATIONAL SHIRT & COLLAR CO. et al.

(District Court, N. D. New York. December 10, 1908.)

1. Bankruptcy (§ 293*) — Jurisdiction of Courts — Suit to Establish Lien on Bankrupt's Property.

Under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), which vests District Courts as courts of bankruptcy with jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto," such a court has jurisdiction of a suit in equity to establish a lien upon property of a bankrupt the title to which has passed to his trustee and which is in the possession of such court for administration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \S 410, 411 ; Dec. Dig. \S 293.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

2. Bankruptcy (§ 302*)—Suit Against Trustee-Sufficiency of Bill.

A bill against a trustee in bankruptcy of a corporation which alleges facts showing that complainant was induced by the fraudulent representations of the bankrupt, through its officers having apparent authority, to release a mortgage on its property, and offers to restore the consideration received therefor, states a cause of action for equitable relief by a restora-

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of the lien, the question of the intervening rights of creditors being one to be determined on the hearing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456; Dec. Dig. § 302.*]

In Equity.

This is a demurrer to the complaint in an action in equity brought to rescind a certain agreement, whereby certain bonds were surrendered and canceled, on the return of certain shares of stock of Curtis Leggett & Co., and to restore a certain mortgage, given to secure the said bonds, as a lien upon certain property owned by the bankrupt, Curtis Leggett & Co., at the time of the adjudication, and thus make such property, real estate, and certain personal property subject to the indebtedness represented by the bonds and secured by such mortgage. In substance and effect the action is brought to declare and create or restore a lien on the real estate and certain personal property of the bankrupt, Curtis Leggett & Co., the title to which is now vested in George A. Frisbie as its trustee in bankruptcy.

Van Santvoord & Wellington, for plaintiff. William W. Morrill, for defendant Frisbie as trustee. Thomas S. Fagan, for defendant International Shirt & Collar Co.

RAY, District Judge. Curtis Leggett & Co., a New York corporation, was adjudicated a bankrupt on or about November 9, 1907, and December 2, 1907, the defendant George A. Frisbie was duly appointed trustee of the bankrupt estate. On or about December 16, 1903, H. C. Curtis & Co., a New York corporation, duly executed a mortgage on its real estate and fixtures described in the complaint to a trustee, the Security Trust Company of Troy, N. Y., to secure the payment of an authorized issue of its bonds to the amount of \$50,000, \$48,000 of which were actually issued. Of those actually issued, \$2,-000 were thereafter actually paid and canceled. The mortgage was recorded in the county clerk's office of Rensselaer county, N. Y., on the 17th day of December, 1903, Book of Mortgages No. 302, p. 447. The bonds were of even date with the mortgage, December 16, 1903, and of the par value of \$1,000 each. H. C. Curtis & Co. delivered 38 of these bonds to the plaintiff here, Charles Cleminshaw, and the complaint alleges that there are other holders of the balance of such bonds who are similarly situated with himself. May 29, 1906, Curtis Leggett & Co. made a proposition in writing to H. C. Curtis & Co. for the purchase of the entire property, rights, privileges, business, and franchises of the H. C. Curtis Company. The consideration proposed was 2,250 shares of the capital stock of Curtis Leggett & Co, of the par value of \$100 per share and the assumption and payment of all the debts of H. C. Curtis & Co. A similar proposition was made by Curtis Leggett & Co. to the defendant International Shirt & Collar Company, also a New York corporation, to purchase its property, etc., paying therefor 5,250 shares of its said stock at the par value of \$100 per share.

The bill of complaint alleges that it was the intention of both said selling corporations that the business of each should be transferred to and continued by Curtis Leggett & Co. Before H. C. Curtis & Co. and its stockholders accepted the offer of Curtis Leggett & Co., the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant International Shirt & Collar Company, by its officers and certain other persons, and Curtis Leggett & Co. and certain persons acting in its behalf, the same persons in the main who represented the International Shirt & Collar Company, falsely and fraudulently, and with the intent to defraud the plaintiff and stockholders of H. C. Curtis & Co., represented that the assets of the International Shirt & Collar Company were very largely in excess of its liabilities to its creditors and stockholders. These representations were false and known to be false when made. In fact, the assets of the International Shirt & Collar Company were not worth within several hundred thousand dollars of what they were represented to be worth.

The bill of complaint sets out these representations and their falsity, and the names of the officers and persons who made them and their authority in all necessary detail. The authority to make representations is alleged to have been the general authority to make the sales, and that therefore the persons making them were acting within their apparent authority in making even false representations as to the property. In reliance upon said representations, H. C. Curtis & Co. on the 15th day of June, 1906, executed and delivered to Curtis Leggett & Co., who accepted same, a conveyance of all its said real estate covered by the said mortgage, and also the personal property covered thereby and described therein, subject to such mortgage. Curtis Leggett & Co., as a part of the consideration for such conveyance, agreed to pay the mortgage and bonds therein referred to and thereby secured to be paid. Thereafter, and in 1906, Curtis Leggett & Co. increased its capital stock and reclassified the same. Its original issue of stock was all common stock.

The bill of complaint also alleges that relying on similar statements, which were false and fraudulent, made May 29, 1906, and September 6, 1906, by officers of the International Shirt & Collar Company, who were also officers of Curtis Leggett & Co., and false representations made by both said companies and by their officers, naming them and their official capacity, and made to plaintiff and others, that the assets of Curtis Leggett & Co. amounted to more than \$1,000,000 in excess of all its debts and liabilities, the plaintiff and others were induced to surrender up and cancel their bonds secured by said mortgage, and to consent to a cancellation of such mortgage and bonds, and take in exchange therefor shares of preferred stock in Curtis Leggett & Co., which shares were in fact worthless and are still worthless, but which would have been worth par if such representations had been true.

The bill of complaint alleges that the plaintiff in doing what he did relied on such representations; was ignorant of their falsity and remained in ignorance until March 7, 1907; that he was not in a position to ascertain the actual and full truth, giving reasons why, until August, 1907.

The complaint proceeds to state that from time to time after March, 1907, the officers of Curtis Leggett & Co. falsely and fraudulently represented to the plaintiff that the assets of the company were more than sufficient to pay its debts, and more than sufficient to make its preferred stock worth par, even conceding the inventory of the assets of the

International Shirt & Collar Company was a fraudulent one; and also, as a further inducement to delay by plaintiff in bringing action, promised to make good any shortage in the assets of the International Shirt & Collar Company. Also, that in ignorance of the truth, "and to permit, if possible, Curtis Leggett & Co. to weather the extraordinary conditions in the money market that obtained during the summer of 1907, refrained from prosecuting his claim and refrained from instituting suit." In short, the complainant admits some delay in bringing the suit after he was partially informed of the fraud and deceit practiced on him in the first instance, but he also alleges that such delay was induced by further false and fraudulent representations as to actual conditions. These further false and fraudulent representations were to the effect that, even if some or all of the earlier ones were false, they occasioned complainant no damage.

The bill of complaint does not show that the rights of others have intervened, so that injury would result to innocent third parties should relief be granted the complainant. The trustee of Curtis Leggett & Co. represents its creditors, but it does not appear that these creditors became such on the strength of the ownership by that company of the property in question. What facts a trial will disclose in these regards is problematical. The demurrer of the defendant International Shirt & Collar Company presents the contentions that the bill on its face is without equity, fails to excuse delay in bringing the action, that the said company is not a proper or necessary party, and that this court has no jurisdiction of the subject-matter or of the person of such defendant. The demurrer of the trustee, Frisbie, presents some, but not all, of these contentions.

It seems to me clear that this court has jurisdiction. The title to the property sought to be charged with the lien of a mortgage is vested in the trustee, an officer of this court, and was at the time of the commencement of the action. This court has the charge and custody of the property, and common sense seems to indicate that, if any court is to charge it with a lien or permit it to be charged with a lien, this is the one. If the transaction in and by which the lien was canceled was fraudulent and voidable, may not this court at the suit of a party in interest so say? By section 2 of the bankruptcy act, "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), amended February 5, 1903, c. 487, § 1, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1024), the District Courts are made courts in bankruptcy, and invested with such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, and to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto." I am very sure that this confers ample and plenary jurisdiction on this court to determine the question involved here.

Whitney v. Wenman, 198 U. S. 539, 552, 25 Sup. Ct. 778, 49 L. Ed. 1157; Ex parte The City Bank of New Orleans, in Matter of William Christy, Assignee, etc., 3 How. 292, 312, 313, 11 L. Ed. 603. This is a plenary action in equity to determine whether or not complainant has a lien on the property, and the extent of it. As stated, the property is

now in the possession of this court, and is to be reduced to money and distributed by it. In Whitney v. Wenman, 198 U. S., at page 552, 25 Sup. Ct., at page 781 (49 L. Ed. 1157), the court held:

"We think the result of these cases is, in view of the broad powers, conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in the federal courts. In re Whitener, 105 Fed. 180, 44 C. C. A. 434; In re Antiago Screen Door Co., 123 Fed. 249, 59 C. C. A. 248; In re Kellogg, 121 Fed. 333, 57 C. C. A. 547."

In Minnesota Co. v. St. Paul Co., 2 Wall. 609, 632, 17 L. Ed. 886, the court held that:

"Where a court of equity has taken possession of property for any reason, and has placed it in the custody of receivers, sequestrators, or custodians, it will maintain its possession of such property, and will determine all rights with respect thereto," etc.

If the allegations of the complaint are broadly true, a cause of action is stated, and the bill is not devoid of equity. Broadly stated, if a man is deprived of his property, or is induced to surrender a lien thereon by materially false and fraudulent representations upon which he relies, he may, on restoring what he has received, or on offering to restore, or on being able, ready, and willing to restore, be placed in his original position so far as possible, and so far as restoration will not interfere with the rights of innocent third persons. It may be that the rights of general creditors in this case are such that relief cannot be granted the complainant. I do not think it was incumbent on the complainant to negative possible conditions which would prevent the granting of equitable relief. The rights of the general creditors and of the trustee, as against the complainant, depend upon many things. I am pointed to no case holding that, in a case like this, the complainant must negative possible defenses. Wallace v. Hood (C. C.) 89 Fed. 11, was the case of an action by the receiver of a national bank to enforce an assessment against a stockholder for the benefit of its creditors. Scott v. Abbott, 20 Am. Bankr. Rep. 335, 160 Fed. 573, 87 C. C. A. 475, is in some respects quite different from this case, but it will be for the court to pass on the equities as between the complainant and general creditors when all the facts appear.

As to laches, the complainant sets out many facts explaining and excusing his delay in bringing suit. I am not prepared to hold as matter of law or fact that the delay is not sufficiently excused. The sufficiency of the excuse is better determined on the trial when all the facts and surrounding circumstances are before the court. It will be material to know whether or not the delay has prejudiced any one. It will be material to know the amount of the general indebtedness of Curtis Leggett & Co., and the times when such indebtedness was incurred. It is to be remembered that H. C. Curtis & Co. owned the

real estate in question, executed the mortgage, and issued the bonds. Cleminshaw took \$38,000 of these bonds, and claims he was induced to surrender them and consent to a cancellation of the mortgage by the fraud of Curtis Leggett & Co., a then existing corporation. For anything that appears, the present general creditors of Curtis Leggett & Co. were its creditors at that time.

It must be conceded that there is more or less confusion in the allegations of the complaint, but, accepting the allegations of fact as true, I am of the opinion that a case for equitable relief is stated.

The demurrers are overruled, without costs, and the defendants may

answer within 20 days.

BUSH v. ADAMS.

(Circuit Court, S. D. New York. December 12, 1903.)

PLEDGES (§ 56*)—SALE OF PLEDGED PROPERTY—VALIDITY.

Where bonds pledged as collateral security were sold after default in payment of the debt secured, on notice to the pledger and strictly in accordance with authority given by the contract, the fact that they were purchased by the pledgee, as was also expressly authorized, at less than their actual value, is not ground for impeaching the sale in equity, nor is the fact that pursuant to previous announcement the purchaser of the first lot sold was given the option to take all, where the sale was at public auction at an exchange, no objection was made to the manner of sale, and no facts are alleged showing fraud or unfairness.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 162; Dec. Dig. § 56.*]

In Equity. Demurrer to bill of complaint in suit to set aside a sale of collateral and to stay a common-law action brought to recover the difference between the amount of the proceeds of such sale and the amount due on certain promissory notes for which such collateral was held as security.

George S. Cooper, for complainant.

F. S. Bangs, for defendant.

RAY, District Judge. At New York, April 1, 1907, the Western Maryland Railroad Company, of which the complainant is now receiver, duly appointed, by its president, B. F. Bush, for value received, executed and delivered to Edward D. Adams 40 of its promissory notes, each reading as follows (aside from the number of the bonds pledged as collateral), viz:

"\$75,000.

No. ----

"New York, April 1, 1907.

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

both inclusive, and does hereby give full authority to the holder hereof to sell the whole or any part thereof, at any broker's board, or at public or private sale, at the option of the holder hereof, on the non-performance of this promise, or in case of the insolvency, bankruptcy or failure of the undersigned, and without notice of intention to sell, or of the time or place of sale and without demand of payment of this note; and in case of any sale or other disposition of any of the securities aforesaid, after deducting all expenses of collection and sale, to apply the residue of the proceeds to pay this note. And in case of deficiency the undersigned agree to pay to the holder hereof the amount thereof forthwith after such sale with legal interest.

"It is also agreed and understood that upon any sale of any of said collaterals the holder hereof may become the purchaser of all or any part thereof, and hold the same thereafter in his, or its own right absolutely free from any claim of the undersigned — Western Maryland Railroad Company,

"[Seal] By B. F. Bush, President.

"Attest: L. F. Timmerman, Secretary."

The bonds mentioned were duly put up as collateral. It is not alleged that there was any new modifying or qualifying agreement. The bill alleges that these notes were in renewal of a former set of notes, and that, as a part of the agreement for the renewal, it was agreed:

"That the Deutsche Bank should have the right to purchase any part of the \$4,000,000, par value, of bonds securing said loan at any time before March 1, 1908, at the price of 80% of their par value; and that such bonds so purchased, and their coupons, should be stamped 'Payable in Berlin and Frankfort at the rate of marks 4.20 per dollar': that the railroad company should apply for listing of said bonds so purchased on the New York Stock Exchange, and that, if the Deutsche Bank should desire to apply for quotation of such bonds upon any of the stock exchanges of Europe, the railroad company should pay the expenses connected with such application."

In 1906 and 1907 the said railroad company committed itself to large expenditures for betterments, improvements, extensions, and equipment, but because of financial conditions in the money market it was unable to meet such expenditures by an issue and sale of bonds, and hence met them partly from temporary loans and partly from current revenues.

The defendant, Edward D. Adams, is the agent and representative of the Deutsche Bank, a foreign corporation, and in substance the complaint alleges that such bank was to furnish the money and renew the notes. From time to time in December, 1907, and January and February, 1908, representatives of the said railroad company had conferences with said Adams as to the notes and their approaching maturity, with a view to securing an extension thereof. Pending the negotiations, and on the 17th day of February, 1908, Adams wrote a letter to the board of directors of the railroad company stating, in substance, that the Deutsche Bank would not renew the notes, but would expect them to be paid at maturity. Thereupon, and on or about March 5, 1908, proceedings were taken by the trustee of mortgage given to secure the bonds for the appointment of a receiver of the said railroad company, and the complainant was duly appointed.

Adams was informed of the proceedings and of a proposed plan to pay the interest on such bonds maturing April 1, 1908. March 7, 1908, a general notice was published of the formation of a committee to prevent a default under the mortgage, and that such committee

would co-operate in all measures to preserve its integrity, including an application to the court for an order to pay the interest on said bonds maturing April 1, 1908. The bill alleges:

"That said Adams favored and urged the policy of such payment, and it was not until after assurance had been given to him that a petition to the court for an order authorizing the receiver to provide for and pay said interest was about to be presented that said Adams took and carried out the peremptory, hasty, insufficient, and inequitable proceedings and methods for the sale of said bonds hereinafter set forth."

Then comes the following allegations:

"(19) That on March 10, 1908, said Edward D. Adams addressed a communication to the defendant company stating that, in view of the insolvency of said company, he had concluded to sell the \$4,000,000 first mortgage bonds deposited as collateral security, as aforesaid, at public auction on the next day, to wit, March 11, 1908, at 12:30 o'clock p. m., and that unless additional security or credit could be given before 5 o'clock on the afternoon of March 10, 1908, he would authorize the auctioneers to include said bonds in the list of se-

curities to be advertised for sale on the succeeding day.

"(20) That upon the following day, namely, March 11, 1908, at 12:30 o'clock p. m., there having been no sufficient intervening opportunity given to the said railroad company, or to others interested on its behalf, to enter into any adequate negotiations for the protection of said collateral, or to avail in the market of plans for the protection of the credit of said bonds, through provision for the payment of the interest thereon, which plans had been considered and discussed with, approved of, and urged by said Adams as aforesaid, and of which he was cognizant, said Edward D. Adams caused said first mortgage bonds, amounting in the aggregate to \$4,000,000, par value, to be sold at public auction in the city of New York, and the same were sold, and said Edward D. Adams claims to have become the purchaser thereof, having bid therefor 53 per cent. of the par value of said bonds. That notwithstanding that said notes were secured by specific bonds, identified by numbers stamped thereon and referred to on the face of said notes, and that no power was contained in any one of said notes to offer the bonds securing it for sale together with bonds securing any other note, and notwithstanding that so to offer said security of one note together with the security for other notes as one block or item would tend to depreciate the price at which said bonds would be sold, yet the defendant offered or caused to be offered at said sale all of said bonds (being the number securing each of said notes) on such terms that the successful bidder for one block of 100 should have the privilege and option of taking the whole number of 4,000 bonds at the same price. That on said sale said Adams claimed to have become the successful bidder for the first block of 100 bonds, for the price of 53 per cent. of their par value, and thereupon claimed to exercise the said option of taking the whole number of 4,000 bonds at the same price, and said entire amount of said bonds was declared by the auctioneer to be sold to him at the price of 53 per cent. of their par value. That no other notice or advertisement of said sale, other than an inadequate and obscure item in an auctioneer's list printed in a newspaper published on the morning of the pretended sale, was made or given. The notice and advertisement so printed is attached hereto, marked 'Exhibit B,' and made a part hereof. That no notice whatsoever as to the terms or method of said sale was given except by the auctioneer at the time of offering said bonds for sale.

"(21) That thereafter, and on the 12th day of March, 1908, said Adams began an action on said notes in the Supreme Court of New York county against Western Maryland Railroad Company by serving on L. F. Timmerman, secretary of said company, a summons and complaint, in which the notes aforesaid were set forth and described, and in which it was alleged that the railroad company, defendant in said action, was then insolvent; that the plaintiff therein, pursuant to the authority granted to him by said promissory notes and each of them, caused the securities held as collateral thereto to be sold at public auction, and that the plaintiff therein became the purchaser thereof for

the sum of \$2,120,000; that the expense of the sale amounted to \$1,000, leaving \$2,119,000 to be credited as a payment on account of said notes; that interest on said notes due and owing at the date of sale amounted to the sum of \$35,000, making a total of \$3,035,000; that after crediting upon said notes the net proceeds of sale there remained unpaid thereon the principal sum of \$916,000, for which said Adams, plaintiff in said action, demanded payment.

"(23) And your orator shows unto your honors that said defendant Adams and said Deutsche Bank were not justified in selling said bonds in the manner above recited, and in so doing acted contrary to equity and good conscience, in this: That at the time of said sale said bonds were temporarily depressed in value because of the recent appointment of a receiver of the railroad company; that the defendant Adams well knew the value of said bonds on account of the information that had been imparted to him during the course of the negotiations above described, and particularly on account of his knowledge that it was the purpose to prevent a default in the payment of interest due April 1, 1908, on said first mortgage bonds. That the offering of said bonds for sale in the manner aforesaid was in pursuance of a plan not only to secure said bonds at a price far below their intrinsic value, but to be enabled thereby to institute an action for the deficiency and obtain a preference over the other creditors of the railroad company, contrary to equity and good conscience."

The bill also alleges that the value of such bonds was in excess of 53 cents on the dollar of the par value and instances two or three sales

for a higher price.

The defendant insists that no ground for equitable relief is stated; that there is full and complete remedy at law; that in the suit at law to recover the balance due on the notes the sale of the bonds and the validity of such sale are necessarily involved, and may and must be passed upon and determined; and that in the absence of fraud in the sale, of which there is no pretence, there is no ground for the inter-

position of a court of equity.

The bill of complaint shows that Adams gave full and ample notice that the notes must be paid at maturity. There is no allegation or pretence that he ever assented to anything different. Clearly he had the right to fully approve the proposition to secure an order from the court to pay the interest on the bonds falling due April 1st. By the very terms of the contract contained in the notes, Adams had the right to become the purchaser; to sell at a broker's board, at public sale or at private sale, without notice of intention to sell, or of the time or place of sale, and without demand of payment of the note. Not only did the railroad company have ample notice that the notes must be paid at maturity, but notice of the sale was given. Notice was given that the purchaser of one lot could at his option have the whole. No demand was made after the sale of one lot that the others be put up and offered separately. It is not alleged that any one was prevented from becoming a purchaser at a higher price by pursuing the mode adopted.

I do not find ground for equitable relief. In re Mertens, 15 Am. Bankr. Rep. 362, 366, 367, 144 Fed. 818, 75 C. C. A. 548, affirmed 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945. And the burden of alleging and proving that this sale was unfair is upon the complainant. Hiscock v. Varick Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945. I fail to find any allegation of any fact tending to show that the sale

was either fraudulent or unfair. It seems to have been made upon due notice and in strict accordance with the contract.

The demurrer is sustained, with costs.

THE ETHELWOLD.

(District Court, E. D. New York. November 14, 1908.)

1. MABITIME LIENS (§ 62*) — ENFORCEMENT IN ADMIRALTY—PARTIES—RIGHT OF OTHER CREDITORS TO DEFEND.

In proceedings in rem in admiralty to enforce maritime lieus on a vessel, any creditor of the claimant desiring to contest the claim of any lieu claimant must appear in the cause and do so by answer and on the reference.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 100; Dec. Dig. § 62.*]

2. Admiralty (§ 101*) — Sale of Vessel — Proceeds—Decree in Personam—Waiver of Lien.

The libelant in a suit in admiralty against a vessel and the owner, after the vessel had been sold and the proceeds paid into court, and after intervening libels asserting maritime liens had been filed, proved its claim and took a decree in personam only against the owner of the vessel, making no opposition to the claims of the intervening libelants. *Held*, that as against them it waived its right to assert a lien on the fund in court and elected to look to the owner alone, and that such election also bound an insurer entitled to succeed to libelant's rights by subrogation.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 684; Dec. Dig. § 101.*]

In Admiralty.

Ralph James M. Bullowa, for Cuba Planters' Co.

Robinson, Biddle & Benedict (E. G. Benedict, of counsel), for John N. Robins Co.

CHATFIELD, District Judge. The Cuba Planters' Company, a fruit raising corporation, filed a libel against the steamer Ethelwold and her owners, in this court, upon January 17, 1908, for damages caused by the loss of certain bananas jettisoned at the time of the stranding of the steamer while under charter to carry a cargo of bananas for the libelant. This action resulted in a default and the entry of an interlocutory decree against the steamer and the company, under which decree the steamer was sold, and the proceeds, amounting to \$3,750, deposited in the registry of this court. Subsequently thereto a final decree was entered against the North American Steamship Company, Limited, but not against the steamship Ethelwold, although both were made parties defendant in the libel. The question of the validity of a maritime lien for the jettisoning of cargo was thus avoided.

It is suggested that the reason why a judgment in personam, and not in rem, was sought, was that a policy of insurance against the exact loss which occurred by the jettisoning of the cargo had been taken out by the steamship company in favor of the libelant, and it is also suggested that the libelant purposely sought to exhaust the security upon

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this policy first, in order to enable the surety company (which stood ready to pay this insurance) to reimburse itself by claiming subrogation and pursuing the action in rem against the steamer. If such were the plan, it was interfered with by the filing of four libels for supplies, repairs, and wharfage. These libels were filed January 28, 29, and 30, 1908, respectively. One of them, that of the Robins Company, has proceeded to a reference, and, no opposition having been made, the commissioner has found that the libelant, the Robins Company, is entitled to the sum of \$6,725.61. The three other claims do not seem to be disputed, and they have been assumed to be correctly stated at \$187.51, \$349.62, and \$74, respectively. The four libelants in these last-mentioned libels have agreed upon a decree proportionately dividing the surplus for the payment of their claims, and ask that the fund be awarded to them, and that the claim of the Cuba Planters' Company, so far as it concerns the vessel, be adjudged to have been lost by default. This would leave the Cuba Planters' Company to their judgment in personam, and to the reimbursement afforded by the bond of the surety company, up to the amount of \$2,800. This, in turn, would leave the surety company out of pocket unless they obtained security in the first instance from the owners of the vessel before insuring the cargo. On the other hand, the libelants claim that they are not in default, that they are entitled to a decree in rem as well as in personam, and that if, through an outside arrangement, security was given to the Cuba Planters' Company, in the form of insurance to the owners of the vessel, for a particular purpose, then a payment by the surety company, accompanied by an assignment of the libelants' cause of action in admiralty, would still leave the libelant or its assignee in a position where it could demand the entry of a decree in rem. The Cuba Planters' Company, or its assignee, likewise claims the right, even if no more than as a general creditor, to oppose the claims of other libelants, and asserts that it was entitled to notice of the hearing upon those references.

It will be well to determine the last question first, and this question is important, inasmuch as the argument is presented that if libels were filed on behalf of certain creditors, and the general creditors of the claimant were not allowed to contest the libels, the claimant might cause a preference by defaulting and enabling the libelant to obtain judgment in rem for the full amount of his claim. This argument is of some force when the situation under consideration is that of creditors of a bankrupt, or, in other words, in a situation where the bankruptcy court would have jurisdiction to prevent preferences voidable under the bankruptcy law; but the record here shows no such situation, and it seems necessary to hold, in order to make maritime liens of any use whatever, that objecting creditors must appear and oppose, by answer, claims filed under a libel, if they wish to preserve their rights, without reference to what the claimant or debtor may do in admitting the claim sought to be enforced by the proceeding in admiralty. In the present case each creditor who had a maritime lien, enforceable against the vessel, had a right to attack the allowance and payment of any other lien, but, if he wished to dispute the amount of that allowance, he

must appear in the action or on the reference and contest the libelants' claim. This was not done on behalf of the Cuba Planters' Company, although notice was given of the hearing to compute the amount due under the libel for wharfage, and the amount of that award could have been questioned only by exceptions filed within the term.

The four libelants who have entered decrees in rem, however, cite the cases of The Williamette Valley (D. C.) 76 Fed. 838, and The Evangel (D. C.) 94 Fed. 680, as authority for the proposition that neither the surety company nor the owner of the vessel was entitled to succeed to any rights of the Cuba Planters' Company as their rights existed at the time of the libel. Both of the cases cited arose from the giving of a bond by a claimant, subsequent to the filing of a libel, to secure the release of a vessel, and in each case an attempt was made to claim a maritime lien because these bonds became due and had been enforced. It was properly held in each case that no maritime lien could attach to a vessel, after a sale, for any cause of action existing before the sale, nor to the fund which took the place of the vessel. The fundamental idea of a proceeding in rem is the right to seize the res, and if that res has been released for certain purposes by the giving of a bond, then no other purpose could be included within the claims released. Any other maritime lien would have to be enforced against the vessel itself, and thus create another fund, if the vessel were again released under bond or by sale. But it does not seem that this doctrine has anything to do with the present situation. The bond given by the surety company was purely and simply one of insurance. The insurers upon a payment of their loss were entitled to subrogation, and subrogation means that they were entitled to be put in the shoes of the person to whose rights they were subrogated. In the present case, there having been no satisfaction of the decree in personam, no assignment in writing of that decree, or the claim, the insurance company is merely, with the consent of the libelants, endeavoring to enforce the libelants' rights, in order to prevent the payment of its insurance, and the situation does not arise of a possible second payment of the claim. It is rather the question whether an insurance company can advance the money upon its policy, and then elect whether to (1) make a demand upon the person who has contracted with it for the policy, or (2) realize upon collateral if it has it, or (3) attempt to enforce the original liability for which it has become a surety. Under the present circumstances this third course would seem to be the one chosen, and the insurance company, if it is the moving party upon the present application, has demanded the enforcement of a lien existing in admiralty before the sale of the vessel, but as to which lien this insurance or surety company had agreed to stand as guarantor in the case of loss. Or, to state the matter in still a different way, the insurance company originally promised to guarantee whatever amount of loss, up to the sum of \$2,800, could not be collected through ordinary legal channels, and it now contends that it cannot be compelled to relinquish any rights by which this loss could be made as small as possible, admitting it is responsible, up to the amount of \$2,800, for anything that cannot be recovered. On this aspect of the case the libelant would

seem to be entitled to a decree in rem, if the libelant were not in default in the action itself.

But the libelant subsequent to the sale, subsequent to the determination by the commissioner of the amount of the libelant's damages, and subsequent to the filing of the other libels, entered a decree, on the 18th day of February, 1908, in which the sale of the vessel was recited, the amount found due by the commissioner was decreed to the libelant, the report of the commissioner confirmed, and a judgment in personam against the North American Mail Steamship Company, Limited, and its right, title, and interest in the proceeds of sale of the steamship Ethelwold, was docketed for the sum of \$2,637.88, with interest and costs. The libelant, knowing that other libels had been filed against the vessel, that other decrees could be entered, and making no move to interfere with those decrees nor to oppose the claims on which they were based, may fairly be considered to have elected to look to the claimants of the steamer, and to leave the proceeds of the sale for distribution among other libelants. If such an election was made, it is now too late for the insurance or surety company to say that they were entitled to prevent such an election. They must be held to have known of the situation, and should have intervened or in some way attempted to prevent the libelants' release of the proceeds of the sale for the payment of the other libels. The sale was had under an interlocutory decree in rem, the judgment entered was based upon the action in personam, and the present motion to be allowed to enter a decree in rem cannot be granted.

If a decree were to be entered, the order of payment would give the claims for repairs and wharfage priority as well, and again the Cuba Planters' Company would have no rights which could result in payment of any of the fund to it, and the result would be the same.

AMERICAN CREOSOTE WORKS, Limited v. C. LEMBCKE & CO. et al.

(Circuit Court, S. D. New York. December 16, 1908.)

1. COURTS (§ 342*)—FEDERAL COURTS—CAUSES OF ACTION—JOINDER—LEGAL AND EQUITABLE ACTIONS.

The distinctions between actions at law and suits in equity in the federal courts being maintained, an action at law for damages for breach of contract cannot be joined with a suit in equity, which is incidental merely to the collection or enforcement of the judgment on the legal demand

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 468; Dec. Dig. § 342.*]

2. EQUITY (§ 39*)—JURISDICTION—LEGAL RELIEF.

Where equity takes or exercises cognizance of a case because equitable relief is solely appropriate to the main issue or cause of complainant, it will retain jurisdiction and take an account of damages growing out of or flowing from the wrong which is the basis of such equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 110; Dec. Dig. § 39.*]

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. Jury (§ 13*)—RIGHT TO JURY TRIAL—LEGAL AND EQUITABLE RELIEF.

A defendant entitled to a jury trial in an action for breach of contract cannot be denrived thereof by plaintiff's uniting it with a demand for

cannot be deprived thereof by plaintiff's uniting it with a demand for equitable relief incidental to the collection of his judgment on the legal demand.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 52; Dec. Dig. § 13.* Right to trial by jury in federal court, see notes to O'Connell v. Reed, 5 C. C. A. 603: Vany v. Peirce, 26 C. C. A. 528.]

4. Fraudulent Conveyances (§ 237*)—Fraudulent Corporation—Remedies. Where complainant having a claim for breach of contract against a corporation believed that defendant was about to transfer, or had transferred, its assets to a new corporation for the purpose of defeating complainant's recovery, complainant's remedy was to sue at law and recover his damages and then ask the interposition of equity to prevent the dissipation and concealment of the property of the corporation liable in damages.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 674; Dec. Dig. § 237.*]

5. Corporations (§ 579*)—Fraudulent Organization—Rights of Creditors. Where a second corporation was organized to take over the assets of an existing corporation merely to defraud its creditors, and was but a continuation or successor of the first corporation, and its organizers, stockholders, and officers had knowledge of the fraud and illegal purpose, the second corporation and its assets would be liable for any judgment recovered against the first.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2316; Dec. Dig. § 579.*]

Demurrer to Amended and Supplemental Bill of Complaint.

Edward P. Bryan, for complainant.

Olney & Comstock, for defendants.

RAY, District Judge. The bill of complaint as amended and supplemented sets out a contract between the complainant and the defendant C. Lembcke & Co., styled the first defendant, the breach of that contract by said defendant, and damages to complainant for such breach, and alleges indebtedness therefor. It is not alleged that any suit has been brought, or that any judgment has been recovered, or that the damages have been liquidated by agreement. The bill further alleges that, after such breach and the making of a claim for damages, the defendant, by its representative, told complainant's representative "that said defendant would take steps to protect itself, so that before your orator would recover judgment it would find no assets to seize, and that your orator, if it should win such litigation, would find a dead dog in the pit." That the same threats were thereafter made by said defendant company. Also that the complainant believes the said defendant was then concealing and secretly preparing the plan set out for transferring its property and assets so as to hinder, delay, and defraud the complainant.

The bill then alleges that the plan formed and carried out was as follows: That on or about December 18, 1907, the second defendant, C. Lembcke & Co., Incorporated, was organized and incorporated in such a manner "that said new corporation was a continuation and succession of the old corporation"; that the first corporation by a bill of

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sale endeavored to transfer to the second corporation, second defendant, its entire business and property, receiving in payment therefor nearly all of the capital stock of the new corporation, and that the new corporation refuses to be bound by or take any liability under the said violated and broken contracts. Also that, as the new corporation had notice of the fraud, it was not a bona fide purchaser of the property, and that such sale was in fact made, and is subject to the claims and demands of the complainant and all other creditors of the first corporation. Also that the stock of the new corporation held by the old is easily transferable, and of doubtful value and of little present value; that it may pass by delivery, and the proceeds be divided among the stockholders of the old corporation; that the old corporation has filed a certificate for voluntary dissolution and stockholders' consent, and also a certificate of dissolution. It has ceased to do business, but it appears from the bill that the dissolution proceedings are pending.

The relief demanded is that the defendants, and their officers, directors, and stockholders, be restrained from selling, or otherwise alienating, removing, or appropriating any of their business, property, or assets, except in the strict, due, and necessary regular course of business and trade as such, to be accounted for herein; second, from dissolving either of said corporations; third, from declaring or paying any dividends; all until the complainant's debts, damages, interest, and costs be paid and satisfied, and until the event that the complainant have a lien upon the said business, property, and assets. Also that complainant on the final hearing recover payment of the alleged debts and damages in the sum of \$136,034.60 and interest. I find no allegation that the new corporation is disposing of its property to cheat or defraud any

one or threatening so to do.

It is clear that two causes of action are stated or attempted to be stated in the bill. One is a common-law action to recover a judgment for damages sustained by reason of a breach of contracts. is in equity to restrain, while complainant is securing or attempting to secure a lien on the property of one or both defendants by prosecuting his cause of action for damages to judgment and execution, the unlawful and fraudulent disposition of the property of the defendants, and a fraudulent dissolution of such corporations or of either of them. Sometimes when the court has equitable jurisdiction, or takes and exercises equitable cognizance of a case because equitable relief is solely appropriate to the main issue or cause of complainant, it will retain the case and take an account of the damages growng out of or following from the wrong which is the basis of equitable relief. Such is a patent case to restrain infringement and for damages, or an action to restrain the unlawful cutting and taking away of growing timber and for damages. In those cases the damages given are incidental to the equitable relief demanded and given, and the court of equity having the case before it will not relegate the plaintiff to a court of law for his damages.

But this is not such a case. Here the main cause of action is at law for damages, and the complainant is entitled to no relief whatever of an equitable nature until he has established his main cause of action, the contract, its breach, and damages, or is in process of establishing it. The equitable relief is incidental to that and can be sought or demanded only in aid of the enforcement of his judgment for damages. In the federal courts the distinction is maintained between actions at law and suits in equity. The Circuit Court of the United States has jurisdiction of both classes of actions. But the practice, form of pleading, etc., are different. The Circuit Court practice does not permit the joining of both these causes of action in one action or suit, except in rare instances, of which this is not one. See Kennedy v. Creswell, 101 U. S. 641, 25 L. Ed. 1075. In the common-law cause of action, which here is the main or primary cause of action, the defendant is entitled to a jury trial. He cannot be deprived of that right by uniting it with a demand for equitable relief purely incidental to the collection or enforcement of his judgment on the demand at law for damages. Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246; Root v. Lake Shore, etc., 105 U. S. 189, 26 L. Ed. 975; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451. The whole controversy will be settled by a court of equity where it has equitable jurisdiction of a part involving the principles upon which the whole depends. Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Hepburn v. Dunlop, 1 Wheat. 179, 4 L. Ed. 65. Here the principles, the right upon which the whole depends, are the contracts. That is an action at law.

The first ground of demurrer, want of jurisdiction, is overruled. There is the necessary diversity of citizenship and amount in controversy. But this court, as a court of equity, will not entertain this suit as to the claim for damages, for the reason the complainant as to that has no standing in a court of equity. Venner v. Great Northern Railway (decided February 24, 1908) 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666, and cases there cited. The second ground of demurrer, misjoinder of causes of action, one at law, purely, and the other in equity, incidental to and in aid of the enforcement of a judgment in the

first, if obtained, must be sustained.

The third and fourth grounds of demurrer, misjoinder of parties defendant and multifariousness, are overruled.

But I am of the opinion that this action as a suit in equity cannot, under the allegations of the bill, be maintained. The complainant may sue at law to establish and recover his damages for breach of contract; and that is his remedy. If having brought such an action at law, or being about to bring one, acting with diligence, he finds that the defendant corporations are doing the acts alleged here for the purposes alleged here, and that there is danger of the result sought being accomplished, I do not doubt the power of a court of equity to interpose and prevent the dissipation and concealment of the property of the corporation liable in damages. And if it be true that the second corporation is but the continuation and successor of the first, and its organizers, stockholders, and officers had knowledge of the fraud and illegal purpose, who can doubt that, when judgment is obtained, if obtained, the plaintiff can reach the new or second corporation and its assets? But no such suit at law has been brought or is about to be brought, and there is no suggestion that the American Creosote Works, Limited, intends to bring such an action.

The questions are not raised by the demurrer that no cause of ac-

tion at law is stated, or that no cause of action in equity is stated. In an action at law for damages, the second corporation would not be a proper party or directly concerned. In an action in equity such as has been suggested, both companies would be necessary and proper parties.

The demurrer is sustained on the second ground, misjoinder of

causes of action.

LING V. GREAT NORTHERN RY. CO.

(Circuit Court, D. Montana. December 19, 1908.)

No. 687.

1. Negligence (§ 39*)—Injury to Children-Depots.

A depot is not a place which allures children of tender years, or which a railroad company holds out to them as an implied invitation or special attraction to visit.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 55; Dec. Dig. § 39.*]

2. RAILROADS (§ 274*)—DEPOTS—PROTECTION AGAINST CHILDREN.

A railroad company was under no obligation to exercise active vigilance to guard its depot, to protect little children going alone on the depot platform, without invitation or purpose other than childish curiosity and amusement, and without the knowledge of the railroad company's servants.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868-874; Dec. Dig. § 274.*]

3. Railroads (§ 274*)—Injury to Licensees—Children on Depot Platform. Plaintiff, between 2½ and 3 years old, without the knowledge of his parents, wandered onto defendant's depot platform for curiosity and amusement. While a passenger train was standing at the station plaintiff leaned against the rear sleeper, and when the train started was thrown and injured. The presence of the child was not known to any of defendant's servants, though it could have been discovered, had they looked in the child's direction before starting the train. Held, that the servants were not bound to look for plaintiff's peril, and, not having seen him, defendant was not liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868–874; Dec. Dig. § 274.*]

At Law.

This cause was submitted upon the following agreed statement of facts:

"The parties to the above-entitled action hereby admit as facts, for all the purposes of the trial and determination of the issues in said action, by the above-entitled court, and to be considered as if fully established by competent proof, legally admissible and duly admitted, the following circumstances, facts, and conditions:

"First. That at all the times mentioned in the complaint, ever since, and now the defendant Great Northern Railway Company has been and is a railroad corporation organized under the laws of the state of Minnesota, and engaged as a common carrier of freight and passengers from St. Paul, in the state of Minnesota, to Seattle, in the state of Washington, and to and from intermediate points.

"Second. That Marcus Ling, the plaintiff herein, is an infant, and at the time of the injury herein complained about was between 2½ and 3 years of age, and at the time of said injury was living with his parents, C. W. Ling and

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Emma Ling, at their home in the town of Havre, Choteau county, Mont., a distance of about three blocks from the depot of the defendant company in said town.

"Third. That C. W. Ling is the duly appointed guardian ad litem of said

infant for the purposes of this action.

"Fourth. That during all the times in the pleadings mentioned the defendant had and maintained at said town of Havre a depot for the accommodation of passengers entering its cars or departing therefrom, for the loading and unloading of freight, and for other purposes, and upon either side of said depot there are, and at all of said times were, railway tracks used in operating defendant's trains. That on account of the location of said tracks on either side of said depot, and because of the great number of passengers and others usually at said depot upon the arrival and departure of passenger trains, in order to afford protection to such people, the defendant at all said times did, and now does, keep in its employ a watchman for the purpose of watching and guarding the safety and comfort of passengers and others rightfully at said depot.

"Fifth. That at the time the plaintiff sustained the injury hereinafter mentioned the said watchman so in the employ of defendant was unnecessarily absent and away from said depot, where his said employment required him to be, and the defendant had no one at said depot at the time of said injury to perform the services for which said watchman was employed, except in so far as such services devolved upon the conductor and other employés in charge of the passenger train that caused said injury to the plaintiff.

"Sixth. That if said watchman had been at the depot, in discharge of the duties for which he was employed, there were no conditions or circumstances to interfere with his seeing the infant, and knowing that said infant was alone and unattended by any one, and that there was danger of said infant being struck by said passenger train, and injured upon the starting of such train.

"Seventh. That on May 10, 1903, at 11 o'clock a. m., said infant was at said depot, alone and unattended by any one, and was playing on the depot platform for at least 10 minutes prior to the injury sustained by him, and when said passenger train started on its journey the said infant was standing upon the platform of said depot and leaning against the rear sleeping car of such passenger train, and while in such position said train, upon orders from the conductor thereof, suddenly started, causing said infant to be disturbed in his footing, and causing him to fall beneath such train; his right hand thereby being caught under one of the wheels of said train, and so crushed that it had to be amoutated. Said train was a regular passenger train that stops at said depot for a short time as per time schedule, and was in charge of a conductor, engineer, fireman, and two brakemen. That the conductor in charge of said train was upon said depot platform within a short distance from the place where said injury occurred, and gave orders to the engineer to move forward with said train while said infant was so leaning against said rear sleeping car, and at such time there existed no circumstances or conditions to interfere with or prevent the said conductor and other employes of defendant from seeing the said infant and knowing that he was alone and unattended by any one, and that there was danger of said infant being struck by said train upon its starting, and injured in the manner that he was injured. That no agent or employe of defendant made any effort to prevent said infant, so unattended, from playing about said depot at said time, or made any effort to cause said infant to be removed or taken away from the place where he was so injured. If the said conductor had looked in the direction of the rear sleeping car before giving said orders to the engineer for the train to move, there was no obstruction of his view of the place where said infant was, and said infant would not have received the injury complained of, if said conductor or any agent or employé of defendant had been observant enough to see the situation in which said infant was placed at the time of the starting of said train, and had taken the precaution to cause said infant to be removed from said position before said train was put in motion; but there is no proof or evidence known to plaintiff, his guardian, or his counsel that any of said trainmen actually saw said infant,

or knew of his being in danger, nor that any other employe of defendant saw

the said infant, or knew of his being in danger.

"Eighth. That said infant had never been in the habit of going to said depot. The said infant at said time was not away from its home more than 20 or 30 minutes, and during that time its father, C. W. Ling, was at his office in said town of Havre, and its mother, Emma Ling, was at their said home.

"Ninth. The foregoing agreed statement of facts shall have the effect of a special verdict or finding of facts, and judgment shall be pronounced thereon as upon a special verdict or finding of facts. It is agreed that, if the plaintiff is entitled to recover in this action, the damages sustained by him amount to twenty-five hundred (\$2,500) dollars, and, if the foregoing facts, circumstances, and conditions are sufficient under the law to sustain a verdict and judgment in favor of the plaintiff, then judgment shall be entered in favor of the plaintiff and against the defendant for the sum of twenty-five hundred (\$2,500) dollars, and costs of suit."

George H. Stanton and J. A. McDonough, for plaintiff. I. Parker Veazey, for defendant.

HUNT, District Judge (after stating the facts as above). Upon the agreed facts, it must be held that a depot is not a place which allures children of tender years, or that it holds out to them an implied invitation or special attraction to visit it.

It must be held, also, that the child, having strayed from his home, was upon the defendant's depot platform without invitation, and, of course, without purpose other than childish curiosity and amusement, and that he was there without the knowledge of defendant's servants. There was, therefore, in this case no special obligation resting upon defendant to guard the depot with active vigilance in order to protect the child going alone upon the platform. The doctrine of Railroad Company v. Stout, 17 Wall. 657, 21 L. Ed. 745, and U. P. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the turntable cases, is inapplicable.

The case, then, resolves itself into this: The child, not being a passenger or one having business with the railroad company, and not having been seen by any of the railroad company's employés or servants, leaned against the rear sleeping car just before the train moved. The train started. The child was thrown and injured. Clearly, if the defendant's servants had seen the child in the obviously imminent peril that he was in when leaning against the car, correct principles of law and instinctive rules of proper human caution would have made it their duty to have exercised every diligence to protect him against injury, irrespective of the fact that he was on the platform without right; and if they had failed in such duty, and the injury followed as a result of such negligence, the defendant would have been liable. Coasting Company v. Tolsom, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Gilbert v. Erie R. Company, 97 Fed. 747, 38 C. C. A. 408.

But, as neither the conductor nor the other servants saw the child, the doctrine of discovered peril is inapplicable, unless that doctrine can be extended far enough to say that, notwithstanding the child was on the platform without technical right—let us call him a licensee—still, if the conduct of the defendant's servants in not having seen him was a failure to have exercised ordinary care, the defendant is liable. Or

put the point interrogatively this way: Did the defendant's conductor fail to see the child as something he was bound to look for, and ought he to have seen him just before he gave the orders to the engineer to start, and ought the defendant to be held as if its servants had seen the child, and failed to hold the starting signal to the engineer, or otherwise to try to avoid the injury?

My opinion is that the question must be answered in the negative. It is not difficult to suppose a situation where circumstances of probable immediate danger are such as to put a prudent man on his guard, requiring him to use ordinary care to avoid injury, and where omission to use such care after having notice of such danger will not prevent a recovery by a plaintiff, notwithstanding plaintiff's own negligence has exposed him to the risk of injury. Richmond Traction Co. v. Martin's Adm'x, 102 Va. 209, 45 S. E. 886. Denver & R. G. R. Co. v. Buffehr, 30 Colo. 27, 69 Pac. 582.

But this rule cannot be applied to the facts before the court, because defendant's servants did not see the child or know of the child's presence before the accident, or at the precise time thereof, and because, under the circumstances, the law imposed no duty upon them either to look back to the rear car to see if there was a child there in a position of danger, or to anticipate such a peril as the plaintiff volun-

tarily, and at law wrongfully, put himself in.

Were the case one where the child had been playing on the track in front of the locomotive, and the engineer had omitted to look ahead before he started his train, negligence might be inferred; but there is no room for a contention that there was gross or wanton negligence. Or if we had an instance of a passenger injured by falling from the steps of the car because the conductor failed to see his passenger trying to mount the steps, and gave an order to start the train before the passenger had had a reasonable time to board the train, different rules would require consideration.

The circumstances surrounding the case impel the view that there was no difference between the duty of defendant to plaintiff and that which it owed to an adult; and unless there was a legal duty, and a breach thereof, there can be no liability. The conclusion follows that, inasmuch as there was no duty of protection against the particular injury suffered, omission to have furnished such protection was not

negligence.

Judgment for defendant.

BECKER V. EXCHANGE MUT. FIRE INS. CO.

(Circuit Court, E. D. Pennsylvania. December 28, 1908.)

No. 86.

1. Insurance (§ 361*)—Premiums—Brokers—Nonpayment.

Plaintiff applied through brokers, S. & Co., for certain insurance, which they procured in defendant company through G., another broker. Plaintiff received the policy January 5, 1907, which provided that, if the premium was not paid before the 15th day of the month succeeding that in

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which the policy was dated, it should be void, without notice or other act on the part of the company. Plaintiff made no payment until February 8th, when a check was sent to S. & Co., who in turn remitted to G.; but he made no offer to pay the premiums to defendant until March 1st, when payment was refused because a loss had occurred on February 22d. Held, that both brokers were plaintiff's agents, and, she being chargeable with their neglect, the policy was forfeited.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 923; Dec. Dig. § 361.*]

2. Insurance (§ 392*)—Premiums—Nonpayment—Waiver.

An insurance broker's contract with defendant company required payment of premiums within 40 days succeeding the month in which policies were issued. Plaintiff having secured a policy through such broker, the premium was charged in the broker's December account. The policy provided for forfeiture unless the premium was paid by the 15th of the month succeeding the date of the policy. The premium not having been paid on February 18th, the insurance company's representative wrote the broker, claiming that payment should have been made by February 10th; but no payment was made until after plaintiff had suffered a loss on February 22d, when payment on that policy was tendered and refused. On March 11th the company wrote to the broker, inclosing a bill for December policies and demanding payment of premiums not later than March 15th; but there was no evidence that the inclosed bill contained the policy in question. Held, that such correspondence did not constitute a waiver of the policy provision 1 or forfeiture for nonpayment of premiums.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 392.*]

3. Insurance (§ 384*)—Waiver Clause—Validity.

A clause in a fire insurance policy that no officer or agent of the company should have power to waive any provision or condition, except as by the terms of the policy might be the subject of agreement indorsed thereon or added thereto, nor unless such waiver should be written on or attached to the policy, and that no privilege or permission affecting the insurance should exist or be claimed by the insurer unless so written or attached, was valid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. $1018 \; , \; Dec. \; Dig. \; 384.*$

Authority of insurance agent to waive prepayment of premiums, see note to Smith v. Provident Sav. Life Assur. Soc. of New York, 13 C. C. A. 292.]

At Law. Motion by defendant for judgment notwithstanding the verdict.

Davison & Seymour, for plaintiff.

H. B. Gill, for defendant.

J. B. McPHERSON, District Judge. After the evidence in this case had been put in, the parties agreed that there was no question to be submitted to the jury, and that the whole controversy was a question of law to be determined by the court. A verdict for the plaintiff was thereupon taken, subject to a reserved point, and the defendant has now moved for judgment notwithstanding the verdict. For the following reasons, I think the motion should prevail:

In December, 1906, the plaintiff, acting through her husband and agent, Charles W. Becker, employed Skinner & Co., of New York City, a firm of insurance brokers, to place insurance upon certain property in

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes $165~\mathrm{F.}{-52}$

the town of Little Falls. Skinner & Co. communicated with their correspondent in Philadelphia, A. B. McGuffey, and on December 20th McGuffey took out a policy of \$2,500 in the defendant company. The policy was sent by McGuffey to Skinner & Co., and reached the plaintiff's hands some time before January 5, 1907. It was numbered 16, 103, and is referred to in the following letter:

"Amsterdam, N. Y., Jan. 5, 1907.

"Exchange Mutual Fire Insurance Co.,
"327 Walnut St., Philadelphia, Pa.

"Gentlemen: James R. Skinner & Co., our insurance brokers in New York City, have sent us policies No. 16,103, 16,104, 16,105, and 16,106 on various risks. These do not bear the indorsement allowing you to do business in New York state. Are you licensed to do business in this state?

"Kindly send us statement of the condition of your company, assets, etc.
"Yours truly,
C. W. Becker, Agt."

On January 10th the plaintiff's agent addressed a second letter to the defendant:

"Amsterdam, N. Y., Jan. 10, 1907.

"Exchange Mutual Fire Insurance Co.,

"327 Walnut St., Philadelphia, Pa.

"Gentlemen: Kindly send us invoices for the following of your policies: 16,103, 16,105, and 16,106. Please make each one out separately.

"Yours truly, Chas. W. Becker, Agt., by A. V. H."

The policy in suit contains a peculiar provision concerning the payment of the premium:

"If the assured fails to make the payment in full hereinbefore named on or before the 15th day of the month succeeding that in which this policy is dated, this policy shall be null and void, without any notice or other act or thing to be given or done by the company, anything hereinbefore to the contrary notwithstanding."

It will therefore be seen that the plaintiff had possession of the policy as early as January 5th, and presumably had knowledge of the provision just quoted. Nevertheless, although the policy distinctly stated that unless payment in full should be made on or before January 15th the insurance should cease ipso facto, the plaintiff made no payment to any one until February 8th, upon which date a check was sent to Skinner & Co. to pay certain premiums, among them the premium on the policy in dispute. It does not appear when Skinner & Co. remitted to McGuffey; but at all events he made no offer to pay to the defendant company until March 1st, when he offered to Arthur R. Drake, the company's general agent, a check for the amount. This was refused, because meanwhile a fire had destroyed the property. The loss occurred on February 22d, and the plaintiff sent notice to the defendant under date of February 25th. To this notice the defendant replied on February 27th as follows:

"Philadelphia, Pa., Feb. 27, 1907.

"Mr. Charles W. Becker, Amsterdam, N. Y.

"My Dear Sir: Your favor of the 25th received. The premium under your policy has not been paid, and therefore we are not interested in the reported loss.

"We would refer you to the printed conditions of our policy, and suggest that you eliminate from your schedule of companies the policy of the Ex-

change Mutual, as we take the position that the other companies would be obliged to contribute proportionately, ignoring the amount of our policy.

"For your sake, we regret that the premium was not paid when due.

"Yours very truly,

Arthur R. Di

To this letter the plaintiff sent the following answer:

"Amsterdam, N. Y., Feb. 28, 1907.

"Exchange Mutual Fire Insurance Co.,

"327 Walnut St., Philadelphia, Pa.

"Gentlemen: Yours of the 27th received, relative to policy No. 16,103, and premium not having been paid. Beg to advise that we sent the James R. Skinner Co. check for this on the 8th of February, our check No. 6,031. This check paid several other policies. We have no doubt but that they sent you the remittance, and that through some failure in your office you have forgotten to give them the proper credit. This policy is in our possession and it stands against your company.

"Yours truly,

Frances A. Becker, by C. W. Becker."

On March 1st the defendant company replied:

"Philadelphia, Pa., March 1, 1907.

"Mr. Charles W. Becker, Agent, Amsterdam, N. Y.

"My Dear Sir: We have your favor of the 24th ult. The premium under your policy was due and payable at this office on or before January 15th. The business was not received direct from your broker or agent, the James R. Skinner Co. The application was sent to us by another broker, whom we have been urging to make settlement, in order to have the insurance effective. The situation is unfortunate, and we regret it just as much as you do. You will admit, however, that you are responsible for the act or neglect of your broker, and no doubt if the business had been received direct from the James R. Skinner Co. the premium would have been paid, and neither of us placed in this unfortunate position.

"We are bound by the instructions of our board of directors to comply with the conditions and terms of policies, and the only thing we can do in the matter is to refer the whole situation to them at their next meeting, which

will be within a few days.

"Check for the premium of this policy was tendered to us this morning, and we were obliged to refuse the same until authorized by the board of directors

to the contrary.

"Is it out of place for us to suggest to you to refer the whole matter to your attorney, so that, if it is held that this company is not liable, it will not interfere with your collecting from the other companies what under different circumstances we would be obliged to contribute as an assurer?

"Yours very truly, Arthur R. Drake."

Shortly after March 1st—the precise date does not appear—McGuffey, acting under instructions, took a \$50 gold certificate to Drake's office and offered again to pay the premium. Upon Drake's refusal to receive it, he laid the money upon the desk and walked out of the office. Drake returned the money promptly by registered letter; but McGuffey declined to receive the communication, and the letter was thereupon returned to the defendant, and was opened in court at the trial of the case. Up to this point the evidence shows clearly that the plaintiff had no right to recover. Skinner & Co. were her agents, and so was McGuffey; neither being employed in any character by the defendant company. Both these agents discharged their duty in the first instance. They obtained the policy, and sent it to her in ample time to permit the payment of the premium on or before January 15th. But, in spite of the express and unequivocal warning upon the face of the policy, the

plaintiff neglected to pay, and the insurance according to its terms ceased to be effective on January 16th. The subsequent attempt to pay by sending the money to her own agents on February 8th could only become effective if the defendant should accept the payment, and, as it never had an opportunity to accept before the fire, the attempt was unsuccessful.

Admitting the soundness of this position, the plaintiff seeks to recover upon the ground that the defendant waived the foregoing provision of the policy, and it therefore becomes necessary to consider the evidence on this subject. The facts are not in dispute, and are briefly these: As already stated, McGuffey, acting as the representative of Skinner & Co., took out the policy in suit on December 20th. He had brought other business to the defendant company during that month, and the premiums on all the policies were charged to his account. This account remained unpaid on February 18th, and upon that date the defendant sent him the following letter:

"Philadelphia, Pa., Feb. 18, 1907.

"Mr. A. R. McGuffey, 1001 Chestnut St., Philadelphia, Pa.

"My Dear Sir: We respectfully call your attention to your unpaid December account, which is now long overdue. You may recall that, when you placed this business with us, we asked you particularly in regard to the payment of the premiums, and you promised us they would be paid within forty days succeeding the months of issue of the policies. The December account should, therefore, have reached this office not later than February 10th. Will you please see that check reaches us for these premiums tomorrow?

"Yours very truly, Arthur R. Drake."

No payment was made in response to this request, and soon afterwards came the fire and the correspondence that followed thereupon. Certainly, as it seems to me, this letter of February 18th lacks the essential elements of a waiver. Nothing was done or omitted by McGuffey to the plaintiff's prejudice as a result of the letter, and nothing was done or omitted by Skinner & Co., or by the plaintiff, even if either of them knew that such a letter had been sent. Upon the point of their knowledge there is no evidence whatever. The utmost effect that can be given to the letter is to regard it as containing an offer to receive the premium on this policy, although it was a month overdue, and it may well be that if the offer had been promptly accepted the company would have been bound to receive the money. That the company was ready to receive it, if it had been offered, is, I think, fairly to be inferred from the following language in their letter of March 1st:

"The business was not received direct from your broker or agent, the James R. Skinner Co. The application was sent to us by another broker, whom we have been urging to make settlement in order to have the insurance effective."

But the neglect of the plaintiff's agent to offer the premium continued, and within a few days the relation of the parties was radically changed by the happening of the fire on February 22d. In brief, the plaintiff's situation was this: She had a policy which expressly notified her that it would be null and void after January 15th. After that date, however, she made an effort to re-establish it, and sent to her agents in New York the necessary money to offer to the company in payment of the premium. These agents neglected to act promptly, and retained

the money until after the fire. Meanwhile, and in ignorance of the fact that the plaintiff's agents were holding the money, the company asked the agents' correspondent in Philadelphia to pay the premium with which he was charged, and in effect stated its willingness to accept it. This statement was not communicated to the plaintiff, or to her brokers, and, even if it had been communicated, no additional effect upon the present controversy would have been produced thereby. The plaintiff had already given the money to pay the premium, and her brokers had it in their possession. All that was necessary was to pay it over to the defendant, and the vital need of payment must have been well known to all parties concerned. It seems to have been a clear case of neglect on the part of the plaintiff's brokers, and of their negligence she must bear the consequence.

A word may be added concerning one other letter written by Drake to McGuffey. On March 11th, after all the foregoing correspondence had taken place and the company had definitely refused to pay, the following communication was sent:

"Philadelphia, Pa., March 11, 1907.

"Mr. A. R. McGuffey, 1001 Chestnut St., Philadelphia, Pa.

"My Dear Sir: We wish to call your attention to the inclosed bill and the fact that policies are outstanding the premiums under which have not been paid, although these policies were issued in December last.

"You have knowledge of the conditions of our policies, and we must ask that settlement be made promptly in accordance with your agreement. Please let us have your check by return mail for policies issued in December, and a check for those issued in February not later than the 15th.

"Yours very truly, Arthur R. Drake."

The "inclosed bill" was not offered in evidence, and we are not otherwise informed of what it contained. Presumably it included only the premiums on the other policies which McGuffey had placed in December; for the company had positively denied liability on the policy in suit, and without proof it cannot be supposed that the payment of the premium on that policy was still being demanded.

But there is another objection to the effectiveness of the so-called waiver. Even if we concede the utmost force that the plaintiff assigns to the meager testimony concerning waiver, there is an insurmountable obstacle in a provision of the policy that has not yet been referred to:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions and conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

As already stated, the only evidence that the company waived the provision concerning payment of the premium is to be found in the letters, and, as these were neither written upon nor attached to the policy, they were ineffective. I am aware of the conflict of decision upon this subject; but, for a federal court, the governing rule has been laid

down by the Supreme Court in Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. The following quotation from page 361 of 183 U. S., and page 153 of 22 Sup. Ct. (46 L. Ed. 213), summarizes the elaborate discussion contained in the opinion:

"What, then, are the principles sustained by the authorities, and applicable to the case in hand?

"They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies that such a policy shall be void and of no effect if other insurance is placed on the property in other companies without the knowledge and consent of the company are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, wherewaiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that, where the waiver relied on is the act of an agent, it must be shown either that the agent had express authority from the company to make the waiver or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

The provision concerning waiver that was under consideration in that case is identical with the provision now before the court, and the decision was (page 363 of 183 U. S., and page 133 of 22 Sup. Ct. [46 L. Ed. 213]), that fire insurance companies are at liberty to protect themselves by such a condition. This is conclusive of the present controversy.

Judgment may be entered for the defendant notwithstanding the verdict.

CONWAY et al. v. OWENSBORO SAVINGS BANK & TRUST CO. et al.

(Circuit Court, W. D. Kentucky. November 12, 1908.)

1. Banks and Banking (§ 293*)—Insolvency—Stockholders—Double Liability.

The double liability of stockholders of a bank created by Ky. St. 1903, § 547, constitutes a trust fund, so that creditors of an insolvent savings bank may sue on behalf of all the creditors who may become parties to have the trust administered in equity without first having obtained a judgment at law on their demands.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. $\$ 1135; Dec. Dig. $\$ 293.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. Courts (§ 328*)—Federal Courts—Jurisdictional Amount.

Where, in a suit to enforce a double liability of stockholders of an insolvent bank imposed by Ky. St. 1903, § 547, the debts of complainants who were citizens of Indiana, against the bank, a citizen of Kentucky. exceeded \$2,000, exclusive of interest and costs, and the trust fund to be collected from the stockholders was nominally \$200,000, the amount in controversy was sufficient to sustain federal jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 891; Dec. Dig. § 328 *

Jurisdiction of Circuit Courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

3. Banks and Banking (§ 49*)—Insolvency—Liability of Stockholders— Enforcement.

The double liability of stockholders of an insolvent bank created by Ky. St. 1903, § 547, may be enforced in a suit in equity by one creditor for the benefit of all, or by separate suits against each stockholder by a receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 76; Dec. Dig. § 49.*]

4. JURY (§ 13*)—RIGHT TO JURY TRIAL.

Where, in a suit to enforce the double liability of stockholders of an insolvent bank created by Ky. St. 1903, § 547, issues of fact are raised by the defendant's pleading, defendant has a right to a jury trial of such issues, whether the action be in equity or at law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 39; Dec. Dig. § 13.*]

5. Courts (§ 492*)—Federal Courts—Conflicting Jurisdiction.

Stockholders of an insolvent bank should not be twice vexed by a suit to recover the double liability imposed by Ky. St. 1903, § 547, by a suit in the state and federal courts to administer the trust so created, but jurisdiction should be surrendered to the court first acquiring jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1345; Dec. Dig. 492.*

Jurisdiction as affected by possession of the subject-matter, see note to Adams v. Mercantile Trust Co., 15 C. C. A. 6.]

6. Banks and Banking (§ 77*)—Insolvency—Stockholders—Double Lia-Bility—Assets.

The double liability of stockholders in an insolvent banking corporation to creditors, imposed by Ky. St. 1903, § 547, does not constitute assets of the corporation subject to administration, under section 616, providing for the appointment of a receiver to take possession of the bank's books, papers, assets, and business, and administer the same.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 173; Dec. Dig. § 77.*]

Sweeney, Ellis & Sweeney, for complainants.

George W. Jolly and W. Scott Morrison, for defendants.

EVANS, District Judge. The complainants, citizens of Indiana, who allege themselves to be creditors of the Owensboro Savings Bank & Trust Company (hereafter for brevity called "the bank"), filed this bill for the benefit of themselves and all other creditors of the bank who might come in and contribute to the expenses of the suit, and seek not only to establish their claims, but also to have collected and distributed certain sums of money due from the stockholders of the bank under the law of Kentucky presently to be stated, and whereby

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stockholders in such corporations created by that state are made liable to creditors for an amount equal to the face value of their respective shares of stock therein. The individual stockholders, having been made codefendants with the bank, have filed demurrers to the bill, and thereby raised the questions which we will now discuss. Some of those questions were raised and disposed of orally several months ago, when a receiver was appointed in the case, but it is thought to be well to restate the reasons therefor in this way.

Section 547 of the Kentucky Statutes of 1903 is in this language:

"The stockholders of each corporation shall be liable to creditors for the full amount of the unpaid part of stock subscribed for by them, and no stockholders shall be liable because of being a stockholder, for any sum more than to the amount of the unpaid part of stock held by such stockholder of any company, except stockholders in banks, trust companies, guaranty companies, investment companies and insurance companies shall be liable equally and ratably, and not one for the other, for all contracts and liabilities of such corporation to the extent of the amount of their stock at par value, in addition to the amount of such stock; but persons holding stock as fiduciaries shall not be personally liable as stockholders, but the estates in their hands shall be liable, in the same manner and to the same extent as the property of other stockholders, and no transfer of the stock shall operate as a release of any such liability existing at the time of such transfer: Provided, the action to enforce such liability shall be commenced within two years from the time of transfer."

Though not having obtained judgments, the complainants are creditors of the bank to the amount of at least \$5,000, and in this suit seek not only to establish their claims, but to obtain the benefit of the statutory provisions just copied. We have concluded that the so-called "double liability" thus provided for necessarily constitutes a trust fund, and, therefore, that the complainants suing for the benefit of all the creditors of the bank who may become parties can maintain this suit to have the trust thus created administered in a court of equity without having first obtained a judgment at law upon their demands. We regard this ruling as clearly supported by Case v. Beauregard, 101 U. S., in its opinion in which, at pages 690, 691 (25 L. Ed. 1004), the Supreme Court said:

"It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the payment of the debt must show that all remedy at law had been exhausted; and, generally, it must be averred that judgment has been recovered for the debt, that execution has been issued, and that it has been returned nulla bona. The reason is that until such a showing is made it does not appear, in most cases, that resort to a court of equity is necessary, or, in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must therefore show that he had done all that he could do at law to obtain his rights.

"But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form. 'Bona, sed impossibilia, non cogit lex.' It has been decided that where it appears by the bill that the debtor is insolvent, and that the

issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. Turner v. Adams, 46 Mo. 95; Postlewait & Creagan and Keeler v. Howes, 3 lowa, 365; Ticonic Bank v. Harvey, 16 Iowa, 141; Botsford v. Beers, 11 Conn. 369; Payne v. Sheldon, 63 Barb. (N. Y.) 169. This is certainly true where the creditor has a lien or a trust in his favor.

"So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, and to subject the property to the payment of the debt due him. Thurmond and Others v. Reese, 3 Ga. 449, 46 Am. Dec. 440; Cornell v. Radway, 22 Wis.

260; Sanderson v. Stockdale, 11 Md. 563.

"In Brisay v. Hogan, 53 Me. 554, it was ruled that when a creditor seeks by his bill to obtain payment of his debt from land paid for by the debtor, but conveyed to his wife, a levy of an execution is unnecessary, if the debtor never had legal title to the land. See, also, Day et al. v. Washburn, 24 How. 352, 16 L. Ed. 551.

"The foundation upon which these and many other similar cases rest is that judgments and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes.

"But, without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies."

See, also, the remarks of Judge (afterwards Mr. Justice) Jackson in Stutz v. Handley (C. C.) 41 Fed. 537.

If the liability thus created by the statute cannot be regarded as a trust fund and administered upon, collected, and distributed in a court of equity, it cannot be administered and distributed at all, as no mode of otherwise doing so is expressly provided in the statute by which the trust is created. It would be difficult to imagine a case which would call more strenuously for the aid of an equity tribunal, as distinguished from a common-law court, than one arising under this statute. Certainly the greatest possible confusion would ensue if each creditor might for himself separately sue each stockholder for his proportion of the individual liability. How each creditor's share in the liability of each stockholder could be adjusted in such a contingency it is impossible to conceive, and it is therefore obvious that anything other than one comprehensive suit in equity for the settlement of all the questions involved would be wholly impracticable. Nor do we think that the nice calculations made on behalf of the defendants as to what interest the complainants can have in the fund can be determinative of the question of jurisdiction. The debts of the complainants who are citizens of Indiana against the Owensboro Savings Bank & Trust Company, a citizen of Kentucky, largely, as we have seen, exceed \$2,000, exclusive of interest and costs, and manifestly the trust fund would, at least nominally, be \$200,000—the amount of the capital stock. Precisely what proportion of the liabilities of the stockholders would be paid, and precisely what per centum of his claim each creditor would ultimately obtain, would depend upon the amount realized from the double liability and the amount of claims presented and proved against the fund thus provided. Possibly the per centum of collections and the per centum of claims proved would be such as to pay complainants nearly or quite all of their demands, so that the calculation presented by the defendants' counsel is merely theoretical. We think, prima facie, that the amount in controversy very much exceeds \$2,000, besides interest and costs, and possibly it may be correct to say that the whole trust fund is in controversy. See McDaniel v. Traylor, 196 U. S. 426–431, 25 Sup. Ct. 369, 49 L. Ed. 533, and cases cited. At all events, upon the authority of Handley v. Stutz, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706, we have no doubt of the jurisdiction of the court, and so held upon the hearing of the motion for the appointment of a receiver. Besides, the complainants, under cases like Byers v. McAuley, 149 U. S. 620, 13 Sup. Ct. 906, 37 L. Ed. 867, and Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536, have the right to have their claims established.

The complainants joined as defendants numerous holders of the capital stock of the defunct bank, and sought to make the trust fund available by having it realized and collected in this action. The demurrers to the bill have also raised the question of whether the claims against the stockholders individually can be adjudicated and enforced in this suit, or whether proper practice requires that each stockholder shall be sued by the court's receiver in a separate action. It seems to the court that either course is open in a suit to gather in the trust funds, although, if any issues of fact are raised by any defendant's pleading, such defendant might, if he so desired, have the right to a jury to try those issues. So that, while we think the demurrers should all be overruled, we do not mean to say that upon proper application the court would not direct the liability of stockholders to be determined and enforced by actions at law to be brought by its receiver. We do not pass upon that phase of the case now, because it has not been presented. What we hold is that the "double liability" constitutes a trust fund for creditors which it is competent for this court to administer in a suit in equity, and that, in order to do this effectually, the fund would have to be brought into court. We further think that in its discretion the court might pursue either the course of enforcing the liability in this suit, or, by directions to its receiver, cause him to sue each or any of the stockholders in separate actions in any court having jurisdiction of such actions. We think this indicates the proper practice, and that it is supported by the authorities. Terry v. Little, 101 U. S. 216, 25 L. Ed. 864; Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885: Stutz v. Handley (C. C.) 41 Fed. 531.

Stated generally, these are the views we entertain, but we have never shut our eyes to the fact, shown by the bill, that certain proceedings are pending in the state court which were begun before the commencement of this action, but the precise scope of which has never been made to appear. Whether those proceedings were adjusted or designed to subject and administer for the benefit of all creditors the trust fund created by the Kentucky statutes, as distinguished from the bank's own assets, we do not know from anything that appears in the record. If, however, that be the scope of the suit in the state court, independently of the statutory suit presently to be referred to, we should probably be compelled to yield to it as having first ac-

quired jurisdiction of the subject-matter. Otherwise a different result might follow. At all events, the stockholders should not be twice vexed, once in the state court and once in this, upon the same subject-matter. Were we to speculate, we might suppose that the suit in the state court was brought under section 616 of the Kentucky Statutes for 1903 alone. That section is in this language:

"The Secretary of State, upon becoming satisfied that any bank or corporation has become insolvent, or that its capital has become, and is permitted to remain, impaired, or that it has violated any of the provisions of the law under which it was organized, may, with the approval of the Attorney General, apply to the Circuit Court, or judge thereof in vacation, of the county in which the bank or corporation is located, for the appointment of a receiver, who, under the direction of the court or judge, shall take possession of books, papers, and assets of every description, and all business of the bank or corporation, and collect all collectible debts and demands, and sell or compound, under the order of the court, all bad debts, and sell all the real and personal property of the bank or corporation, on such terms as the court may direct. The receiver shall be resident of the county in which the action is pending, and give bond, with good surety, to be approved by the court, and settle his accounts under the general laws."

It will be observed that this section authorizes the appointment of a receiver by the state court whose duty it shall be to—

"take possession of books, papers and assets of every description, and all business of the bank or corporation, and collect all collectible debts and demands, and sell or compound, under the order of the court, all bad debts, and sell all the real and personal property of the bank or corporation, on such terms as the court may direct."

Prima facie this refers to the property and assets of the corporation, as such, and we think that under the language of section 547, supra, the double-liability obligation ought not in any wise to be regarded as the property of the corporation or as any part of its assets. Section 547, which creates the liability, in express terms gives the benefit of it not to the corporation (which indeed has been paid in full for all the stock it had issued), but in express terms makes the stockholders liable to the "creditors," but not to any other person. We cannot find that the Kentucky Court of Appeals has ever definitely construed these two sections in connection, though in Covington Stone, etc., Co. v. Rosedale, etc., Co., 76 S. W. 506, 25 Ky. Law Rep. 964, it gave some indication of its views thereon. We are, therefore, without guidance from that tribunal except to the extent just mentioned, and must decide for ourselves. What we have said will, for present purposes, sufficiently indicate our views, which seem to accord with those of the Court of Appeals.

Orders will be entered overruling each and all demurrers and pleas

filed by the complainants to the bill of complaint.

In re CULWELL,

(District Court, D. Montana. December 11, 1908.)

No. 473.

1. Bankruptcy (§ 400*)--Exemptions-Homestead.

Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vests in the trustee the title of the bankrupt's property as of the date he was adjudged a bankrupt, except as to exempt property, and section 6a (30 Stat. 548 [U.S. Comp. St. 1901, p. 3424]) declares that the act shall not affect the allowance to bankrupts of exemptions prescribed by state laws in force when the petition in bankruptcy is filed. Held that, where a bankrupt in his schedules claimed certain real estate exempt as a homestead, his exemption therein, in the absence of fraud, was not defeated because he had not designated the same according to the laws of the state, provided he proceeded to do so within a reasonable time thereafter.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

2. Bankruptcy (§ 400*)—Exemptions—Time—Manner.

Courts of bankruptcy are not controlled as to the time or manner in which claims for exemptions are preferred.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 671; Dec. Dig. § 400.*]

3. BANKRUPTCY (§ 147*)—EXEMPT PROPERTY—ADMINISTRATION.

The authority of the bankruptcy court to control the property in order to set it aside if exempt, and to exclude it from the assets of the bankrupt's estate, does not extend authority to the trustee to administer exempt property as though it constituted assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. § 147.*]

R. O. Lunke, J. B. Clayberg, and Edward Horsky, for bankrupt.

HUNT, District Judge. This matter is presented for review of an order made by the referee in bankruptcy at Helena. By stipulation, it was agreed between the attorneys for the bankrupt and the trustee in bankruptcy that A. J. Culwell, the bankrupt, filed his petition in bankruptcy on October 28, 1907; that upon October 29, 1907, he was duly adjudged a bankrupt; and that, in the schedule of his estate attached to his petition, certain lots, hereinafter described, were enumerated and claimed by the bankrupt as exempt. It was further stipulated that neither the bankrupt nor his wife had filed a declaration claiming said property as a homestead at the time of filing said petition, or prior thereto, or at the time the order of adjudication was entered herein, but that said A. J. Culwell did duly file a declaration of homestead on December 7, 1907, and prior to any further steps in the bankruptcy proceedings than the adjudication. Upon that statement of facts, the referee held that the property was not exempt, and should not be set aside. The question, therefore, is whether or not lots 7 and 8 in block 14 of the original plat of Culbertson, Mont., as described in the schedule, should be set aside for him as exempt property.

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

My opinion is that the court should allow the bankrupt's claim of exemption, and that the trustee should release any control he may be assuming. The basis for this view rests upon construction of the provisions of section 70a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), which vests in the trustee in bankruptcy the title of the bankrupt as of the date he was adjudged a bankrupt, "except in so far as it is to property which is exempt," etc., and also of section 6a, which, in so far as pertinent here, provides that the bankrupt act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the state in force when the petition in bankruptcy is filed. I do not construe the bankrupt act as meaning that upon the trustee's qualifying, the bankrupt is deprived of all right to perfect his homestead exemption, provided in his schedules he claims a designated piece of realty as a homestead and as exempt, and provided he proceeds, under the state statutes, without delay, and provided always there is no fraud involved in the matter of the claim. The bankrupt act, in its further provision concerning "the allowance" to bankrupts of exemptions, as provided for under the state law, necessarily contemplates determination by the bankruptcy court of "claims" for exemptions by the bankrupt in his schedules, and after determination, setting apart or refusal to set apart. Section 7, cl. 8, Bankrupt Act; In re Le Vay (D. C.) 125 Fed. 990.

Yet the act does not make it a precedent to having a homestead allowed to the bankrupt claiming the same in the bankruptcy court, that the homestead shall have been designated pursuant to the state statute, prior to the date of adjudication in bankruptcy. In re Friedrich, 100 Fed. 284, 40 C. C. A. 378. If the bankrupt has expeditiously and in good faith made his declaration, following the claim in the schedule, the property is exempt and cannot be retained for administration. In re Fisher (D. C.) 142 Fed. 205; In re Brumbaugh (D. C.) 128 Fed. 977. It has been well said:

"Courts of bankruptcy are not controlled as to the time or manner in which claims for exemptions may be preferred in bankruptcy." In re Kane, 127 Fed. 552, 62 C. C. A. 616.

The authority to control property in order to set it aside, if exempt, and to exclude it from the assets of the bankrupt estate, which are to be administered upon, does not in any way extend authority to the trustee to administer upon exempt property as though it were an asset of the estate. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. The spirit of the bankrupt law in the matter of exemptions is one of liberality, and, under facts as presented herein, the bankruptcy court will allow the homestead exemption recognized by the state.

The question certified is answered in the affirmative, and the ref-

eree's order is reversed.

Ex parte CRAWFORD.

(District Court, S. D. New York. October 13, 1908.)

ALIENS (§ 18*)—DEPORTATION.

An alien acquires no rights by a domicile in this country which will relieve her of the effects of a decision of the Department of Commerce and Labor ordering her deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 70, 71; Dec. Dig. 18.*]

(Syllabus by the Court.)

Franklin Grier, for relator.

Henry L. Stimson, U. S. Atty., and Francis W. Bird and James J. Hogan, Asst. U. S. Attys.

ADAMS, District Judge. The question now presented upon this writ of habeas corpus is whether the action of the Secretary of Commerce and Labor in ordering a deportation of the relator should be sustained. The return shows that she was arrested by warrant of the department, dated September 3, 1908, and a hearing was had before the Board of Special Inquiry to determine whether or not the relator was lawfully within the United States. At this hearing, after an examination of the relator, the board decided that she was in the United States in violation of law. Thereafter, a rehearing was granted to the relator, during which she and four witnesses produced on her behalf, were examined and the board again found the same. Upon said finding the Secretary of Commerce and Labor issued a warrant, dated September 21, 1908, for her deportation. Pending execution of the warrant, she remained in the custody of the Commissioner of Immigration. This writ of habeas corpus, with certiorari, was thereupon obtained from this court upon a petition alleging that the relator was imprisoned and restrained in her liberty on Ellis Island, or on board of some vessel about to sail for Europe, upon the cause or pretence that she is in the United States in violation of law. Upon the return of the writ, the Commissioner of Immigration alleged the hereinbefore stated facts and annexed to his return a copy of the minutes of the proceedings before the Board of Special Inquiry. This copy tended to show that the relator had committed acts which would form a basis for a finding that she had violated the provisions of the Act. The Board of Special Inquiry so found, after a full hearing was given to the relator, with an opportunity to present the testimony of witnesses and be represented by counsel. The finding was subsequently confirmed by the Secretary of Commerce and Labor and the warrant was thereupon issued.

The testimony taken before the Board of Special Inquiry, while tending to show that the relator for some months after her arrival conducted herself badly, also showed that later she worked at her occupation of sewing and apparently lived reputably, making some respectable friends, who were willing to come to her aid in these proceedings and

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

help her to live honorably, by the exercise of her abilities as seamstress, and support her child at an educational institution.

Reliance is placed by her counsel upon the provision of the law contained in section 29 of the Act of February 20, 1907 (34 Stat. 907, c. 1134 [U. S. Comp. St. Supp. 1907, p. 407]), which provides that the circuit and district courts of the United States are invested with full and concurrent jurisdiction of all cases arising under the Act. If it were not for previous decisions upon the matter, I should think that thereunder the power remained with the court to afford the relator the relief she seeks, but it appears that the previous Act of March 3, 1903 (32 Stat. 1220, c. 1012, § 29), contained the same provision, and that Act has been held in the case of immigrants to give the Secretary of Commerce and Labor the final authority in the matter. Nothing favorable to the relator can be gleaned from the section in question, and if this were the case of an alien immigrant, the ruling of the department would be final. In re Kleibs (C. C.) 128 Fed. 656; U. S. ex rel. Funaro v. Watchorn (C. C.) 164 Fed. 152.

It is contended, however, that the matter was not properly before the department officials because it was not a case of an alien immigrant but of an alien domiciled here, who left the country temporarily without losing her domicile but intending to return. It is claimed to be similar to Rodgers v. United States, 152 Fed. 346, 81 C. C. A. 454, where it was held by the Circuit Court of Appeals for the Third Circuit, as stated in the headnote:

"An alien, who has acquired a domicile in the United States, cannot thereafter, and while still retaining such domicile, legally be treated as an immigrant on his return to this country after a temporary absence for a specific purpose not involving change of domicile."

But the case just cited was before Judge Ward when he decided U. S. ex rel. Funaro, supra, and he there held that the relator's domicile conferred no rights upon him and that he should be deported. That case seems to cover this and it should be followed.

The writ is dismissed and the petitioner remanded, but in order that there may be an opportunity for appeal, following the decision in the Funaro Case, let the U. S. Attorney give five days' notice of the entry of an order hereafter.

MERCANTILE NAT. BANK OF CITY OF NEW YORK v. BARRON.

(Circuit Court, S. D. New York. December 11, 1908.)

REMOVAL OF CAUSES (§ 114*)—FOREIGN ATTACHMENT SUIT—JURISDICTION ACQUIRED BY FEDERAL COURT—SERVICE BY PUBLICATION.

Where, in a suit by attachment in a state court of New York, after the levy of the attachment on property within the state, an order was made for service by publication on defendant as a nonresident of the state, in strict accordance with the requirements of the state statute, such service is sufficient to give a federal court, to which the cause is removed, jurisdiction to render judgment enforceable against the attached property,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

although no proof was required by the state statute, or made, that defendant owns property in the state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 242; Dec. Dig. § 114.*]

On Motion to Set Aside Order for Service by Publication.

Sullivan & Cromwell, for plaintiff.

Leventritt, Cook & Nathan, for defendant.

WARD, Circuit Judge. July 10, 1908, the plaintiff, a corporation of the state of New York, began this action in the Supreme Court of the state against the defendant, a citizen of the state of Massachusetts, by filing a complaint, with an undertaking in the sum of \$2,500, upon which a warrant of attachment was issued to the sheriff against the defendant's property. July 11th the sheriff levied the attachment on property in the hands of the plaintiff. July 31st, upon sheriff's return that the defendant could not be found and upon proof of nonresidence, an order was made directing service of the summons by publication. September 23d the defendant appeared specially, removed the case into this court, and now moves to set aside the order of publication on the ground that it was granted because of the nonresidence of the defendant; the moving papers not showing that he had any property in The proceedings conformed to the practice in the state courts. Section 439 of the Code of Civil Procedure does not require proof that the defendant has property within the state. Before the order of publication was made property of the defendant had been attached, and any judgment recovered could only be enforced against the property levied on. Section 707, Code Civ. Proc. comes into this court in the condition it was in when removed from the state court. Act March 3, 1875, c. 137, § 4, 18 Stat. 471 (U. S. Comp. St. 1901, p. 511). Service of summons by publication will be sufficient to sustain a judgment in this court against the defendant, restricted to the property that has been attached. Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138,

Motion denied.

^{*}For other cases see same topic & \ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NEW YORK CENT. & H. R. R. CO. v. UNITED STATES. (Circuit Court of Appeals, First Circuit. December 4, 1908.)

No. 774.

1. CARRIERS (§ 37*)—Interstate Cabriers of Live Stock—Statutoby Regulations—Action for Penalties.

A declaration, in an action by the United States to recover the penalty for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) by permitting cattle to remain in a car for a period longer than 28 hours without unloading for rest, water, and feeding, which describes the defendant railroad company as "lessee" of the road and otherwise follows the language of the statute, is sufficient after verdict, although it does not expressly allege that defendant was at the time operating the road.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

2. CARRIERS (§ 37*)—Interstate Carriers of Live Stock—Statutory Regulations—Action for Penalties.

Technical objections to the declaration, in an action by the United States against a railroad company to recover the penalty for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), considered, and held without merit after verdict.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

3. CARRIERS (§ 37*) — INTERSTATE CARRIERS OF LIVE STOCK—STATUTORY REGULATIONS—ACTION FOR PENALTIES.

So far as relates to the rules of pleading and proof, an action by the United States to recover the penalty for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) is a civil and not a criminal action.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

4. CARRIERS (§ 37*)—INTERSTATE CARBIERS OF LIVE STOCK—STATUTORY REGULATIONS—ACTION FOR PENALTIES—PLEADING.

In an action by the United States against a railroad company to recover the penalty for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), which requires a carrier to unload cattle for rest, water, and feeding within each consecutive 28 hours, "unless prevented by storm or by other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence and foresight," the plaintiff is not required to allege or prove the nonexistence of accidental or unavoidable causes which might have prevented a compliance with such requirement; but such causes are matters of defense.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

5. CARRIERS (§ 37*)—INTERSTATE CARRIERS OF LIVE STOCK—STATUTORY REGULATIONS—VIOLATION.

In the provision of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) subjecting railroads to a penalty for knowingly and willfully failing to obey such act, the words "knowingly and willfully" do not require an evil intent, but only that defendant should have failed to obey the statute purposely and with knowledge of the facts.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

6. PENALTIES (§ 33*)-BURDEN OF PROOF-PENAL ACTION.

The rules as to the burden of proof with reference to allegations setting up the negative in penal suits, so far as applicable to this case, explained and applied.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. § 32; Dec. Dig. § 33.*]

[•]For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—53

7. EVIDENCE (§ 154*)—DOCUMENTS—ADMISSIBILITY—MANNER OF PROCUREMENT.

As a general rule papers which are in fact in court may be used in evidence, even though the party offering them procured them illegally, so that papers produced by counsel for one party pursuant to an irregular order of the court, made at the instance of the adverse party, may be introduced in evidence by the latter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 443; Dec. Dig. § 154.*]

8. Carriers (§ 37*)—Interstate Carriers of Live Stock—Statutory Regulations—Penalty for Violation.

Where a railroad train carried a number of different consignments of live stock, and the company failed to unload any of them for rest, water, and feeding, as required by the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), it became subject to a penalty thereunder for each consignment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 927; Dec. Dig. 37.*]

In Error to the District Court of the United States for the District of Massachusetts.

George L. Mayberry (George P. Furber, on the brief), for plaintiff in error.

Asa P. French, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

Before COLT, PUTNAM, and LOWELL, Circuit Judges

PUTNAM, Circuit Judge. This was an action of contract commenced in the district of Massachusetts, and, therefore, governed by the Massachusetts practice, which makes it equivalent to an action of debt for a statutory penalty. The verdict was for the United States, whereupon the respondent took out this writ of error. The suit was based on Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), of which the essential sections are the first, second, and third, as follows:

"Section 1. That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory or the District of Columbia, into or through another state or territory or the District of Columbia, or the owners or masters of steam, sailing or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, that it shall not be required that sheep be unloaded in the nighttime, but when the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

"Sec. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

"Sec. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: Provided, that when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply."

There are several counts in the declaration, of which we need quote only one, as follows:

"And the plaintiff says that the defendant is a railway corporation duly established and existing under the laws of the state of New York, and at the times hereinafter mentioned was the lessee of the Boston & Albany Railroad Company, a railway corporation and common carrier engaged in the transportation of cattle from one state to another in the United States: that is to say, from Albany, in the state of New York, to Boston, in the commonwealth of Massachusetts.

"And the plaintiff says that the defendant on the twenty-seventh day of January, A. D. 1907, at Albany, in the state of New York, did load upon one of its cars, known as 'N. Y. C. Car, No. 23316,' certain cattle, to wit, twenty-two cows and forty-nine calves, consigned by George N. Smith, of said Albany, to the order of the said Smith, at said Boston; that said car was fully loaded with said cattle at three o'clock in the afternoon of said day, and said car containing said cattle was conveyed by the defendant from said Albany over the line of said Boston & Albany Railroad Company to said Boston, where it arrived on the twenty-ninth day of said January at nine o'clock and thirty minutes in the forenoon; that during the period of time in which said cattle were in transit as aforesaid, and for a period of more than twenty-eight consecutive hours—that is to say, for a period of forty-two hours and thirty minutes-the defendant did knowingly and willfully fail to unload said cattle from said car for rest, water, or feeding, and did knowingly and willfully fail and neglect to feed or water said cattle.

"And the plaintiff says that the defendant was not prevented by storm, or by other accidental or unavoidable cause which could not be anticipated or avoided by the exercise of due diligence or foresight, from unloading said cattle from said car, or from feeding or watering said cattle as required by law; that said car was not one in which said cattle had proper food, water, space, or opportunity to rest; and that no written request was then or theretofore made by the owner, or any person in custody of said shipment of cattle, that the time of confinement of said cattle might be extended from

twenty-eight hours to thirty-six hours.

"Wherefore, and by reason of the premises, the plaintiff says that the defendant became liable to pay to the plaintiff the penal sum of five hundred dollars, in accordance with the provisions of the statutes of the United States in such cases made and provided, and plaintiff prays judgment for said sum and for its costs."

Several questions of pleading were raised by the defendant below, now the plaintiff in error. The first attempt to raise them was by a motion to dismiss. This was overruled; and, as it was an inartificial method of pleading, the court might in its discretion strike it out or overrule it, so that its action laid no basis for a writ of error. Even under the Massachusetts practice acts the demurrer is retained, with the requisition that the causes of the demurrer be specifically assigned, and that no mere defects of form may be so assigned. Rev. Laws, c. 173, §§ 13, 14.

Subsequent to the verdict a motion in arrest of judgment was filed, specifying all the topics which we will consider, and perhaps some others. As we understand, this is not known in the Massachusetts practice in civil cases; but this is not of any consequence, because, whatever might, under the common-law practice, be thus assigned, would be good on a writ of error. It must be remembered, however, that a verdict cures many defects at common law and under the statutes of jeofails. Independently of what is found at common law and under the statutes of jeofails, section 954 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 696) provides:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof."

Consequently, as there was no demurrer, no mere matter of form can be taken advantage of at the present stage of the litigation.

The statute on which the suit was based is quite inartificially drawn. In the first section it enumerates the "lessee." The natural and just presumption would be that the statute is aimed at the corporation actively operating the road over which the transportation occurs, whether it is the lessee or not; but it is plain that it assumes that the lessee would necessarily be such active operator. The first objection to the declaration rests on the fact that it does not discriminate clearly in reference to this particular; but it follows the language of the statute, and certainly, after verdict, must be held to be sufficient.

Then, again, the statute uses the words "confine the same," which are not precisely found in this declaration. Nevertheless these words do not relate to the real pith of the offense, which is found in what follows, namely: "Without unloading the same in a humane manner, and into properly equipped pens for rest, water, and feeding." Force is not to be attached to these words to such an extent as to hold that they mean anything more than ordinary transportation of cattle in the ordinary railroad cars used for that purpose. While the declaration omits the word "confine," it expressly states that the cattle were

loaded in such cars, and that they were "fully loaded with such cattle," and were "conveyed by the defendant" from Albany to Boston "over the line of" the corporation described as the lessee. As it was not required that the pleader should anticipate the proviso in the third section of the act, this clearly describes all the confinement to which the statute relates; and, as this substitution for a particular word named in the statute of other words having the same effect is not a lawful ground of objection, especially after verdict, the requirements of

the law in this particular are fully complied with.

The defendant below also objects because the declaration alleges that it failed to unload the cattle "for rest, water, or feeding," and it claims that, if the cattle were unloaded for any purpose, that would be sufficient; but the statute in this particular is express, and the allegations of the declaration conform strictly to it. Some comment is also made upon the expression in the first count, as follows: "Did knowingly and willfully fail and neglect to feed or water said cattle." It is said that this is an offense only under the second section of the statute, which is true. It is also true that there is not sufficient in these words to properly describe an offense under that section. As the count properly declared an offense under the first section, they might have been stricken out as surplusage; but, as no motion therefor was made, they became immaterial matter.

The result is that, so far as any questions of pleading are urged on us, they need not be considered further than they have been.

The statute enumerates some matters which might excuse the defendant if they had been proven. A portion of them—that is, so much as relates to storms and other accidental or unavoidable causes—are incorporated into the first sentence of the first section, and are therefore necessary to be alleged. Others are incorporated into a proviso which forms a clearly separate topic, as much as though they appeared in a distinct section. Therefore it was not necessary for the United States to negative them. All these propositions are covered by Chitty on Pleading, *246, *247. The plaintiffs offered evidence from the records of the Weather Bureau that there was no storm. They offered no proof, however, bearing on the "other accidental or avoidable causes" named in the statute.

Penal actions are for some purposes criminal in their nature, so that they are subject to certain provisions of the Constitution of the United States with reference to constitutional guaranties; yet, so far as the ordinary rules of pleading and proof are concerned, a suit like this is to be regarded as merely a civil proceeding. This was understood to be the law even before the ruling of Lord Kenyon in Wilson v. Rastall (1792) 4 D. & E. 753, 758. This was in a qui tam suit. There had been a verdict for the defendant. Thereupon the plaintiff moved for a new trial. Of course, if the case was a criminal one strictly, there could be no new trial, under the English practice or under the Constitution of the United States. Lord Kenyon said:

"All cases of indictments I lay out of the case, because they are criminal cases, and are exceptions to the general rule; but I consider this as a civil action."

The rule of this case is stated in Dane's Abridgement, vol. 5, p. 243, which is sufficient authority for the law in the United States at the beginning of the last century. The same rule was stated in Watertown v. Draper, 4 Pick. (Mass.) 165. The origin of this ruling will be found in the earlier case of Atcheson v. Everitt, Cowper, 382, 387, decided in 1776. There the question came directly in issue. At page 383, Lord Mansfield thought that, under the law as it then stood, where an action and an indictment both lie for the same act, "a Quaker is an admissible witness in the action, although not on the indictment." The then statute, as he said, made "an exception to their being admitted as witnesses in criminal causes." He said that till that time it had not been decided whether they were admissible in actions for penalties; that is to say, whether actions for penalties were "criminal causes" or not. He observed:

"There being no case in point, it is a material circumstance that actions for penalties are to a variety of purposes considered as civil suits. They may be amended at common law. To be sure, the action in this case is not only given to recover a penalty; but it is attended likewise with disabilities. Therefore it partakes much of the nature of a criminal cause. Moreover, the offense itself is not merely malum prohibitum by statute, but it was indictable at common law."

Then, referring to the question of admissibility of the oaths of Quakers, he concluded:

"But how the law is in respect to this particular case I am at present not at all decided in my opinion.

The point came up again on reargument, as appears by Lord Mansfield's opinion, commencing on page 388. On page 391 he concluded that the proceeding was not a criminal one, but "as much a civil action as an action for money had and received."

This case was on a motion for new trial in the King's Bench, and, as is plain, it was very carefully considered, and the judgment was concurred in by all the judges. Therefore, in view of Atcheson v. Everitt and the other authorities cited, we must agree that, both in the United States, subject to the limitations we have stated, and in England, the present proceeding is held to be "as much a civil action as an action for money had and received," using the language of Lord Mansfield. While, as we have said, certain guaranties of the Constitution apply, none of them touch any of the questions involved which are raised by the plaintiff in error; and the rules of pleading and procedure and evidence for this suit are those which apply to an ordinary civil action for debt between private parties.

In order that we may not be misunderstood, we reiterate that certain limitations arise from the application of constitutional guaranties and other peculiarities. We do not presume that in all particulars article 3 of the Constitution, or the amendments (article 5 and article 6), are to be disregarded, even with reference to actions of debt. This is illustrated by Lees v. United States, 150 U. S. 476, 480, 14 Sup. Ct. 163, 37 L. Ed. 1150. We do not presume that Congress, even by providing a civil action, could avoid a grand jury for infamous offenses, or could violate the guaranty against self-impeachment. So, also, civil suits for penalties must be prosecuted in the court of sov-

ereignty imposing the penalty, as decided in Wisconsin v. Pelican Insurance Company, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, although held otherwise in Massachusetts; and, until procedure has ripened, even qui tam actions are within the pardoning jurisdiction of the executive. Huntington v. Attrill, 146 U. S. 657, 673, 13 Sup. Ct. 224, 36 L. Ed. 1123. Notwithstanding such exceptional distinctions and limitations, the conclusions of the Supreme Court, and its reasonings leading thereto, in United States v. Zucker, 161 U. S. 475, 480, 481, 16 Sup. Ct. 641, 40 L. Ed. 777, where it was held that depositions might be used in penal suits, and in Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223, and Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, permit the application here of the general rules of practice, procedure and evidence.

Under these circumstances, it follows that the United States were bound to support their case before us by only a preponderance of the evidence; but a question arises whether the burden primarily rested on them as to those portions of section 1 of the statute in question which precede the word "provided." They offered evidence about prevention by storm, sufficient according to the authorities to sustain themselves so far as that is concerned; and, perhaps, so far as that is concerned, they were bound to offer some evidence, because that was a matter of general information as to which they could do this

without difficulty.

Regarding, however, the question of "other accidental or unavoidable causes," we are of the opinion that the burden rested primarily on the defendant. In his work on Criminal Evidence (9th Ed., § 319) et seq.), Mr. Wharton admits that the weight of the authorities is in favor of the rule, not only in civil cases, but at least to a certain extent in criminal cases, that a negative proposition, although required to be pleaded, must generally be first met by proof from the defend-This is so stated in Greenleaf's Evidence, § 74. Of course, it is otherwise where the negative allegation is a fundamental part of the offense in a criminal case or of the claim in a civil suit. This is shown by Mr. Greenleaf in section 78, and is illustrated in suits for malicious prosecution, and in some cases of suits for statutory penalties, instances of which are given by Mr. Greenleaf. On this topic, however, we need not go farther than Colorado Coal Company v. United States, 123 U. S. 307, 318, 319, 8 Sup. Ct. 131, 31 L. Ed. 182, which fully sustains our propositions. Of course the rule ab inconvenienti has application to a very considerable extent. Here, as to the matter of "accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight," the rule of inconvenience applies in favor of the United States, because such causes might easily have been shown by the defendant below, while the method in which transportation by railroad corporations is done over long distances is such that it is quite impossible for those who do not accompany trains to prove what the particular circumstances are.

What we have said, if we are correct, determines also against the plaintiff in error its claim that the United States were bound to establish their propositions beyond a reasonable doubt. The only thing

we have found that may be considered to question this are certain expressions in Chaffee & Company v. United States, 18 Wall. 516, 544, 545, 546, 21 L. Ed. 908; but, wherever that opinion uses the expression "reasonable doubt," it will appear on a careful examination that it originated in the Circuit Court, and was never affirmed by the Supreme Court as suitable. All the Supreme Court decided was in reference to the obligation of the defendants in the litigation there to meet a prima facie case; and the opinion therefore observed, very justly and wisely, that the rule of the Circuit Court justified the criticism "that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction." It is true that here the Supreme Court, as it has done everywhere, recognized the fact that the suit in that case, though civil in form, was so far criminal that the constitutional guaranty against self-crimination remained, as we have already pointed out is the fact. On the other hand, the rule of the preponderance of the evidence in qui tam actions was applied in Roberge v. Burnham, 124 Mass. 277, on careful consideration. This was a qui tam action, and, under the decisions of the Supreme Court, is of some authority in the federal courts in the district of Massachusetts.

We may also, in this connection, dispose of some suggestions made by the plaintiff in error, not thoroughly explained to us, to the effect that on some parts of the case testimony was lacking. In view of the facts we have stated, no testimony required to make out the case on every point, even beyond a reasonable doubt, was lacking, unless it be as to the matter of storms, which is a negation; so that the United States, as we have said, offered all the proofs required, either in criminal or civil proceedings, to make out a sufficient case until met by some contradictory matter.

The authorities relied on by the plaintiff in error to contravene any of our propositions with regard to either pleadings or the rules of evidence are to some extent not of sufficient weight to bind us, and to some extent do not apply to the conditions of this case, and for the rest they sustain what we have said, rather than contradict it. For example, Commonwealth v. Thurlow, 24 Pick. (Mass.) 374, 380, 381, in an opinion by Chief Justice Shaw, fully recognizes the distinction between the proof of affirmative allegations and the proof of negative allegations, and the force of the rule ab inconvenienti even as applied to criminal proceedings.

As bearing, however, on our propositions as to the rules of procedure which we have stated, the plaintiff in error calls our attention to the words "knowingly and willfully" in the third section of the act on which this proceeding is based. These words do not appear in the first section; but the third section imposes a penalty only where the corporation or person charged "knowingly and willfully fails to comply with the provisions" of the first section. "Knowingly and willfully fails," which is about equivalent to "willfully neglects," is a combination not treated of in the authorities, and means undoubtedly the same as "willfully omits"; but, independently of

any verbal criticisms, we do not perceive the effect of the propositions of the plaintiff in error in this connection. The word "willfully" is sometimes used in statutes and indictments, and sometimes omitted from them, for very differing reasons. In order that there shall be a punishable evil intent, the criminal law ordinarily requires that there shall be a knowledge of the facts, and when with a knowledge of the facts is combined an injurious result which the actor foresaw, or might reasonably have foreseen, all the law ordinarily implies by the words "willfully" is accomplished. Nevertheless, there are numerous phases of the law where a knowledge of all the facts involved is not required, arising, for example, with reference to questions of adultery and incest, and under statutes in regard to sales of liquors to minors, and the pure food laws, etc. Therefore sometimes, to guard against any possible inference of criminality in the absence of knowledge, the word "willfully" is inserted in the statutes; and sometimes it is inserted for other reasons. In Potter v. United States, 155 U. S. 438, 446, 15 Sup. Ct. 144, 39 L. Ed. 214, the Supreme Court seemed to be of the opinion, because the word "willfully" was inserted with reference to offenses denounced in the earlier portion of a certain section, and omitted with reference to offenses denounced in a later part, that it could not be regarded as mere surplusage, and that it implied, not only knowledge, "but a purpose to do wrong," thus giving to it peculiar force. In connection with this decision the expressions of the Supreme Court as to the word "willfully" must be regarded as somewhat confusing. However, in the later cases the court has held, in reference to this word "willfully," that a mere lack of knowledge of the law and intent not to violate the law were not. sufficient to escape the statute denouncing the offense, if there was full knowledge of the facts. The case particularly relied on by the plaintiff in error (Yates v. Bank, 206 U. S. 158, 180, 27 Sup. Ct. 638, 51 L. Ed. 1002), summing up previous cases, merely distinguishes between negligence and the violation of a statute knowingly. The latest pronouncement of the Supreme Court is found in Armour Packing Company v. United States, 209 U. S. 56, 85, 86, 28 Sup. Ct. 428, 52 L. Ed. 681, where it was entirely clear that the Armour Packing Company was proceeding, not only according to what it believed to be the law, but according to such a construction thereof that at least three justices sustained it. This involved a statute which contained the word "willfully," and yet it appears at page 86 of 209 U. S., and page 437 of 28 Sup. Ct. (52 L. Ed. 681), that a knowledge of the facts was all the evidence of guilty intent which the act required. The Circuit Court of Appeals for the Eighth Circuit, in Chicago Ry. Co. v. United States, 162 Fed. 835, has so thoroughly expounded the law and the decisions of the Supreme Court so far as this topic is concerned that we need not follow them further for the purpose of showing, as applied to a case of this character and to allegations such as we have here, that the words "knowingly and willfully," on which the plaintiff in error relies, are of no consequence in this particular case.

However, independently of that fact, we are unable to find anything here to benefit the plaintiff in error, because, if the words "knowingly and willfully" require anything additional in order to make out the case of the United States, what is required would be additional facts to be proved, leaving unchanged with reference to those additional facts the propositions we have already stated.

The plaintiff in error relies on an occurrence at the trial as follows. William Waterman, called by the United States, testified that he was at the times in issue agent of the New York Central Railroad Company at Brighton, and that as such he received waybills of merchandise coming from New York, and that he had been summoned to produce certain waybills, but that he did not have them in his possession. The United States then put in evidence the subpœna, which was in sufficient form. The witness then resumed his testimony, admitting that he had been served with the subpœna, and that he had not produced the documents because they had been turned over by him to the persons connected with the legal department of the plaintiff in error. The following occurred, as shown by the record:

"Thereupon counsel for the defendant stated, in answer to an inquiry by the court, that he had in his possession in court the papers referred to in the subpœna, but objected to being required to produce them upon the sole ground that this was in its nature a criminal proceeding and that the defendant could not lawfully be required to produce evidence against itself. The court, upon the request of the district attorney, ordered the counsel for the defendant to produce the said papers for the use of the plaintiff as evidence in the case. To this order the defendant then and there duly excepted, and the exception was duly noted.

"All the waybills called for in the aforesaid subpoena were then produced by counsel for the defendant in compliance with the order of the court, and the

testimony of the witness was resumed as follows:

"These waybills [the ones so produced] were at some time in my custody as agent of the New York Central at Brighton. They are the same documents which I turned over on September 30th last to the legal department. They are seven waybills covering shipments of merchandise over the New York

Central Railroad from West Albany to Brighton.'

"The plaintiff then offered the said waybills in evidence, and the defendant objected to their admission, stating the ground of his objection to be that the documents themselves were mere waybills, not proved or authenticated in any such way as to make the facts that they purported to state competent evidence against the defendant in this case. The United States attorney stated that he would show that the waybills in question referred to the transactions concerning which penalties were sought to be recovered by the plaintiff. The court admitted the said waybills against the defendant's said objection, and the defendant then and there duly excepted, and its exception was duly noted."

According to the usual practice, the defendant below might have refused to produce the papers, and this would have given the right to the United States to prove their contents by secondary evidence, but would have had no other result. On the court's ordering the production of the papers, the order was not refused; but, if not complied with, it might have been followed by an attempt to punish for contempt, which would have enabled the issue to be raised directly on habeas corpus. Therefore, in any view, it might be questioned whether or not, after all, the production of the waybills was not purely voluntary. In these respects the case is different entirely

from Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, where the statute which was held to be unconstitutional provided that, if the papers were not produced, the nonproduction would be a confession of the allegations which it was pretended they would prove. In that case the papers were, under the circumstances, produced, and the court held the statute unconstitutional, and not only so held, but that the use of the papers at the trial, under the circum-

stances, furnished a ground of a valid exception.

Notwithstanding Boyd v. United States, the usual rule is that, where papers are in fact in court, they may be used in evidence, even though the party who offers them in evidence procured them illegally. Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, and other cases. Indeed, independently of any particular decisions, such has always been understood to be the rule. Under the circumstances of this case, however, it is very evident that the United States might have issued a subpoena to counsel of the defendant, requiring production of the papers; so that, in view of all the facts, it must be held that such a subpoena was waived, and it cannot be fairly ruled that the rights of the plaintiff in error are any other than they would have been if the papers had been produced in response to one. Considering that the papers were produced by counsel who were not charged with any offense, and that the suit was against a corporation, we are quite sure, from Adams v. New York, already cited, including the review therein of Boyd v. United States, at page 598 et seq. of 192 U. S., page 375 of 24 Sup. Ct. (48 L. Ed. 575), and from Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860, and Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, that the plaintiff in error received no legal prejudice from the ruling on this particular point.

In this connection we refer to the fact that the plaintiff in error claims that the waybills themselves were not competent evidence in any view, on the ground, apparently, that they were of a secondary character; but according to the usual practices in connection with the transportation of merchandise over long distances, which are so common that we are entitled to take notice of them, it must be held that they were not only admissions such as the law holds may be made by agents in connection with acts done by them in performance of their duties, but that they were also in fact such acts themselves.

It seems that in one or more of the trains on which the cattle were transported there were several consignments; and, in imposing the penalty, the learned judge of the District Court held that each consignment was a unit under the statute. Undoubtedly the statute is capable of a construction more favorable to the plaintiff in error; but there is so much doubt about it that we see no reason for departing from our usual practice, which leads us to follow the decision of the Circuit Court of Appeals for the Sixth Circuit in United States v. Baltimore R. Co., 159 Fed. 33, 86 C. C. A. 223, in harmony with the ruling of the District Court in this particular.

It is possible there may be some propositions made by the plain-

tiff in error which we have not noticed, but we are confident there are none which require special attention.

The judgment of the District Court is affirmed.

NOTE BY THE COURT.—Since this opinion came to hand we have received the opinions in Montana Central v. United States (C. C. A.) 164 Fed. 400, and Hardesty v. United States (C. C. A.) 164 Fed. 420, which are in harmony with our views as to the rule with reference to the use of the waybills and also as to our proposition that, for the most part, the nature of this proceeding is civil, instead of criminal.

UNION PAC. R. CO. et al. v. MASON CITY & FT. DODGE R. CO.

(Circuit Court of Appeals, Eighth Circuit. December 1, 1908.)

No. 2,564.

1. RAILROADS (§ 51*)—JOINT USE OF TRACKS OF UNION PACIFIC AT OMAHA— CONSTRUCTION OF DECREE FOR.

By the decree of 1903 the court adjudged to the Mason City & Ft. Dodge Railroad Company and to its lessee, the Chicago Great Western Railway Company, for reasonable compensation, the joint and equal use of the main and passing tracks of the Union Pacific Railroad Company from their eastern terminus in Council Bluffs to a connection with the Union Stockyards Railroad and the other railroads connecting with the Union Pacific Railroad at or near South Omaha, of the latter's bridge across the Missouri river, and of the connections of its tracks with the tracks of the Union Stockyards and with the tracks of all other railways which were then, or might thereafter be, connected with the tracks of the Pacific Company at or near South Omaha, to the same extent stated in the contracts of the Pacific Company with the Rock Island Company, the St. Paul Company, and the Northwestern Company. There was no express limitation of this use in those contracts, or in the decree, to a use for the transportation of through cars moving across the river. The Mason City Company has a freightyard and a grainyard, which was constructed after the decree, in or near Omaha, its only access to which is over the tracks of the Pacific Company.

Held: The decree of 1903 adjudged to the Mason City Company the use of the tracks of the Pacific Company specified and of the connections of those tracks with other railroads at or near South Omaha and at Council Bluffs to move with its own engines from its railroad east of Council Bluffs cars destined to railroads south and west of Omaha connected with the tracks of the Pacific Company at or near South Omaha, and also to move with its own engines freight cars to and from its freightyard and grainyard in or near Omaha from and to other railroads connected at or near South Omaha and at Council Bluffs with the tracks of the Pacific Company specified in the decree, although such movements are not necessary to complete or to effect through transportation of such

cars over the river.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 51.*]

2. Judgment (§ 524*)—Presumption of No Limitation from Absence of Expressed Restriction.

The absence from a decree of any limitation or exception to general terms of plain significance raises a persuasive legal presumption that the court intended to make none.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 524.*]

3. Judgment (§ 524*)—Modification by Construction—Evidence to War-Bant must be Conclusive.

When the terms of a decree are plain and free from ambiguity, their ordinary meaning and effect may not be lawfully extended or contract-

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed by construction, in the absence of proof to a reasonable certainty that such was the purpose of the court, for the legal presumption is that the judge carefully expressed his deliberate intention therein.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 524.*]

4. Judgment (§ 713*)—Conclusive in Second Suit of All Matters Litigable in Former Suit.

In a second proceeding between the same parties or their privies upon the same cause of action, not only every matter offered, but every admissible matter which might have been offered, to sustain or defeat, in whole or in part, the cause of action, is rendered res adjudicata by the former decree upon the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.*]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

See, also, 128 Fed. 230, 64 C. C. A. 348.

This appeal challenges a decree of the Circuit Court which adjudged the Union Pacific Railroad Company and three of its officers guilty of contempt and fined them for a violation of the decree rendered and the writ of injunction issued in August, 1903, in the case of the Mason City & Ft. Dodge Railroad Company against the Union Pacific Railroad Company. The decree of 1903 adjudged that the Mason City Company and its lessee, the Chicago Great Western Railway Company, were "admitted into the full, equal, and joint use of the main and passing tracks of the Union Pacific Railroad Company then located and established, or which might thereafter be located and established, from the eastern terminus of said tracks in Council Bluffs, in the state of Iowa, to a connection with the Union Stockyards Railroad and other railroads connecting with the Union Pacific Railroad at South Omaha in the state of Nebraska, including the bridge over which said tracks extend across the Missouri river between the cities of Council Bluffs, Iowa, and Omaha, Neb., * * * also the connections with the Union Stockyards in South Omaha, and with the tracks of all other railway companies which now or may be hereafter connected at or near South Omaha with the tracks of the Union Pacific Railroad Company hereinbefore described, each and all, to the same extent and upon the same terms and conditions stated in the contracts between the Union Pacific Railroad Company and the Chicago & Northwestern Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago, Rock Island & Pacific Railway Company"; and it enjoined the Union Pacific Railroad Company, its officers and servants, "from interfering in any way with said full, equal, and joint use of said property as aforesaid by the complainant, its successors, lessees, and assigns, and the right to make said connections as aforesaid."

The western terminus of the Mason City Railroad is at Council Bluffs, but it has a freightyard and railroad tracks therein near Twentieth street in Omaha, and these tracks are connected with the main track of the Union Pacific Railroad which extends from Omaha to South Omaha. Southwest of this freightyard, between it and South Omaha, adjoining the right of way of the Union Pacific Company, the Mason City Company has a large freightyard and many railroad tracks for the handling of grain. These tracks are connected with the main track of the Union Pacific Company which extends from Omaha to South Omaha, and in this yard the Mason City Company has constructed a large grain elevator. This elevator has been constructed and the yard has been equipped and connected with Union Pacific tracks since the decree of 1903. For convenience it will be called the "grainyard." The only method of communication by rail that the Mason City Company and its lessee have between their main line at Council Bluffs and this freightyard and this grainyard in Omaha and between those yards and the Union Stockyards, and

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the railroads from the West and South which connect with the Union Pacific tracks at South Omaha, is by way of the main track and the passing tracks of the Union Pacific Company. The Chicago, Rock Island & Pacific Railroad Company has a line of railroad from Chicago to Council Bluffs and from Denver to South Omaha, but it uses the main and passing tracks of the Union Pacific Company to conduct its trains from South Omaha to Council Bluffs, and vice versa. About a mile west of South Omaha the tracks of the Rock Island Company have a physical connection with the tracks of the Union Pacific Company.

The act which the court below held to be a violation of the decree and of the injunction was the prevention by the Union Pacific Company and its officers of the use by the Great Western Company, the lessee of the Mason City Company, of this connection for the purpose of drawing with one of its engines a car load of stucco, which was consigned to the Rock Island Company, from the Union Pacific tracks over this connection in order to deliver it to

that company.

N. H. Loomis (John N. Baldwin and Edson Rich, on the brief), for appellants.

Frank B. Kellogg and W. D. McHugh (Cordenio A. Severance, on

the brief), for appellee.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). Counsel for the appellants base their contention that the court below was in error in its ruling in this case upon two propositions. They insist that the Great Western Company had no right under the decree of 1903 to deliver through cars or trains from its line at Council Bluffs to the Rock Island Company at South Omaha over the Pacific Company's connection with that company at that place. Their second proposition is that the Great Western Company had no right to transfer cars to the Rock Island Company with its own engines over this connection except for the purpose of completing the through passage of such cars from its line in Council Bluffs to the Rock Island Company at South Omaha, and this (1) because no such right was contemplated or secured by the decree, (2) because the use of the tracks and connections of the Union Pacific Company for such a purpose would cause great congestion of traffic on its tracks in Omaha and would disable it from fairly discharging its duty to the public, and (3) because the extent of the Great Western Company's rights are measured by those of the Rock Island Company and those of the contract tenants of the Pacific Company, who had no such rights.

The argument of counsel in support of their first proposition is that Congress in the passage of the acts of July 25, 1866, c. 246, 14 Stat. 244, and of February 24, 1871, c. 67, 16 Stat. 430, did not contemplate or intend to require the Pacific Company to permit the use of its tracks by other railroad companies to effect an actual interchange of cars and business between the latter, and that the true meaning and effect of the decree of August, 1903, was not to permit the Mason City Company to use the connections of the Pacific Company's tracks with other railroads reaching them from the West, but merely to allow that company to make and use a physical connection of its tracks with those of the Union Pacific Company at Council Bluffs, and to

leave it and its lessee, the Great Western Company, without right to transfer its cars or trains over the connections of the Union Pacific tracks with other railroads. In support of these views, they cite Atchison, Topeka & Santa Fé R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291, in which the Supreme Court decided that the declaration of the Constitution of the state of Colorado that every railroad company should have the right with its road to intersect, connect with, or cross any other railroad meant that such company should have the right to make the appropriate physical connections of the railroads, and not that it must stop its trains and exchange business with every road at every such connection on the same terms that it made with other roads at other connections. They also call attention to Altoona & P. Connecting R. Co. v. Beech Creek R. Co., 177 Pa. 443, 35 Atl. 734, in which the Supreme Court of Pennsylvania held that under a statute which gave railroad companies the right to "connect their roads with roads of a similar character. and authorized a jury to fix the terms of the connection in case the companies disagreed, the jurisdiction was limited to prescribing the place and manner of the connection, and did not extend to the transfer of a part of one company's road to another company, or to the management of its stations or of its land or water privileges." But these decisions are not persuasive, because they do not treat of analogous They construe a Constitution and a statute which authorized the connection of railroad tracks of different companies, while the acts of Congress here involved and the decree thereunder authorize the use of the railroad tracks of one company by other companies upon payment of reasonable compensation.

The duty of the Union Pacific Company to permit the use of its main and passing tracks between Council Bluffs and South Omaha by the Great Western Railway Company was imposed upon it by Act July 25, 1866, c. 246, 14 Stat. 244, and Act Feb. 24, 1871, c. 67, 16 Stat. 430, and the character and limits of that duty were fixed by the decree of 1903. The Pacific Company has claimed from the beginning, and still insists, that it was neither empowered nor required by those acts, or by any other law, to permit any other company to move with the engines of the latter any cars or traffic over any of its railroad tracks, and it has always insisted that the contracts it made to that effect with the Rock Island Company and the St. Paul Company in 1890 and with the Northwestern Company in 1898 were beyond its corporate powers. These claims have been litigated at various times between 1891 and the present day, but no court has ever sustained them. We cannot hope, and shall not endeavor, to review and analyze the acts of 1866 and 1871 more perfectly or to portray more clearly their scope, object, and legal effect than has been repeatedly done by the Supreme Court and by this court. Union Pac. R. Co. v. Chicago, etc., R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; Union Pac. R. Co. v. Chicago, R. I. & P. R. Co., 51 Fed. 309, 2 C. C. A. 174; Union Pacific R. Co. v. Mason City & Ft. Dodge R. Co., 199 U. S. 160, 26 Sup. Ct. 19, 50 L. Ed. 134; Id., 64 C. C. A. 348, 128 Fed. 230. Suffice it to say that the public policy which

inspired and the primary purpose of those acts were to bridge the gap in transportation by railroad between the western ends at Council Bluffs of railroads east of the Missouri river and the eastern ends at or near Omaha and South Omaha of railroads west of the Missouri river, that the method adopted to accomplish that purpose was to empower and require the Union Pacific Company to permit the use for reasonable compensation of their main and passing tracks across this gap by other railroad companies that owned railroads which extended to the gap for the purpose of drawing their trains and cars across it with their own engines, and this was the legal effect of that legislation.

When the Mason City Company, whose railroad extended from the East to Council Bluffs, applied for permission to use the tracks of the Union Pacific Company to haul its cars and trains from Council Bluffs to the railroads which terminated at South Omaha, the Pacific Company refused it, and after the Circuit Court entered the decree of 1903 that company strenuously contended in this court and in the Supreme Court that no duty to allow the use of its bridge or any of its tracks by other companies to move traffic with their engines was imposed upon it by the acts of Congress, and that if any such duty was created it did not require that company to permit such use of its tracks between Omaha and South Omaha southwest of Twentieth street. This court and the Supreme Court held otherwise, and affirmed the decree below. Did that decree empower the Mason City Company and its lessee, the Great Western Company, to haul a car or train consigned from its railroad east of Council Bluffs to the Rock Island Company west of South Omaha over the connection of the Union Pacific tracks with those of the Rock Island Company about a mile west of the stockyards at that place for the purpose of delivering that car or train to the latter company? The express adjudication of that decree is that the Mason City Company and its lessee are entitled to the full, equal, and joint use of the main and passing tracks of the Union Pacific Company from their eastern terminus in Council Bluffs "to a connection with the Union Stockyards Railway and the other railroads connecting with the Union Pacific Railroad at South Omaha, * * * also the connections with the Union Stockyards tracks in South Omaha and with the tracks of all other railroads which now or hereafter may be connected at or near South Omaha with the tracks of the Union Pacific Railroad Company" to the same extent stated in the contracts with the Rock Island Company, the St. Paul Company, and the Northwestern Company. The contract with the Rock Island Company made in 1890—and the others are similar—granted to that company the joint and equal use of the Pacific Company's main and passing tracks between the eastern terminus of such tracks in Council Bluffs and a line drawn at right angles across said tracks within 11/2 miles southerly of its passenger station in Omaha, and the joint and equal use of its connections with the Union Stockyards tracks in South Omaha and conveniently located grounds in South Omaha on which the Rock Island Company might construct and maintain for its exclusive use tracks aggregating 3,000

feet in length. Now it is argued that while this decree and the contracts might have given other companies the right to draw their cars and trains destined to companies on the other side of the gap onto the tracks of the Pacific Company which spanned it, they gave no right to haul them off from those tracks over the connections of the tracks of the Pacific Company with the tracks of the companies to which the cars and trains were destined on the other side of the gap. But the main purpose of the acts of Congress, of the contracts, and of the decree was to bridge the gap, and this construction would defeat that purpose. It would stop the through transportation of other companies on the gap just as effectually as it was halted before upon the sides of it. This could not have been the intention of the Congress, or of the parties to the contracts, or of the Circuit Court which entered the decree. No discussion or argument could make more clear or certain than the terms of the contract and of the decree which have been cited the fact that their true meaning and effect were not thus limited. The contracts and the decree alike gave, upon the payment of fair compensation therefor, the joint and equal use with the Pacific Company of its connections of its main and passing tracks with the tracks of other companies at Council Bluffs, Omaha, and South Omaha from or to which the beneficiaries may desire to transfer trains or cars across the gap. The conclusion is that the acts of 1866 and 1871 imposed upon the Pacific Company the duty to permit the use by a railroad company, whose tracks were connected with its tracks at Council Bluffs, Omaha, or South Omaha, of the connections of its main and passing tracks between those cities with other railroads for the purpose of drawing from its own tracks and delivering over such connections with its own engines to such other railroads cars and trains destined across the river thereto, and the true meaning and legal effect of the decree of 1903 were that the Pacific Company owed that duty to the Mason City Company and its lessee, the Great Western Company, and that it should discharge it. The first proposition of counsel for the appellants cannot be sustained.

The second proposition is that the Mason City Company had no right to move cars with its own engines over the connection of the Union Pacific tracks with the tracks of the Rock Island Company at South Omaha, or from or to its freightyard and grainyard in Omaha, except to effect and complete a transfer of such cars across the gap between South Omaha and Council Bluffs; that it had no right to the use of this connection to exchange between other railroad companies cars which did not necessarily pass over the bridge in order to effect their trips. Upon its face the decree does not limit the use adjudged to the transfer of through cars or traffic. It grants a use joint and equal with that enjoyed by the Pacific Company itself, and that company undoubtedly had the right to use this connection to transfer cars to and from its yards that were not required to cross the river. It is argued that this apparent meaning of the words of the decree should be restricted by construction to the grant of a use for through traffic only because the primary purpose of the provisions of the acts of 1866 and 1871, which required the Pacific Company to allow this use, was to accommodate through traffic across the river only, because the decree granted the use to the same extent that the contract tenants had it, and by the terms of their agreements, by custom, and by their contemporaneous construction those tenants had it for through traffic only, and because the use claimed would congest traffic and disable the Pacific Company from conducting its own business efficiently and from dis-

charging its duty to the public.

It is true that the object of the requirement of the acts of Congress was to bridge the transportation gap and to facilitate the transfer of cars passing between railroads east and railroads west of the Missouri river, but this fact did not deprive the court which was called upon to enforce this legislation of its jurisdiction to prescribe the limits and the terms of the use which the Pacific Company should allow, nor of its power and duty to exercise a wide and wise judicial discretion in fixing those limits and terms. What those should be were questions necessarily involved in the suit which resulted in the decree of 1903. There was much more reason to contend that Congress did not intend to allow the use by other companies of the Pacific Company's tracks and connections south and west of Twentieth street, a use in no way indispensable to the transportation of cars across the river, than there is to argue that it did not purpose to permit the use of those tracks and connections by a company which already has the right to use them for through cars, to move cars to and from its vards in Omaha from and to other railroads with which those tracks connect. And yet the Supreme Court denied the former contention. The questions whether or not these acts of Congress authorize, and Congress intended, that the use now claimed should be permitted, was open to litigation, and was necessarily decided in the original suit, and it is too late for the parties to that litigation to debate that issue now, for in a second controversy between the same parties, or their privies, not only every matter offered, but every matter which might have been offered, to sustain or defeat, in whole or in part, the cause of action, is rendered res adjudicata upon the merits by the former judgment. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Dickson v. Wilkinson, 3 How. 57, 61, 11 L. Ed. 491; Dimock v. Copper Co., 117 U. S. 559, 565, 6 Sup. Ct. 855, 29 L. Ed. 994; Commissioners v. Platt, 79 Fed. 567, 571, 572, 25 C. C. A. 87, 91, 92; St. Louis, K. C. & C. R. Co. v. Wabash R. Co., 152 Fed. 849, 861, 81 C. C. A. 643,

The decree by its terms adjudges to the Mason City Company and its lessee, not the joint use of the Pacific Company's tracks and of its connection with the Rock Island Company in question for the transfer of through cars, but the unrestricted joint use thereof to the same extent that it was granted to the contract tenants. The agreements with those tenants have been searched in vain to find any such restriction. The contract with the Rock Island Company expressly grants to that corporation the joint and equal use with the Pacific Company of the latter's main and passing tracks from Council Bluffs to South Omaha, of its connections with its Union Depot tracks in Omaha, and of its connections with the Union Stockyards tracks in South Omaha and by necessary implication of its connections at Council Bluffs with the

Eastern Railroads. This agreement was made in 1890. Before the Mason City Company built in Omaha, after the decree of 1903, its grainyard, the contract tenants owned no vards in that city wherein cars could be conveniently exchanged with other companies. Through cars were exchanged with companies other than the Pacific Company at the poolyard owned by the Pacific Company in Council Bluffs and at the Union Stockyards in South Omaha without the use of the engines of the Pacific Company. Local Omaha freight cars were handled by the Pacific Company's engines because they were generally obtained from or delivered to shippers on some of the spur or yard tracks of that company, and the contract tenants did not use their own engines for this purpose. Conceding that the custom had been that freight cars which did not cross the river should be exchanged between railroads in Omaha, and that local Omaha freight cars should be handled in that city by the engines of the Pacific Company, that the understanding between the contract tenants and the Pacific Company had been that transportation of this nature should be moved by the engines of the Pacific Company and not by the power of the tenants, and that the latter had never claimed the right to move it with their own engines over the Pacific Company's tracks and connections to their own or other roads, these facts do not establish a controlling contemporaneous construction that they had no right to receive from and deliver to other companies over these tracks and connections of the Pacific Company with their own engines cars destined to and from their own yards in Omaha, because they had no such yards, and that question had never become an instant one. The evidence, therefore, fails to prove any custom regarding the question at issue or any contemporaneous construction of the contracts concerning it which ought to control their terms, and there is nothing in their terms which limits the use they grant to the transference of through cars only, nothing to overrule the ordinary meaning of the words of the contracts and of the decree. We turn back accordingly to the decree to seek the real intention of its maker, the court, the object of all construction of writings.

It is to be interpreted in the light of the rules and principles of equity and of the opinions of the courts upon which it was based. It may be best construed by placing ourselves as nearly as possible in the position of the court which rendered it at the time it framed it. That court could not have been blind on the one hand to the fact that the Pacific Company was charged with the duty of transporting its own passengers and freight over its bridge and its tracks at Council Bluffs, Omaha, and South Omaha; nor could the court have been blind on the other hand to the facts that every railroad company cannot have entrance to our great cities over tracks of its own; that the interest of the public, which in the end must pay for the use of railroads, and the interest of the railroad companies themselves, alike required that the transportation involved should be conducted with the least capital consistent with safe, prompt, and efficient service; and that, to the end that the multiplication of tracks and the increase of investments therein might be avoided, every railroad track in the three cities should be required to carry all the traffic that it could conveniently bear. St. Louis, Kansas City & C. R. Co. v. Wabash Railroad Company, 152 Fed.

849, 861, 862, 81 C. C. A. 643, 655, 656; Union Pacific Railway Co. v. Chicago, R. I. & P. R. Co., 51 Fed. 309, 369, 2 C. C. A. 174, 234; Central Trust Co. v. Wabash, St. L. & P. R. Co. (C. C.) 29 Fed. 558. In the light of these facts and rules of equity jurisprudence, the court rendered the decree of 1903, which grants the joint and equal use of the tracks of the Pacific Company and of their connections with the tracks of other railroads at Council Bluffs and at or near South Omaha, without any limitation of that use to the transportation of through traffic across the Missouri river; and the logical and legal conclusion is that the court intended to adjudge, and that the decree did adjudge, to the Mason City Company and to its lessee the right to use those tracks and connections to draw with its own engines cars from and to its freightyard and grainyard in Omaha to and from other railroads thus connected with the tracks of the Union Pacific Company, although such movements were not made for the purpose of effecting or completing the transportation of such cars across the Missouri river.

The absence from a decree of any limitation or exception to general terms of known significance raises a persuasive legal presumption that the court intended to make none. And, when the terms of a decree are plain and free from ambiguity, their ordinary meaning and effect may not be lawfully extended or contracted by construction, in the absence of proof to a reasonable certainty that such was the purpose of the court, for the legal presumption is that the judge carefully expressed his deliberate intention therein. St. Louis, K. C. & C. R. Co. v. Wa-

bash R. Co., 152 Fed. 849, 852, 81 C. C. A. 643, 646.

Finally, counsel assert, and they have produced testimony to prove, that if the Mason City Company and its lessee, the Great Western Company, are permitted to make the use they here seek of the Pacific Company's tracks and connections with other railroads, those facilities will be so burdened that the latter company will be unable to conduct its own business conveniently and to discharge its duty to the public. If such will be the effect of this use, it was no justification of the violation of the decree and of the injunction. It will be soon enough to consider the effect of this expected overburdening when it becomes an actuality. There was no substantial evidence that any such use had overburdened these tracks or connections when the decree was rendered or when the Pacific Company and its officers disobeyed it.

There was no error in the proceedings in the court below, and the

decree it rendered is affirmed.

FIRST NAT. BANK OF PHILADELPHIA V. ABBOTT.

(Circuit Court of Appeals, Eighth Circuit. November 24, 1908.) No. 2.776.

1. BANKBUPTCY (§§ 449, 468, 225*)— PRACTICE IN TAKING TESTIMONY BEFORE REFEREE AND DISTRICT COURT—REJECTED EVIDENCE SHOULD BE TAKEN AND PRESERVED.

A proceeding in bankruptcy is a proceeding in equity, and the taking of testimony therein and the review by appeals of hearings therein are

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

governed by the same practice as they are in suits in equity, except where otherwise specified.

A referee or the District Court taking testimony in a controversy or hearing in bankruptcy is required by that practice to take, record, and, in case of an appeal, to return to the appellate court, all the evidence offered by either party to the controversy, that which is held by them to be incompetent, irrelevant, or immaterial as well as that which they deem admissible, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and conclude the litigation without remanding the suit to procure the excluded evidence.

From the general rule that all evidence offered should be received, the evidence of a privileged witness, privileged evidence, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are excepted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 915, 930, 384; Dec. Dig. §§ 449, 468, 225.*]

2. Bankruptcy (§§ 463, 228*)—Appeal and Error—Rulings Excluding Evidence Not Preserved Not Reviewable on Appeal—Remedy for Refusal to Preserve.

Rulings of a referee in bankruptcy or of a District Court excluding evidence not taken and returned to the appellate court are not reviewable there

The remedy for a refusal of a referee to take and preserve such evidence is an application to the District Court, and, failing there, to the Circuit Court of Appeals, for an order that it be taken and preserved.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 926, 387; Dec. Dig. §§ 463, 228.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

3. BANKBUPTCY (§ 166*)—REASONABLE CAUSE TO BELIEVE NOT PROVED BY MERE TEMPORARY DEFAULT IN PAYMENT.

The temporary failure of a debtor to discharge his obligations promptly when they fall due is not in itself sufficient to prove that a creditor who is aware of such a default has reasonable cause to believe that it was intended to give a preference by means of a transfer which he obtains.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 256; Dec. Dig. § 166.*]

4. BANKRUPTOY (§ 166*)—GROUNDS OF SUSPICION OF INSOLVENCY OR OF INTENT TO PREFER INSUFFICIENT.

Mere grounds of suspicion that a debtor is insolvent, or that it is intended to create a preference by a transfer, are insufficient to establish the fact that the creditor who receives it has reasonable cause to believe that a preference was intended thereby. There must be substantial evidence of reasonable grounds for such a belief.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \S 256; Dec. Dig. \S 166.*]

5. BANKRUPTCY (§ 467*) — PRACTICE — FINDINGS OF REFEREE AND DISTRICT COURT PREVAIL UNLESS CLEARLY ERRONEOUS.

Where the referee and the District Court have considered conflicting evidence and made a finding or decree thereon, that finding is presumptively right, and it should not be reversed unless it clearly appears that they have fallen into some error of law or have made some serious mistake of fact.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. BANKRUPTCY (§ 166*)—REASONABLE CAUSE TO BELIEVE—EVIDENCE—CONCLUSION.

In April, 1905, a corporation of the highest credit, dominated by its president, a man of the best reputation, both recommended by reliable bankers of St. Louis, where they conducted a large mercantile business, stated to a Philadelphia bank that it had assets worth \$1,316,841.94 and owed \$429,904.48, and borrowed of that bank \$100,000, gave it 20 notes of \$5,000, each payable in October, 1905, and agreed to keep a balance of \$20,000 in the bank. By June 12, 1905, it had drawn out the \$100,000, and had persisted in kiting by depositing its checks on a St. Louis bank in the Philadelphia bank from day to day to the amount in the aggregate of \$111,000, and simultaneously drawing out the amounts so deposited daily by means of its checks on the Philadelphia bank which it had deposited in a St. Louis bank, until the Philadelphia bank had positively refused to permit the kiting to continue longer. The corporation promised in June to restore its deposit to the \$20,000, but failed to do so, and from July 1, 1905, kept less than \$10 in its deposit. In October it paid \$30,000 of the \$100,000 it owed, and failed to pay \$70,000 thereof. Its notes and checks went to protest about the middle of October. The bank refused to accept its common stock as security for its claim, and demanded, and, on November 2, 1905, secured an assignment of, some of its open accounts, upon a statement which it made that it was not its habit to notify debtors of such assignments, and it left the accounts with the corporation for collection. The officers and agents of the Philadelphia bank testified that they did not believe that the assignment was intended as a preference or that the debtor was insolvent.

Held. The evidence in this case does not so clearly show that the referee and the District Court were mistaken in their finding that the bank had reasonable cause to believe on November 2, 1905, that it was intended to give a preference by the assignment it secured, that their conclusion should be reversed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 256; Dec. Dig. § 166.*]

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Eastern-District of Missouri.

P Taylor Bryan (William Meade Fletcher, Harvey L. Christie, and Byron F. Babbitt, on the brief), for appellant.

Lee W. Grant and B. Schnurmacher (Leo Rassieur, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and AMIDON, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree of the District Court which affirmed an order of the referee in bankruptcy to the effect that the claim of the First National Bank of Philadelphia against the estate of the Tennent Shoe Company be expunged unless the bank surrendered the security which it had obtained within four months of the filing of the petition in bankruptcy by an assignment of certain accounts owing to the shoe company. This assignment was made on November 2, 1905. On November 8, 1905, the shoe company gave a letter to the bank in which it stated that its assets were of the value of \$1,247,881, and that its liabilities amounted to \$405,000. The confidential bookkeeper of the shoe com-

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany had testified that the company carried on its books and in its statements as assets items amounting to several hundreds of thousands of dollars which were either worthless or were liabilities, and that the letter of November 8, 1905, with the exception of the signature, was in his handwriting. The appellant specifies as error the fact that the referee sustained objections to queries put to this witness whether or not the statements in that letter were true, and whether or not the fact was ever communicated to any one prior to December, 1905, that these fictitious items were carried among the alleged assets. But the decree below cannot be reversed on account of these rulings, because the facts that the statements in the letter were not true, that the bookkeeper knew that fact, and that the presence of the fictitious assets in the statements was not communicated to the bank, or any of its agents, are sufficiently established by other evidence in the record, and must have been taken as true in the court below, and will be so taken in this court, so that these rulings, if they were erroneous, could not have prejudiced the bank, and also because the questions they present are not reviewable here in the present state of this record.

A proceeding in bankruptcy is a proceeding in equity, and on an appeal to this court, or to the Supreme Court, the decisive issue is not whether there was an error in the admission or exclusion of evidence, but whether or not all the competent and relevant evidence presented to the appellate court sustains the decree. The established practice in the federal courts in equity is that examiners, masters, and the Circuit Courts must, under rule No. 67 in equity, take, record, and, in case of an appeal, return to the appellate court, all the evidence offered by either party, that which was held to be incompetent or immaterial as well as that which they deemed competent and relevant, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the excluded evidence. If evidence is objected to and ruled out, it must nevertheless be written down and preserved in the record subject to the objections, or the ruling cannot be considered in the appellate court. From the general rule that all evidence offered must be taken and preserved, the evidence of a privileged witness, evidence plainly privileged and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or to permit its introduction, are excepted. Blease v. Garlington, 92 U. S. 1, 7, 8, 23 L. Ed. 521; Dowagiac Mfg. Co. v. Lochren, 143 Fed. 211, 213, 214, 74 C. C. A. 341, 343, 344. and cases there cited. Referees, other officers taking testimony, and the District Court are governed by the same rule of practice in the taking of evidence and the hearing of controversies in bankruptcy, where the reason for the rule is much stronger than in ordinary suits in equity, because many of the orders and decrees in bankruptcy are reviewable first in the District Court and again in the Court of Appeals, and the delays would be intolerable if it were necessary for each court to remand for further testimony whenever it found that excluded evidence should have been received. The bankruptcy act of 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), provides that appeals as in equity cases may be taken in bankruptcy proceedings, and the Supreme Court, in prescribing the method of taking testimony, substantially followed the provisions of rule 67 in equity. General Orders in Bankruptcy No. 22, 89 Fed. x, 32 C. C. A. xxv. The last sentence of this order shows clearly that it was the purpose of that court to assimilate the practice in bankruptcy to that in equity in this respect: to require all evidence fairly offered, admissible, and inadmissible, to be taken and preserved, and to penalize the taking of incompetent, irrelevant, or immaterial evidence with costs. It reads:

"The referee shall note upon the deposition any question objected to, with his decision thereon, and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just."

In re De Gottardi (D. C.) 114 Fed. 328, 342; Dressel v. North State Lumber Company (D. C.) 119 Fed. 531; In re Romine (D. C.) 138 Fed. 837, 839. In the case at bar the referee failed to take and preserve the testimony which he excluded, and it is not presented to this court. For that reason his rulings excluding it are not reviewable here. Blease v. Garlington, 92 U. S. 1, 8, 23 L. Ed. 521. The only question judicable on the appeal is, was the decree of the District Court sustained by the competent and relevant evidence which is presented to us in the record before us?

The referee, after noting the objections to the questions, his rulings thereon, and the exceptions thereto, should have taken, written down, and returned the rejected evidence. If he refused or failed to do so upon proper request, the remedy of the party aggrieved was not an appeal, but an application to the District Court, and, failing there, to the United States Circuit Court of Appeals, for an order that such testimony be taken and preserved. When the rejected testimony is made a part of the record and returned to an appellate court, and then only, can such a court consider and decide the legality of the rulings which excluded it, and, after determining that question, it will proceed to decide whether or not all the admissible evidence presented to it sustains the decree below, and to render a final decree accordingly. Fortunately the erroneous practice pursued in the case in hand has in no way prejudiced the cause of the appellant, and the proper practice and the reason for it have been called to the attention of the officers and the members of the profession with some care, that later litigants may not suffer loss by similar errors.

The Tennent Shoe Company was, during all the time here in question, an insolvent corporation which was managed exclusively by its president, a man of the highest reputation for integrity, veracity, piety, and all the other virtues, who, with the exception of his confidential book-keeper who kept the private ledger, was the only person who knew that among the assets included in the statements to creditors and to commercial agencies put forth by him for his corporation were items which aggregated about \$600,000 which were either worthless or of negligible

value. This corporation was conducting a large mercantile business in the city of St. Louis, had a common stock of \$500,000, on which it was paying a dividend of 10 per cent, per annum, and a preferred stock of \$300,000 on which it was paying a dividend of 7 per cent. per annum, and as late as November 2, 1905, when the bank took the assignment challenged, the preferred stock was quoted above par in the market reports in the city of St. Louis. The corporation was given the highest grade of credit by the mercantile agency of R. G. Dun & Co. The corporation and its president were recommended for credit by reliable bankers and business men of St. Louis, and in June, 1905, and during the last days of October of that year, some of them stated to the assistant cashier of the bank, who went to St. Louis to inquire, that the president was a good man, of the strictest integrity, and that in their opinion the corporation would pay its debts. In April, 1905, the president presented to the First National Bank of Philadelphia recommendations by reliable bankers of St. Louis of the highest character, both of the integrity of the president and of the financial standing of the corporation, together with a statement of the corporation signed by himself that its assets were worth \$1,316,841.94, and that its liabilities amounted to \$429,904.98, and he asked for a line of discount of \$100,000 for his corporation. The bank granted this request, and the corporation agreed to maintain a deposit with the bank of \$20,000. Thereupon the corporation made 20 promissory notes of \$5,000 each, payable at various dates between October 1 and October 31, 1905, and the bank discounted them. Early in June of that year the deposit of the shoe company was far below the \$20,000, and it was engaged in kiting; that is to say, it was depositing in the Philadelphia bank day by day checks on the German Savings Institution of St. Louis for the amount of which its own checks drawn on the Philadelphia bank which had been deposited with the Jefferson Bank of St. Louis were daily presented at the Philadelphia bank for payment. On June 6, 1905, the amount thus deposited and drawn within the 10 days just preceding had reached nearly \$75,000, and the bank sent the shoe company a letter to the effect that it could not continue to handle St. Louis funds in that way, that it would charge \$1 per thousand on all such funds sent it by the corporation, that the latter's balance was under \$5,000, and that it requested it to restore the deposit to \$20,000. Between June 6 and June 12, 1905, the shoe company persisted in its course. It deposited St. Louis funds which it simultaneously drew out to the amount of \$39,000, and then the Philadelphia bank wrote that as this practice had been persistent and had grown in proportion it would not continue such transactions even for \$1 per thousand, and in this way it stopped the practice. At the same time the bank sent its assistant cashier to St. Louis, who arrived there on June 14, and left to return to Philadelphia on June 16, 1905. The president of the shoe company showed him a copy of a trial balance of the corporation of May 1, 1905, which was not materially variant from the statement he had delivered to the bank in April, assured him that the business of the corporation was prosperous, and that the kiting was induced by the statement of the cashier of the bank that it would accept St. Louis funds, and that he had indulged in it to discount bills of his corporation. The account of

the corporation was then overdrawn in the Philadelphia bank, and more checks on the St. Louis bank were in the mail. The president of the corporation gave to the assistant cashier of the bank Eastern exchange for the overdraft, and another promise to restore and maintain the deposit at \$20,000. That promise was never fulfilled, and between July 1, 1905, and November 1, 1905, the deposit never rose above \$10. On July 25, 1905, the bank in vain again demanded that the promise to restore and maintain the deposit be fulfilled. The 6 notes which first fell due, aggregating \$30,000, were paid, the remaining 14, which amounted to \$70,000, were not paid, but the corporation sent its checks for them drawn on the German Savings Institution of St. Louis, which the Philadelphia bank forwarded to the Third National Bank of St. Louis and to the National Bank of Commerce of that city for collection, but they were not paid. The first note that remained unpaid matured on October 14, 1905. As the first unpaid checks were protested from day to day the bank telegraphed for an explanation, and the shoe company answered that it was a misunderstanding with its bank, that the check dated the 17th would be paid on the 21st, and that they would arrange to take up all the checks on the 26th of October. The assistant cashier of the bank again appeared in St. Louis on Saturday the 29th of October. On October 30, 1905, he called on the Third National Bank, where its officers informed him that they had presented the checks daily but that they had not been paid; that "they had no question but what they would be"; that the president of the shoe company was a good man, held in the highest esteem, but a poor financier; that the shoe company had been a customer of their bank for some years, and they had extended to it a line of credit of \$200,000, but that they had required it at some previous time to close its account with their bank because it was a continual borrower. The assistant cashier then went to the office of the shoe company, where the president assured him that the reason for the failure to pay the notes at maturity was the yellow fever scare and poor collections, that some investors were about to buy some of his common stock and put in about \$100,000 or \$200,000, that the notes would soon be paid, and that the business was in excellent condition; and he offered to secure the claim of the Philadelphia bank with his common stock in the corporation. The assistant cashier declined to accept the stock as security, and asked for an assignment of some accounts receivable of the corporation. Later in the day the president of the corporation agreed to make the assignment. The assistant cashier asked for a statement of the financial condition of the corporation, but the president declined to make it at that time, and promised to have one prepared for him after November 1, 1905. It was not delivered to him until after the assignment of the accounts on November 2, 1905. From October 30, 1905, until some days after the assignment was made, the president was reported to be ill, and the assistant cashier was unable to see him, although he repeatedly endeavored to do so. The assistant cashier did not call upon or inquire of the German Savings Institution, upon which the protested checks had been drawn, about their payment, or about its alleged misunderstanding with the shoe company, or about the latter's financial condition, although he remained in the city of St. Louis several days after October 30, 1905. He and the other officers of the Philadelphia bank testified that they believed the shoe company to be solvent, and that they did not believe that it was intended to give the bank any preference by the assignment. Other facts were established by the evidence, which fills many printed pages, but none that can control the result, which must be deduced from those which have been recited.

Counsel contend that an actual intent of the debtor to create a preference was indispensable to the avoidance of a preference given by it within the four months, and that there was no substantial evidence of such an intention. It is unnecessary in this case to consider or decide whether or not such an intent was requisite, for the evidence is convincing that the shoe company was insolvent, and that under the circumstances surrounding the transaction the inevitable effect of the assignment was a preference, and the law conclusively imputes to the shoe company the intention to bring about the result which necessarily arose from the nature of the act which it performed (Western Tie & Timber Co. v. Brown, 196 U. S. 502, 508, 509, 25 Sup. Ct. 339, 49 L. Ed. 571; Wilson v. City Bank, 17 Wall. 473, 486, 21 L. Ed. 723), so that the only real question in this case is, Did the bank have reasonable cause to believe a preference was intended by the assignment when it received it?

The rules of law invoked by counsel for the claimant that the test of insolvency is the insufficiency of a debtor's assets to discharge his liabilities, and not his inability to pay his debts in the ordinary course of business as they mature (section 1, par. 15, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), that the mere temporary failure of a debtor to discharge his obligations promptly as they fall due is insufficient to prove that a creditor who is aware of such a default has reasonable cause to believe that it is intended to give a preference which he then obtains (In re Eggert, 102 Fed. 735, 43 C. C. A. 1; In re Pfaffinger [D. C.] 154 Fed. 523), that mere grounds of suspicion that a debtor is insolvent or that it is intended to create a preference by a transfer are insufficient to establish the fact that the beneficiary who receives it had reasonable cause to believe that a preference was intended thereby, and that there must be proof of reasonable grounds for such a belief (Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; Mackel v. Bartlett, 36 Mont. 7, 91 Pac. 1064), are conceded to be sound and to be applicable to the case in hand. But the referee and the District Court found that the bank had reasonable cause to believe that it was intended to give a preference by the assignment, and, when the court and the referee have considered conflicting evidence and have made a finding or decree thereon, it is presumptively right, and it may not be reversed unless it clearly appears that they have fallen into some error of law or have committed some serious mistake of fact in reaching their conclusion. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 94, 15 L. R. A. (N. S.) 372, and cases there cited.

The mere temporary inability of the shoe company to pay its debts as they matured was not the only reason for the bank to believe that a preference was intended by the assignment to it in this case. A corpo-

ration which stated that it was worth more than \$1,300,000 in convertible assets, in accounts receivable, and merchandise, and that it owed only about \$430,000, borrowed \$100,000 in April, and agreed to maintain a deposit of \$20,000. In June it had drawn out this \$100,000 and more, and was so persistently kiting by depositing in the claimant bank St. Louis funds which it drew out on the same day by means of checks on that bank which it had deposited in another St. Louis bank that it was anxious to pay a charge of \$1 on a thousand for the privilege of continuing this practice, and it was prevented from prosecuting it only by the peremptory refusal of the Phiadelphia bank to accepts its checks upon the St. Louis bank for this purpose. Would not these facts give a banker of ordinary prudence reasonable cause to believe that such a corporation could not be solvent, that its statements could not be true, that it could not be that it had a surplus of more than \$800,000 of convertible assets and was yet persisting in such a pernicious course and was yet refusing to restore so modest a deposit as the \$20,000 it had agreed to maintain? The shoe company violated its agreement to keep up its deposit in June, and it continued in that breach in the teeth of repeated demands ever after. Before the bank took the assignment here in controversy it knew that the shoe company had been persistently kiting, that it had failed to maintain its agreed deposit, that its local bank in St. Louis had refused to pay its checks to the amount of \$70,000, that some of them had laid protested for weeks, that the corporation after repeated demands by telegraph, by letter, and in person was unable to pay them, and that the Third National Bank in St. Louis where the shoe company had had a line of discount of \$200,000, had compelled it to close its account because it insisted upon a perpetual loan. It is true that the president of the corporation and many estimable gentlemen of St. Louis wrote and said pleasant things to the officers of the Philadelphia bank about the corporation. But the Philadelphia bank knew facts that some of the bankers in St. Louis were probably ignorant of, and in the face of the facts which have been recited this court is unable to bring itself to the conclusion that it clearly appears that the referee or the court below made any serious mistake when they found that the Philadelphia bank had reasonable cause to believe on November 2, 1905, that it was intended to give it, what it actually received on that day by the assignment of the accounts, a preference over other creditors similarly situated, and the decree below is accordingly affirmed; and it is further ordered that the appellant shall have fifteen (15) days from the date when the mandate of this court shall be filed in the court below within which to surrender its preference, and that if said appellant within said fifteen (15) days shall surrender its preference it shall then be allowed to prove its entire claim with like effect as if no preference had been given, and this order shall be embodied in the mandate remitted to the court below.

T. S. FAULK & CO. v. STEINER, LOBMAN & FRANK et al.

DAVIS WAGON CO. v. SAME.

(Circuit Court of Appeals, Fifth Circuit. December 29, 1908. Rehearing Denied February 2, 1909.)

Nos. 1875, 1876.

1. BANKRUPTCY (§ 114*)—RECEIVERS—APPOINTMENT—NOTICE.

Under General Bankruptcy Order 23 (89 Fed. xi, 32 C. C. A. xxvi), providing that referees' orders should recite, according to the fact, that notice was given and the manner thereof, or that the order was made by consent, or that no adverse interest was represented at the hearing, or that the order was made after hearing adverse interests, an order for the appointment of a receiver should not be made by the referee without notice, except in a case of imperious necessity, when the petitioner's rights could be secured and protected in no other way.

[Ed. Note,—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

2. BANKRUPTCY (§ 114*)—APPOINTMENT—NATURE OF REMEDY.

The appointment of a receiver is an extraordinary remedy, and will only be made on a showing of a clear case of right and pressing necessity.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

3. Bankruptcy (§ 114*)—Receivers—Petition.

Under Bankr. Act (Acts July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]) § 2 (3), authorizing the appointment of receivers on the application of parties in interest in case the court shall find it absolutely necessary for the preservation of the estate until the petition is dismissed or a trustee is qualified, a petition failing to allege that the appointment of a receiver is absolutely necessary to preserve the estate, and failing to contain within itself, or by attached affidavit, sworn facts showing such necessity is insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

4. Bankruptoy (§ 114*)—Receivers—Appointment—Consent by Bankrupt. Consent of an alleged bankrupt to the appointment of a receiver does not authorize such appointment, where it is not absolutely necessary for the preservation of the estate, as required by Bankr. Act (July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]) § 2 (3).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

5. BANKRUPTCY (§ 114*)—RECEIVERS-IMPROPER APPOINTMENT-EFFECT.

The improper appointment of a receiver for a bankrupt should not be permitted to delay or affect the trial of the issues between the creditors filing an involuntary petition and intervening and opposing creditors as to whether the petition should be granted.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

Petitions for Revision of Proceedings of the District Court of the United States for the Middle District of Alabama, in Bankruptcy.

These cases are considered and decided together, as both petitions seek to revise and reverse the same decrees.

On November 9, 1907, at 6 o'clock p. m., an involuntary petition in bankruptcy was filed in the court below against T. S. Faulk & Co. by Steiner, Lobman & Frank, Schloss & Kahn, and the Sessoms Grocery Company (who will hereafter be referred to as Steiner and others), averring that they had provable debts against the alleged bankrupts exceeding \$2,000; that the alleged bankrupts were insolvent, and that they had made preferential payments to named creditors within four months. At the same time, Steiner and

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

others filed a petition for the appointment of a receiver. The material averments of the petition are as follows:

"Your petitioners show that the principal assets of said T. S. Faulk & Co. consist of a stock of goods, wares, and general merchandise, books of account, choses in action, etc. That the said stock of goods, wares, and merchandise are situated in a storehouse in the town of Samson, Ala., formerly occupied by the bankrupts in this cause.

"Your petitioners further show unto your honor that the said goods and merchandise situated in said storehouse should be taken into the possession of this court, and that the same should be preserved under the orders and direction of this court for the benefit of the creditors of this estate. That it is important and necessary that, in order that the said goods, wares, and merchandise, and other property belonging to the said T. S. Faulk & Co. may be properly held, preserved, and cared for until a hearing of their original petition in this cause, a receiver should be appointed by this honorable court to collect, hold, and preserve the same for the benefit of said estate, and until the further orders of this court.

"Wherefore, your petitioners respectfully pray that your honor will make an order appointing some proper and suitable person as receiver in this cause, with power and authority, and whose duty it shall be, to take possession of, seize, hold, and preserve all of the assets, of whatsoever character or description, and wherever the same may or can be found, belonging to the said T. S. Faulk & Co., until the election of a trustee in this cause, or until the further orders of this court. And, as in duty bound, petitioners will ever pray," etc.

The petition is verified by B. Frank to the effect that he has read the same, and that the facts therein contained are true as therein set forth. There was filed in court at the same time, November 9, 1907, at 6 o'clock p. m., an order signed by the referee in bankruptcy, granting the prayer of the foregoing petition and appointing a receiver. The order is as follows:

"This cause coming on to be heard by the undersigned upon the petition of Steiner, Lobman & Frank, Schloss & Kahn, and Sessoms Grocery Company, praying for the appointment of a receiver to take charge of the property and effects of the alleged bankrupts in this cause, and to hold and preserve the same pending the further orders of this court; and it appearing to the court that it would be to the interest of the said estate that the property and effects thereof should be collected up and cared for pending the hearing of the original petition in this cause:

"It is therefore ordered, adjudged, and decreed by the court that George Stuart be, and hereby is, appointed as receiver of all of the estate, property, and effects, books of account, choses in action, and evidences of debt, of every character and description, belonging to the said T. S. Faulk & Co., with power and authority to take immediate possession thereof, wherever the same may or can be found, and hold and preserve the same until the further orders of this court.

"It is further ordered that any and all persons having in their possession or under their control any property or assets belonging to said alleged bankrupts be, and hereby are, required to forthwith deliver the same to said receiver upon demand; and all other persons and parties having in their possession any of the assets belonging to said estate are hereby ordered to deliver the same to said receiver.

"It is further ordered that this order shall not take effect until the petitioning creditors shall have entered into a bond, with good and sufficient sureties, payable as required by law, and approved by this court, in the sum of \$1,000, and until said receiver shall have entered into a bond, with good and sufficient sureties to be approved by the court, in the sum of \$5,000.

"Done this 9th day of November, 1907."

The receiver gave bond and took possession of the property of the alleged bankrupts. On December 23, 1907, T. S. Faulk & Co. filed a petition addressed to the judge of the District Court, alleging that it was not necessary to appoint a receiver to preserve the property, and that it was not necessary to continue the receiver in possession of the property pending the trial of the

original petition, and praying that the receiver be discharged and that they

be restored to the possession of the property.

On the same day, the Davis Wagon Company filed a sworn petition, alleging that it was a creditor of the alleged bankrupts; that it was not absolutely necessary to appoint a receiver for the preservation of the estate of the alleged bankrupts, and that the appointment was greatly detrimental to the interest of the estate; and alleging other facts tending to show that the appointment was improvident. The petition concluded with a prayer that the receiver be discharged, and directed to deliver the property back to the possession of T. S. Faulk & Co., and that the order appointing the receiver be vacated and annulled. The court heard these two petitions, and made the following order:

"After due notice to the petitioning creditors and the receiver, this cause came on this day to be heard on the petitions of the Davis Wagon Company and of the said alleged bankrupts, T. S. Faulk & Co., praying for the discharge of the receiver heretofore appointed in the cause, and for the vacation of the order of the appointment of such receiver, and for the restoration to the possession of the said T. S. Faulk & Co. of the property and assets of the

alleged bankrupts now in the hands of the receiver.

"In support of each of said petitions, said respective petitioners offered the record and proceedings in the cause; no further evidence being offered by any

of the parties.

"And now, after due hearing of said petitions, it is ordered and adjudged by the court that, in so far as they respectively pray for the discharge of said receiver and the vacation of the order of appointment of the receiver, they be, and the same are hereby, denied and refused.

"Done this December 23, 1907."

The record shows that the alleged bankrupts duly filed an answer to the involuntary petition against them, denying their insolvency, and denying the alleged act of bankruptcy, and claiming that the aggregate value of their property would exceed \$50,000, and that their debts were not in excess of \$28,000. They also filed a written demand that the issues presented by the

petition and the answer be tried by jury.

On the application of the Davis Wagon Company and 18 other creditors of the alleged bankrupts holding claims varying in amount from \$15 to \$1,000, an order was made that they be severally and separately allowed to appear in opposition to the petition filed herein for involuntary bankruptcy, and they were made parties to the proceeding. Thereupon they filed a plea, severally and separately denying that T. S. Faulk & Co. had committed an act of bankruptcy, as alleged in the petition, or that they are insolvent, and demanding a trial of the issue by jury.

Steiner and others filed the following replication to the pleas or answer of

T. S. Faulk & Co.:

"(1) That said original petition filed in this cause by them against the said T. S. Faulk & Co. to adjudge the said Faulk & Co. bankrupts, within the purview of the acts of Congress relating to bankruptcy, was filed at the instance and request of the said T. S. Faulk & Co., and upon their admission of

the facts therein alleged.

"(2) That on, to wit, the 6th of November, 1907, the said T. S. Faulk, acting for and on behalf of the said firm of T. S. Faulk & Co., and being fully authorized in that behalf, informed the petitioners, in substance, that said firm was financially embarrassed to such an extent as to be unable to continue the mercantile business in which said firm was then engaged; that his said firm owed large sums of money, which was then past due, and consulted and conferred with the representatives of some of the petitioners with the view of devising a plan whereby he could pay or satisfy the creditors of said firm of T. S. Faulk & Co., or provide a method for the administration of the assets of said firm for the benefit of said creditors; and petitioners aver that as the result of said negotiation or conference the said T. S. Faulk, acting for and on behalf of said T. S. Faulk & Co., and being authorized so to do, requested that petitioners file a petition in bankruptcy against him and obtain the appointment of a receiver to take charge of his assets and property for the benefit of his creditors, and represented to your petitioners to be true the facts so

alleged, and which were alleged, in said petition, and that, pursuant to said request, your petitioners, in good faith, filed the petition in this cause, and, upon the filing thereof, obtained the appointment of a receiver to take charge of the assets of said firm, and, as a condition precedent to the appointment of said receiver, they executed the petitioner's bond required by law in such cases in the sum of, to wit, \$1,000, and they also became surety upon the bond of the receiver appointed in said cause, in the sum of, to wit, \$5,000, which said bonds were made pursuant to the statute in such cases provided, and pursuant to the order of the court in the premises; that your petitioners employed counsel to represent them in the filing of said petition and in the said proceeding, and incurred the costs and expenses incident thereto, amounting in the aggregate to a large sum, and for all of which they became liable.

"Wherefore, your petitioners aver that said Faulk & Co. have waived their right to interpose, or are estopped from interposing, the defenses sought to

be set up in said several pleas or answers.

"(3) That on, to wit, the 6th day of November, 1907, T. S. Faulk, acting for and on behalf of said firm of T. S. Faulk & Co., requested that the petitioners in the said original petition in bankruptcy filed in this cause put said firm in involuntary bankruptcy, upon the grounds in said petition alleged, in order that the assets of said firm might be administered for the benefit of the creditors of said firm; that, acting upon said request, petitioners in the said original petition in bankruptcy in good faith employed counsel, and incurred a liability therefor, in the premises, and instructed said counsel to file the petition in bankruptcy against said Faulk & Co.; that said counsel did accordingly and in good faith file the said original petition for petitioners in this cause, and obtained the appointment of a receiver, which said receiver duly qualified and took possession of the assets of said Faulk & Co.; that petitioners paid the costs required by law to be paid upon the filing of said original petition in this cause; that they executed a petitioner's bond as a condition precedent to the appointment of a receiver, and that some of them became liable as sureties on said receiver's bond, all of which was done at the instance and request of the said T. S. Faulk & Co.

"Wherefore, they say that the said T. S. Faulk & Co. should not, in this honorable court, be permitted to set up the defenses sought to be set up in said pleas or answer."

T. S. Faulk & Co. demurred to these replications.

The cause came on to be heard, and Steiner and others moved the court to set aside and vacate the order which allowed the Davis Wagon Company and other creditors to intervene in opposition to the original petition. Thereupon, the court, deciding the motion and the demurrer, made and entered the following order:

"This cause coming on to be heard, came the parties, and the original petitioning creditors moved the court to set aside and vacate the order of the court made in said cause on the 10th day of July, 1908, allowing the Davis Wagon Company and certain other creditors to appear in opposition to the original petition seeking to adjudge the said defendants bankrupts, and to strike from the files the pleas of Luttrell Hardware Company, and of Troy Bank & Trust Company, and of Davis Wagon Company, et al., severally denying that said T. S. Faulk & Co. had committed an act of bankruptcy, and also strike from the files the demurrer of the Troy Bank & Trust Company and Davis Wagon Company et al., severally, to the special replications of the original petitioning creditors, which said pleas and demurrers were filed in this cause on the 10th day of July, 1908:

"And it appearing to the court that its said order of July 10th was made in advance of the hearing of the cause, and without notice to the original petitioning creditors, and subject to their right to move to vacate it: Now, upon consideration, I am of the opinion that it is within the discretion of the court to allow the creditors to intervene, after the time fixed by law for pleading, but that they should not be allowed to do so under the circumstances of this case, except for the purpose of interposing such defense as the alleged bankrupts could interpose.

"The demurrer of T. S. Faulk & Co. to the special replications of the original petitioning creditors having been argued by counsel and considered,

I am of the opinion that the facts set up in these replications are not proper matters for replication, and that the demurrers should be and are sustained; but I am of the opinion that while the matters set up in said special replications may not wholly avoid the defense set up in the pleas of the alleged bankrupts, yet, if the original petition in this cause was in fact filed by the petitioning creditors in good faith, at the instance or request of the alleged bankrupts, and the appointment of the receiver obtained and costs and expenses incurred by those creditors pursuant to such request or invitation, that it would be manifestly inequitable to permit the alleged bankrupts to defend against the petition without, at least, placing the petitioning creditors in statu quo by reimbursing them for such costs and expenses as were thus incurred; and it being made known to the court by the original petitioning creditors that such was the fact, and that they desired to make proof thereof, and the court having, in the investigation of one branch of this case wherein testimony had been taken by both parties touching this question, announced that it would examine and consider that evidence before proceeding further with the trial of the case to ascertain whether or not the contention of the petitioning creditors was sustained, but counsel for the alleged bankrupts having stated their desire to submit additional evidence upon this issue, and the court, desiring to be fully informed, deems it proper to refer the matter to a

special referee to take the testimony and make report thereof to this court: "It is therefore ordered, that it be and hereby is referred to Philip H. Stern, Esquire, as special referee, with instructions to hold a reference, giving the parties in interest, or their attorneys, reasonable notice thereof. Upon such hearing, the referee will take the testimony submitted by the parties touching the contention of the petitioning creditors, viz., that the proceeding had been instituted and costs and expenses incurred by them, in good faith. at the instance or request of the alleged bankrupts; and also the fair and reasonable expenses incurred by them in the premises, including fair and reasonable compensation for the receiver appointed in said cause for his services therein, and the fair and reasonable compensation to the attorneys of the receiver, and to the attorneys of original petitioning creditors for their service in the premises to the present time; and he will also separately ascertain the fair and reasonable value of such services from the filing of the petition to the time of the interposition of the defense by the alleged bankrupts.

"The referee is authorized to employ a stenographer for the purpose of taking and transcribing the testimony submitted, and he will report the testimony, together with his finding therefrom, to the court for its considera-

tion, with all due diligence.

"And the court being further of the opinion that the alleged bankrupt was not entitled to have a trial by jury at this time, prior to the ascertainment of the facts as to the consent or procurement of the alleged bankrupts to the filing of the petition against them, and a determination of the rights of the parties in that event, continued the trial of the case to the next term, against the objection of the alleged bankrupts, who excepted to such continuance.

"On the coming in of the report of the special referee, the court will make such further orders in respect thereto as may then be deemed proper.

"Done this the 11th day of August, 1908."

The petitions for revision seek to vacate and reverse the foregoing orders and decrees. Among the many assignments of error, it is claimed: (a) That the facts stated in the petition for the appointment of a receiver were insufficient in law to justify the appointment; (b) that the court erred in refusing to vacate and annul the order appointing the receiver, and in refusing to discharge him. And, in the decree of August 11, 1908, it is alleged that the court erred (c) in denying them a trial until after a reference should be held to ascertain costs, expenses, and attorney's fees; (d) in ordering an ascertainment of fees to be paid by alleged bankrupts for the attorneys of the receiver in said cause; (e) in ordering the ascertainment on said reference of expenses, costs, and attorney's fees incurred by the petitioning creditors and the receiver after your petitioners had interposed their sworn plea to the original petition and their demand for a jury trial of the cause; (f) in holding that if the original petition in the cause was in fact filed by the petitioning creditors in good faith, at the instance or request of the alleged bankrupts, and the appointment of the receiver obtained and costs and expenses incurred by those creditors pursuant to such request or invitation, that it would be inequitable to permit the alleged bankrupts to defend against the petition without placing creditors in statu quo by reimbursing them for such costs and expenses as were thus incurred; (g) by referring the cause to a special referee to take testimony and make report upon the issue suggested by the court, viz., that it would be inequitable to permit the alleged bankrupts to defend against the petition by placing the petitioning creditors in statu quo by reimbursing them for such costs and expenses as were thus incurred, as set forth in said order; (h) by holding that the alleged bankrupts were not entitled to have a trial by jury before the ascertainment of the facts as to the alleged consent or procurement of the alleged bankrupts to the filing of the petition against them, and a determination of the rights of the parties in that event.

Warren S. Reese (J. M. Chilton, on the brief), for petitioner T. S. Faulk & Co.

Massey Wilson and Thomas W. Martin, for petitioner Davis Wagon Co.

B. P. Crum (Steiner, Crum & Weil, on the brief), for respondents. Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

SHELBY, Circuit Judge (after stating the facts as above). 1. When the involuntary petition was filed, the petition to appoint a receiver was also filed, and the receiver was appointed immediately, without notice to the alleged bankrupts. No fact is alleged or shown by the record to authorize the appointment without notice. The bankruptcy act does not expressly provide that notice shall be given before the appointment shall be made, but it is a general rule that, from the institution of a suit until final judgment, every step that immediately affects the rights of a defendant should be preceded by notice, and, with few and well-defined exceptions, no court is justified in appointing a receiver and seizing the property of a defendant without giving him notice and an opportunity to be heard. It is necessary to fairness and justice in all legal procedure that judicial action should be taken in open court on issue between the parties, or after an opportunity for such issue; and a regard for this rule "will not only insure the rights of litigants, but will also protect from the unjust criticisms so often made, and, what is of more importance, will secure the courts themselves against hasty and ill-considered action." Hutchinson v. American Palace-Car Company (C. C.) 104 Fed. 182, 185.

The twenty-third general order in bankruptcy (89 Fed. xi, 32 C. C. A. xxvi) provides that:

"In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests."

The referee, in the appointment, disregarded this order. This rule is prescribed by the Supreme Court by authority of section 30 of the act (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]), and it is the duty of referees to make their orders conform to it.

It has been doubted if a referee is ever justified in appointing a receiver without notice before adjudication. Ross-Meeham Fdry. Co. v. Sou. Car & Fdry. Co. (D. C.) 124 Fed. 403. No principle is more essential to the administration of justice, whether by a referee or a judge, than that no man should be deprived of his property without notice and an opportunity to make his defense. A mistaken notion seems to have grown up in reference to bankruptcy proceedings that they are in some way an exception to this principle. It constantly occurs that applications are made for summary action by referees without any notice whatever to the parties who are in possession of the property sought to be seized. Alderson on Receivers, § 280. courts should stand firmly against this tendency, and not hesitate to vacate any order of a referee that is violative of this vital principle. If it be conceded that a case may occur where a referee could lawfully appoint a receiver without notice—a question it is not necessary now to decide—he is certainly not authorized to disregard the rule of equity procedure as to notice which controls a chancellor when appointing receivers. Under the well-established rule, a chancellor will not appoint a receiver without notice except in a case of imperious necessity, when the rights of the petitioner can be secured and protected in no other way. It sometimes becomes necessary for the court to act without notice to the defendant, when he has absconded, or is beyond the jurisdiction of the court, or cannot be found, or when there is imminent danger of irreparable injury, or when, by giving notice, the very purpose of the appointment may be rendered nugatory. The rule on the subject is found in many cases, and has often been enforced by this court. These limitations upon the authority to appoint a receiver without notice, to say the least, are controlling when an application to make the appointment is decided by a referee in bankruptcy.

2. We are also required to consider the question whether there is anything in the record, as matter of law, to justify the appointment of a receiver. Aside from the bankruptcy act, the appointment of a receiver is an extraordinary remedy, and is granted with great caution and only in cases of necessity. The court acts with extreme caution, and requires a clear case of right and pressing necessity to induce it to make an appointment. Is the rule less strict as to the appointment of receivers in bankruptcy? The bankruptcy act was framed with the purpose of securing to the creditors a distribution of the bankrupt's estate at a minimum cost. The policy of the act is one of economy, and, to promote this policy, Congress sought to provide against the improvident and unnecessary appointment of receivers. The authority to make the appointment is conferred and limited by the act. There is but one ground stated for the appointment. The act authorizes the appointment of receivers "upon the application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified. Act July 1, 1898, c. 541, § 2 (3), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421). The petition to appoint the receiver should allege that the appointment is absolutely necessary for the preservation of the estate, and the facts should be stated either in the sworn petition, or in accompanying affidavits showing the necessity. The record falls far short of this rule, both as to averment and proof. Neither the petition, the affidavit accompanying it, the order of appointment, nor other parts of the record show that the appointment was absolutely necessary for the preservation of the estate. In a replication filed in a subsequent proceeding, it is alleged that Faulk & Co. agreed with Steiner and others that the involuntary petition should be filed and a receiver appointed. This feature of the case will be referred to later. It is sufficient at this point to say that the order appointing the receiver does not purport to have been made by consent, and the record nowhere shows such agreement to have been made. We think it appears from the record that the appointment was improvident, and in opposition not only to the form but to the substance of the law. We are of opinion that the District Court erred in refusing to discharge the receiver. A decree will be entered reversing the order of the District Court of December 23, 1907, and vacating the order of the referee appointing the receiver, and the petitioning creditors, on whose motion he was appointed, will be taxed with all the costs and fees of the receivership, when ascertained by the District Court.

3. We come now to consider the decree of the District Court of August 11, 1908. The involuntary petition had been filed; Faulk & Co., the alleged bankrupts, had filed pleas denying insolvency and denying alleged acts of bankruptcy; creditors had been allowed to intervene to oppose the involuntary petition, and they had also filed pleas denying the insolvency of the alleged bankrupts and denying the alleged acts of bankruptcy. A trial by jury had been demanded. To these pleas, the original petitioning creditors, Steiner and others, presented several replications, to the effect, in brief, that, before the involuntary petition was filed. Faulk & Co. had agreed with Steiner and others that it should be filed, that the alleged bankrupts were insolvent, and that a receiver should be appointed. Faulk & Co. demurred to these replications. On the trial, the court made the order in question. The effect of the order was to stop the trial, so that a special referee might inquire into the question whether or not Faulk & Co. had made the agreement alleged in the replications. The referee is also directed to ascertain the costs and expenses of the petitioning creditors in prosecuting the involuntary petition and in having the receiver appointed. This order is attacked by both Faulk & Co., the alleged bankrupts, and the Davis Wagon Company, a creditor intervening in opposition to the involuntary petition. The important question presented by the objections to this order of reference relates to the effect of the alleged agreement that the involuntary petition should be filed and the receiver appointed. If the effect of such agreement if shown to be made—is not to deprive Faulk & Co., or the creditors intervening in opposition, of the right to object to the appointment of a receiver and to resist the adjudication, then the reference and investigation is useless. The bankruptcy act makes no provision for the appointment of a receiver in bankruptcy by the consent of the alleged bankrupt. The appointment, by the terms of the act, is only authorized when it is absolutely necessary for the preservation of the estate. The involuntary petition is filed on the theory that the alleged bankrupt is insolvent; that he has creditors to whom his estate is to be distributed. If this be not true, there is no reason for the appointment of a receiver or for the adjudication. The creditors, therefore, are the parties chiefly interested in avoiding the expenses of an unnecessary receivership. It was not intended, we think, that the bankrupt, by his consent, could remove the limitation of the statute, and authorize the appointment of a receiver where it was not necessary for the preservation of the estate. Provisions of the act for the protection of the bankrupt cannot be waived by him if such provisions also serve to protect the bankrupt's creditors. In re Sarsar (D. C.) 9 Am. Bankr. Rep. 576, 120 Fed. 40. In Whelpley v. Erie Ry. Co., 6 Blatchf. 271, Fed. Cas. No. 17,504, it was claimed that a party was estopped by consenting to the appointment of a receiver. Nelson, Circuit Justice, held:

"I do not assent to this view. The company waived the notice which is required by the rules and practice of this court before an injunction can be issued; but the order for the injunction, and for the appointment of a receiver, depended upon the judgment of the judge who granted them. Indeed, I am not prepared to admit that an order for an injunction, or a receiver, can be made in an improper case, even with the consent of both parties, more especially where the rights of third persons may be concerned."

The agreement of the alleged bankrupt that a receiver should be appointed—if such agreement has been made—should not, under the circumstances, be permitted to affect the rights of opposing creditors (Scott v. Hotchkiss, 115 Cal. 89, 47 Pac. 45; Beach on Receivers, § 49; Alderson on Receivers, § 51); nor should such appointment, when not authorized by law, be permitted to delay or affect the trial of the issues between the creditors filing the involuntary petition and the intervening and opposing creditors.

That part of the order of August 11, 1908, which sustains the demurrer of T. S. Faulk & Co. to certain replications is affirmed; the remainder of said order is reversed.

emander of said order is reversed.

DONEGAN v. BALTIMORE & N. Y. RY. CO.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 49.

1. Negligence (§ 136*) — Proximate Cause of Injury—Question of Law or of Fact.

It is only when the facts are clearly settled and but one inference can possibly be drawn therefrom that the question of proximate cause is one of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \$\$ 292, 300; Dec. Dig. \$ 136.*]

2. MASTER AND SERVANT (§ 285*)—INJURY TO BRAKEMAN—VIOLATION OF SAFE-TY APPLIANCE ACT.

Plaintiff was a brakeman on a freight train of defendant's railroad being moved in interstate business, and was directed to cut off the two rear cars while the train was moving slowly and before it reached a certain switch. The automatic coupler on one of the cars was broken, and plaintiff went between the cars and attempted to pull the pin by hand, but, not

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

succeeding, started out, when his foot caught in an unblocked switch frog and he was injured. *Held*, in an action to recover for the injury, that the question whether the failure of defendant to have the car properly equipped was the proximate cause of the injury, so as to render it liable therefor under the safety appliance act of March 2, 1893, c. 196, § 8, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3176), was, under the evidence, one of fact for the jury, and that it was error for the court to direct a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. § 285.*

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

3. MASTER AND SERVANT (§ 289*)—INJURY TO BRAKEMAN—CONTRIBUTORY NEGLIGENCE.

In an action by a brakeman against a railroad company to recover for an injury received in attempting to uncouple cars in a moving train, the question of contributory negligence *held*, under the evidence, one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1089; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 112*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—UNBLOCKED RAILROAD FROGS.

The use by a railroad company of unblocked frogs in a switchyard does not constitute negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §; 218, 221; Dec. Dig. § 112.*]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Pinney, Thayer & Van Slyke, for plaintiff in error.

J. Colton and Cravath, Henderson & De Gersdorff (Lyle H. Hall, ocunsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This was an action to recover damages for personal injuries sustained by the plaintiff while employed by the defendant upon its railroad. The complaint is based both upon the alleged violation by the defendant of the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), and upon the alleged negligence of the defendant. Upon the trial the plaintiff put in his case. The defendant thereupon moved to dismiss the complaint, and the court granted the motion.

Upon this writ of error the ultimate question is whether, viewing the testimony from the standpoint most favorable to the plaintiff, and giving him the benefit of all inferences fairly to be drawn therefrom, a case was presented which should have gone to the jury. There was evidence from which the jury would have been warranted in finding these facts: At the time of the accident, May 24, 1906, the plaintiff was employed as rear brakeman on a freight train which ran daily—starting in the morning—from St. George, Staten Island, in the state of New York, to Cranford Junction, in the state of New Jersey. On the morning in question the train started from St. George as usual, and ran, picking up freight cars at various points, until it

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

reached the Arlington yard upon Staten Island, where it was rearranged and made up for the run into New Jersey. The train was composed of 35 cars, with a caboose at the rear. As the train approached Cranford Junction the conductor ordered the plaintiff to cut off the two rear cars upon the main track in the Cranford yard. It was necessary that this cut-off should be made before reaching a switch track leading from the main track into the "West Yard," so called, in order that the entrance to such track should not be blocked. As the train drew near the place for making the cut-off it was running at a slow speed-about two miles an hour-and the plaintiff, who was upon the caboose, jumped off and ran forward to cut off the two cars as ordered. He attempted to use the uncoupling device provided—a cut lever—on the front end of the second car, but it would not work, the chain connecting it with the top of the coupling pin being broken. The plaintiff was out of sight of the engineer and other brakemen, and could not signal them to stop the train. He therefore went between the cars and attempted to raise the pin by hand, but failed to do so, and in endeavoring to step out from between the cars caught his foot in an unblocked frog of a switch leading to a turntable, was unable to extricate it, and was pulled down under the wheels, receiving the injuries complained of. The plaintiff knew the location of the turntable switch, but did not know that the frog was unblocked.

Upon these facts it is obvious that the defendant violated the safety appliance act. The car was not equipped with couplers which could be "uncoupled without the necessity of men going between the ends of the cars." The uncoupling device was broken. The defendant's liability for any injury caused by such violation of the statute was absolute, and not dependent in any degree upon its negligence. St. Louis, etc., R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061.

The inquiry, then, is whether this violation of the statute was the proximate cause of the accident. But such a question cannot ordinarily be determined as a matter of law. It is generally the province of the jury to determine the proximate cause of an injury. As said by Mr. Justice Strong in Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it."

See, also, Choctaw, etc., R. Co. v. Holloway, 191 U. S. 334, 24 Sup. Ct. 102, 48 L. Ed. 207; Southern Pacific Co. v. Yeargin, 109 Fed. 436, 48 C. C. A. 497; San Francisco, etc., Co. v. Carlson (C. C. A.) 161 Fed. 859; Missouri, etc., R. Co. v. Byrne, 100 Fed. 359, 40 C. C. A. 402.

It is only when the facts are clearly settled and but one inference is possible to be drawn therefrom that the question of proximate cause is one of law. In the present case the question was essentially one of fact—different conclusions could be drawn from the testimony. It

is true that the direct instrumentality by which the plaintiff was injured was the frog. It was the immediate, but not necessarily the proximate, cause. It was for the jury to determine whether the failure of the defendant to equip the cars with the appliances required by the statute was, in view of all the facts and circumstances, a proximate cause of the accident. Had the car been properly equipped, there would have been no occasion for the plaintiff to go into a place of danger. We cannot say that the jury would not have been warranted in finding that the accident would never have occurred had the car been equipped with the statutory appliances, and, consequently, that the failure to have such appliances was a proximate cause of the plaintiff's injuries.

The trial court ruled as a matter of law that the violation of the statute was not a proximate cause of the accident, and in so ruling erred. This error necessitates a new trial, and the consideration of the other questions raised may be unnecessary. As, however, the same questions will undoubtedly arise upon another trial, it seems desirable to

examine them.

It is contended that upon the facts the plaintiff was, as a matter of law, guilty of contributory negligence. We cannot so rule. Without attempting to differentiate between the defense of assumption of the risk, which cannot be set up in an action based upon the safety appliance law, and the defense of contributory negligence (see Schlemmer v. Buffalo, etc., R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681), it is sufficient to say that the question of contributory negligence here was one for the jury. The duty of the plaintiff was to uncouple the cars. His first obligation was to use the safety appliance. He attempted to use the appliance on his side of the car, but it was broken. He could only have used the appliance on the opposite side of the car-provided it was in working order-by in some way going around or across the moving train. He could hardly have accomplished this before reaching the west yard switch. He attempted to obey his order by uncoupling by hand. Under the circumstances it cannot be said as a matter of law that he adopted a dangerous method of discharging his duty when a comparatively safe means was open to him. It was peculiarly within the province of the jury to look into all the facts and circumstances and determine whether the plaintiff used the ordinary care required of him in carrying out the order which was given him. Negligence is not the only inference possible to be drawn from the facts, and its existence could not be determined as a matter of legal knowledge.

In the next place, it is contended by the plaintiff that the trial court erred in holding, as a matter of law, that the use of an unblocked frog did not constitute negligence. While, as already pointed out, we think the court erred in holding, as a matter of law, that the condition of the frog was the proximate cause of the accident, we are of the opinion that the ruling that its unblocked condition did not establish negligence was correct. The testimony was quite insufficient to show any material distinction between the present case and the cases of Southern Pacific Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38

L. Ed. 391, Wabash R. Co. v. Kithcart, 149 Fed. 108, 79 C. C. A. 150, and Kilpatrick v. Choctaw R. Co., 121 Fed. 11, 57 C. C. A. 255, where it was held that the use of unblocked frogs did not constitute negligence. Moreover, it is by no means clear that the presence of the ordinary blocking would have prevented the plaintiff from catching his foot in the wing of the frog.

The judgment of the Circuit Court is reversed.

DALTON v. GUNNISON, Judge.

(Circuit Court of Appeals, Ninth Circuit. December 7, 1908.)

No. 1,650.

Exceptions, Bill of (§ 43*)—Signing—Time—Necessary Delay.

A delay in settling and signing a bill of exceptions until after the expiration of the time fixed for filing the same as extended, caused by the inability of the court stenographer to make a transcript of his notes of the evidence and exceptions within the time so extended, is an extraordinary circumstance within an exception to the rule that a bill not presented within such time cannot be signed thereafter, so that, on such facts appearing it is the duty of the judge to sign and allow the bill.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. $§ 72\frac{1}{2}$; Dec. Dig. § 43.*]

Application for Writ of Mandamus.

The petitioner applies for a writ of mandamus to the Judge of the District Court of Alaska, Division No. 1, requiring him to settle and allow a bill of exceptions in a civil action in which the petitioner was defendant and Henry Bratnober was plaintiff. The petition presents in brief the following averments: That on April 2, 1908, the judgment was rendered; that, on the trial, exceptions were taken by the petitioner to the admission and rejection of evidence, and to the refusal of the court to give certain instructions; that the evidence in the case was taken down by the official stenographer of the court; that the term of the court at which the cause was tried was adjourned on May 2, 1908, but before adjournment an order was made and entered allowing the petitioner until July 1st in which to file a bill of exceptions; that before the expiration of the time so allowed the court made a further order extending the time until and including August 1st; that on May 6th, the petitioner filed in said court his assignments of error and his petition for a writ of error, which was allowed by the court, and the writ was duly sued out and served, citation was duly issued and served, and a supersedeas bond was given and approved; that orders were made extending the time to file the transcript of the record in said cause in this court until October 1, 1908; that immediately upon the rendition of the judgment the petitioner, by his counsel, applied to the said court stenographer and requested him to extend his shorthand notes into typewriting, embodying therein the entire evidence taken at the trial and the exceptions reserved, so that a bill of exceptions might be prepared; that the stenographer answered that he was very busyreporting other cases, but that he would prepare the transcript as early as possible; that about the 1st of July, 1908, the stenographer, accompanying the judge, departed from Juneau to attend a term of court at Skagway, Alaska, but before leaving he informed petitioner's counsel that he had not been able to complete the said transcript, but would do so at Skagway during the month of July; that on or about July 22, 1908, petitioner's counsel went to Skagway, but was unable to obtain the transcript of the evidence taken on the trial, for the reason that the stenographer had not completed the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same; that the transcript was finally completed on August 31, 1908, and was then delivered to petitioner's counsel, who immediately tendered a bill of exceptions to the judge of said court for settlement and allowance; that the judge of said court declined to allow the same, but made an order reciting that the said stenographer did not, "because of the large amount of work in his office, complete the transcript of his shorthand notes of the evidence until August 31, 1908, * * * and the court being of the opinion that upon the expiration of the time last allowed for filing said bill, without an order granting further extension of time, it lost jurisdiction and power to settle said bill of exceptions, and is now without power to sign, settle, and allow any bill of exceptions herein."

The respondent answers the petition, not denying any of the averments above set forth, but alleging that the petitioner did not use due diligence to procure extensions of time in which to settle the bill of exceptions, and alleging that the respondent was without power to settle the bill at the time when it was presented.

J. H. Cobb and W. C. Sharpstein, for petitioner. Lindley & Eichoff and Shackleford & Lyons, for respondent. Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The general rule is well established that, when judgment has been rendered and the term expires, a bill of exceptions cannot be allowed, signed, and filed as of the date of the trial, in the absence of the consent of the parties or of a previous order of the court reserving the power to do so, unless there are extraordinary circumstances which are sufficient to except the case from the rule.

In United States v. Breitling, 20 How. 252, 15 L. Ed. 900, the bill of exceptions was presented by the attorney for the United States during the term. Before the term adjourned, at the request of the court, the bill was submitted to opposing counsel. It was not again presented to the judge until a week after the term adjourned. It was then allowed and signed by the judge. The Supreme Court held that it was always within the power of the trial court to suspend its own rules or to except a particular case from its operation whenever the purposes of justice required it, and said that the time within which the bill of exceptions—

"may be drawn up and presented to the court must depend on its rule and practice, and on its own judicial discretion. In the case before us the judge who tried the case has deemed it his duty to seal and certify the exception to this court, and, under the circumstances stated in the exception and the note, we think he was right in doing so."

In Müller et al. v. Ehlers, 91 U. S. 249, 23 L. Ed. 319, a writ of error had been sued out and served, and a supersedeas bond approved and citation filed, but no bill of exceptions had been signed or allowed, nor had time been given to prepare one when the court adjourned. At the next term, and after the return day of the writ of error, the bill of exceptions was signed and filed by the court nunc pro tunc as of the prior term. The Supreme Court said:

"Upon the adjournment of the term, the parties were out of court, and the litigation there was at an end. The plaintiff was discharged from further attendance, and all proceedings thereafter, in his absence and without his consent, were coram non judice. The order of the court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of

the date of the trial was a nullity. For this reason, upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record."

The court, further commenting upon the decision in United States v. Breitling, said:

"That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation."

In Davis v. Patrick, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090, a stipulation had been made extending the time of settling the bill of exceptions to a day beyond the term, but the bill was not allowed or signed until more than a month after the date so fixed by the stipulation. The Supreme Court sustained the allowance and signing of the bill on the ground that it had been presented to the judge prior to the stipulation, and that the stipulation was for the convenience of the judge. Said the court:

"The defendant was not to blame for the delay beyond the time named in the stipulation. He appears to have done all he could to obtain the settlement of and the signature to the bill, and he cannot be prejudiced by the delay of the judge."

In Re Chateaugay Ore & Iron Company, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508, the trial judge had refused to settle and sign the bill of exceptions on the ground that the term of court at which the action was tried expired on March 31st. On March 27th, counsel for the defendant had served on opposing counsel notice of settlement of the bill of exceptions by the judge on April 10th. On March 31st, the trial judge was not within the district so as to be able to perform any judicial act there, nor did he return until April 2d. The Supreme Court allowed mandamus commanding the judge to settle the bill according to the truth of the matters, and to sign it when settled.

In Morse v. Anderson, 150 U. S. 156, 14 Sup. Ct. 43, 37 L. Ed. 1037, the bill of exceptions was tendered to the judge on December 24th. He declined to sign it, and returned it to counsel with suggestions of amendment. On January 14th following, the court extended the time to March 15th. Before that date another bill was tendered which was not acceptable to the judge, and the matter was held open for argument before him. The time was again extended to May 15th, and again extended to July 2d. The bill was not settled and signed until April 1st of the following year. The trial judge certified that—"plaintiff's counsel had made various efforts to have counsel of defendant Anderson present and before me, so that a bill of exceptions might be prepared and signed; but, owing to sickness of family of counsel, this has been impracticable until the bill of exceptions now signed by me as of April, 1899."

The Supreme Court held that there was great delay for which there was no adequate excuse, and affirmed the judgment for want of a bill of exceptions.

In Western Dredging & Improvement Company v. Heldmaier, 116 Fed. 179, 53 C. C. A. 625, the Circuit Court of Appeals for the Seventh Circuit held that, although a judge cannot allow a bill of exceptions after the term unless the time has been extended by order or rule of court, except under extraordinary circumstances, he is not

absolutely without power to do so, and that the rule is not so rigid that it must be applied in cases where it would work injustice, and where the party presenting the bill has been without fault. In that case the bill had been submitted to opposing counsel during the term, and by them found correct, and had been presented in court to be signed and filed during the term. But the judge before whom the case had been tried had departed from the district, and was not within the circuit. When he returned to the district, he signed and allowed the bill of exceptions on December 4, 1901, nunc pro tunc as of June 27, 1901. Said the Circuit Court of Appeals:

"The delay in the signing by the trial judge, not being due to neglect of the parties, must be deemed a case of delay for the convenience of the trial judge, and to fall within the exception declared in Davis v. Patrick and In re Chateaugay Iron & Ore Company."

In Roberts v. Bennett, 135 Fed. 748, 68 C. C. A. 386, the Circuit Court of Appeals for the Second Circuit said:

"We think the delay was excused by the illness of the judge before whom the action was tried, and his consequent inability to settle the bill, and that the 'extraordinary circumstances' withdraw the case from the operation of the general rule."

In Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., 151 Fed. 466, 81 C. C. A. 76, it was held that an exception to the general rule exists where extraordinary circumstances excuse the failure to sign the bill of exceptions within the term, and that the fact that the exhibits in the case were mislaid without fault or negligence on the part of the plaintiff in error, and were not found until after the expiration of the term, is sufficient to bring the case within the exception, but the court held further that such facts so excusing the delay should,

if possible, be evidenced by the certificate of the trial judge.

Counsel for the petitioner relies upon the provisions of chapter 21, tit. 2, of the Code of Civil Procedure of Alaska, 31 Stat. 365, which, it is claimed, permit the presenting and signing of the bill of exceptions after a term expires without extension of time by the court for that purpose. That chapter is taken from the laws of Oregon. In Che Gong v. Stearns, 16 Or. 219, 17 Pac. 871, it was held that the statute did not fix the time within which a trial judge may sign a bill of exceptions. But in McElvain v. Bradshaw, 30 Or. 569, 48 Pac. 424, it was held that after the court has once fixed a time by order, within which to settle the bill of exceptions, the question whether the bill shall be settled and allowed after that time is a matter within the sound discretion of the trial judge, the exercise of which cannot be controlled by mandamus save under circumstances which did not appear in that case. The court said

"The reasons given by the petitioner for not tendering the bill within the time allowed are, briefly, (1) his alleged inability to obtain from the stenographer a copy of the official report of the trial from which to prepare it, and (2) a mistaken belief that sixty days had been allowed for that purpose, neither of which is sufficient to support the proceeding. The first, no doubt, would have been considered a ground for granting an extension of time, if a proper application had been made therefor; and the second was an error of counsel, which, under the circumstances, would have justified the trial judge in ex-

cusing the default, but it is not sufficient to authorize us to compel him to do so."

In the light of the authorities, we are of the opinion that a delay necessarily caused by the inability of a court stenographer to make a transcript of his notes of the evidence and of the exceptions taken, within the term or within the time allowed by an order of the court, is an extraordinary circumstance, which brings the case within the exception to the rule, and that it is the duty of the trial judge in such a case to settle and allow the bill of exceptions. The averments of the petition are corroborated to some extent by the order which the trial court made at the time of refusing to settle the bill of exceptions, in which it was recited that the stenographer did not, because of the large amount of work in his office, complete the transcript until August 31st. In view of this recital and of the respondent's answer to the petition, it is unnecessary to issue a mandamus nisi to show cause why a peremptory writ should not be issued.

It is ordered that the writ be issued as prayed for.

SINGER MFG. CO. v. ADAMS, State Revenue Agent, et al. (Circuit Court of Appeals, Fifth Circuit. January 12, 1909.)

No. 1,763.

1. Courts (§ 366*)—Federal Courts—Rules of Decision.

The construction of the Mississippi tax laws, given by the Supreme Court of that state, is binding on the federal courts in determining questions arising thereunder.

[Ed. Note.—For other cases, see Courts, Cent. Dig. 961; Dec. Dig. 66.*

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. Taxation (§ 164*) — Foreign Corporations — "Doing Business Within State."

Where a nonresident corporation had one or more local agencies in Mississippi in control of salesmen, selling sewing machines throughout a limited number of counties and reporting to such local agency, which in turn reported to a district agency in another state, the corporation during such period was doing business within the state and taxable on credits, as provided by Rev. Code Miss. 1880, § 497, but not so during a period when it had neither office, store, nor managing salesman in the state, and did business only through traveling salesmen, who transmitted all cash collected and contracts arising from the disposition of machines to agencies outside the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. $\$ 286; Dec. Dig. $\$ 164.*

For other definitions, see Words and Phrases, vol. 3, pp. 2155–2160; vol. 8, pp. 7640, 7641.

Taxation of foreign corporations, see note to McCanna & Fraser Co. v. Citizens' Trust & Surety Co. of Philadelphia, 24 C. C. A. 13.]

3. Taxation (§ 498*)—Illegal Assessment—Injunction.

Where, in a suit to recover back taxes against a nonresident corporation, it appeared that defendant owed no taxes, back or otherwise, at the places where taxes were sought to be levied, and to allow the assessments

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

would either compel defendant to pay illegal taxes or drive it to a multiplicity of suits, an injunction restraining such assessments would be allowed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 913-919; Dec. Dig. § 498.*]

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

C. H. Alexander, for appellant.

J. B. Harris, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The law governing assessments of property in the state of Mississippi (section 497, Rev. Code Miss. 1880) is as follows:

Sec. 497, Code 1880: "Every person, resident or nonresident, whether corporate or otherwise, and the agent of such nonresident, having money loaned at interest in this state, or employed in the purchase or discount of bonds, notes, bills, checks, or other securities for money, or employed in any kind of trade or business, shall be taxable for the same in the county where such person may reside, or have a place of business, or be temporarily located at the time of the assessment; and if any such person shall fail or refuse to give in such money on oath, or if the assessor shall have cause to believe that such person has not rendered a true account of all such money, he shall assess to such person such an amount as he shall have reason to believe correct according to the best information he can procure; and he shall forward to the party, or his agent, in writing, a notification of such assessment having been made; and the assessor is authorized to address written interrogatories, to any agent of any nonresident, or to any person for the purpose of obtaining such information, and to require written answers thereto on oath which oath the assessor is authorized to administer; and if any person being so interrogated, shall refuse to answer such interrogatories, on oath, within a reasonable time, he shall be liable to pay the sum of five hundred dollars, to be recovered by action, in the name of the board of supervisors of the county, for the use of the county; and it shall be the duty of the assessor to cause such suit to be brought."

This statute was construed in the Supreme Court of the state of Mississippi in State v. Bolton Smith et al., 68 Miss. 79, 8 South. 294, which was a case in which it was sought to tax the loans made in the state of Mississippi by a foreign building and loan association, which loans were made on security of real estate in Mississippi. In that case the Supreme Court said:

"Section 497 of the Code of 1880 applies to money loaned or employed in this state, where the person resides or has a place of business or a location or an agent in this state. * * * Money sent here from abroad to be loaned is undoubtedly subject to taxation. The distinction is commented on in Jahier v. Rascoe, 62 Miss. 699, where it is said 'that whether personal property is situated in this state or not is to be determined by reference to the intent of the owner, which intent is to be discovered by all the surrounding circumstances; * * * that wherever it appears that the debt arose as an incident to a business conducted in this state, whether that business be that of lending money, buying or selling property, or in any other manner, it is situated in this state."

Reference to the case of Jahier v. Rascoe, supra, will show that that was a case which dealt with the situs of notes and evidences of debt

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

as determining the question of descent and distribution. The construction of the tax laws of Mississippi, as given by the Supreme Court of

the state, is binding on this court.

During all the period in question the Singer Manufacturing Company was a nonresident corporation to a certain extent doing business in the state of Mississippi; that is, it had traveling agents going through the state making sales of sewing machines for cash and on time, the latter being conditional sales, in which for security for the price the Singer Manufacturing Company retained the ownership until full payment. By the agreed statement of facts in this case it seems that from 1886 to April, 1895, the Singer Manufacturing Company had a local agency at Vicksburg, Warren county, more or less in control of salesmen working through a limited number of counties in the state, with a depot at Vicksburg, in which were kept a stock of sewing machines and supplies used to fill orders taken by the different salesmen reporting to such local agency. The local agency reported weekly to a central agency at New Orleans, forwarding all moneys collected and all contracts for sales on time or for leases to be kept until paid. It seems to be pretty clear that, if the Singer Manufacturing Company had been a resident corporation, it could be well said of it that it was carrying on a business in the state of Mississippi at Vicksburg, and that its property and money invested were there employed in its trade and business, and were taxable at Vicksburg.

During the same period through other counties of the state the Singer Manufacturing Company had traveling salesmen selling and disposing of sewing machines for cash and on time; but this business was not managed by any agency in the state, but all the accounts and proceeds, moneys, contracts, and leases were weekly reported to agencies outside and were weekly transported out of the state. As to this part of the business, therefore, it seems that the Singer Manufacturing Company was in no taxable sense doing business in the state of Mis-

sissippi.

From April 1, 1895, until 1901, it is agreed that the Singer Manufacturing Company had no office, store, or managing salesman in the state of Mississippi, but did have traveling salesmen in the several counties of the state, and that all cash collected and all contracts arising from the disposition of machines were remitted and forwarded to agencies outside of the state. Under the construction given by the Supreme Court to the taxing act, it seems reasonably clear that during this period the Singer Manufacturing Company was not carrying on and doing any business in the state of Mississippi that was taxable in that state.

From January, 1901, to the bringing of this suit, the Singer Manufacturing Company had located and maintained agencies in charge of its business covering the state (except Pike, Wilkinson, and Amite counties), and to which all traveling men reported, at seven different points in Mississippi, to wit, Jackson, Natchez, Columbus, Hattiesburg, Vicksburg, Meridian, and Greenville; and the business was conducted at, and reports and remittances made to, said places, and at each of these places a stock of sewing machines was kept constantly

on hand, from which sales made by traveling salesmen were filled. At these offices a full record was kept, and weekly returns were made to the Singer Manufacturing Company at New Orleans, and in all cases balances of money and contracts and leases were transmitted with the returns to New Orleans. Under this state of facts, it seems that the Singer Manufacturing Company was doing business in the state of Mississippi during the period mentioned at the seven points above named, within the meaning of section 497, Rev. Code Miss. 1880, as construed by the Supreme Court in State v. Bolton Smith, supra.

In the agreed statement of facts the following appears:

"It is agreed that the plaintiff was assessed for taxation in the counties shown in the attached list, and that the assessments covered the unsold machines on hand in the state, county, and town on the 1st of February of the year of the assessment, but did not include any notes or collectible debts for machines disposed of in the state except as shown on the statement."

We do not find this statement referred to in the record, but take it that the agreement means that from 1886 to April, 1895, the Singer Manufacturing Company was assessed for taxes at Vicksburg on all its unsold machines and other property, exclusive of notes or collectible debts for machines disposed of in the state, and that from January, 1901, up to the bringing of this suit, the Singer Manufacturing Company was assessed for taxes at Jackson, Natchez, Columbus, Hattiesburg, Vicksburg, Meridian, and Greenville on all its unsold machines on hand and other property, exclusive of notes or collectible

debts for machines disposed of in the state.

Assuming that, during the time the Singer Manufacturing Company had a place or places of business in the state of Mississippi, it was liable for taxes on its moneys invested in its business in the state as well as upon its actual, visible property, and also that it may be assessed under the laws of Mississippi for back taxes not returned during the periods in question, we hold that the assessments sought to be made against the company at Vicksburg for the period from 1886 to 1895, and against the company at Jackson, Natchez, Hattiesburg, Vicksburg, Meridian, and Greenville from 1901 up to the bringing of this suit, on property not heretofore taxed, are so far regular and proper that they ought not to be enjoined, but that all other back assessments against the company complained of and at other places are irregular and improper, and ought to be enjoined, on the ground that the Singer Manufacturing Company owes no taxes, back or otherwise, at such places, and to allow the assessments contemplated would either compel the company to pay illegal taxes or drive it to a multiplicity of suits, and would otherwise inequitably annoy and harass the company.

The decree of the Circuit Court is annulled and reversed, and this cause is remanded, with instructions to enter a decree in accordance

with the views herein expressed.

NEW RIVER COAL LAND CO. v. RUFFNER BROS.

(Circuit Court of Appeals, Fourth Circuit. February 20, 1908.)

No. 757.

BANKRUPTCY (§ 217*)-PROCEEDINGS IN STATE COURT-STAY.

The jurisdiction of the federal courts in bankruptcy in the administration of the affairs of insolvents and corporations, being essentially exclusive, on a corporation being declared bankrupt, proceedings against it in the state court, instituted to impose a lien on certain of the bankrupt's property, were properly stayed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340;

Dec. Dig. § 217.*]

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Southern District of West Virginia, at Charleston, in Bankruptcy.

A. M. Prichard, for petitioner.

W. D. Payne, for respondents.

Before PRITCHARD, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PER CURIAM. We have given careful consideration to the arguments submitted, and are of opinion that the order granting a stay of proceedings in the state court was clearly authorized by the bankruptcy act. In the administration of the affairs of insolvent persons and corporations the jurisdiction of the federal courts in bankruptcy is essentially exclusive. "The intent of the bankruptcy law," says the Supreme Court in Re Watts & Sachs, 190 U. S. 27, 23 Sup. Ct. 718, 47 L. Ed. 933, "is to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts." Bankr. Act July 1, 1898, c. 541, § 11a, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; In re Knight (D. C.) 11 Am. Bankr. Rep. 1, 125 Fed. 35.

The judgment of the court below is affirmed.

NEW RIVER COAL LAND CO. V. RUFFNER BROS.

(Circuit Court of Appeals, Fourth Circuit. December 1, 1908.)

No. 757.

1. BANKRUPTCY (§ 391*)—ADMINISTRATION OF ESTATE—JUBISDICTION OF COURT—STAY OF SUIT IN STATE COURT.

The fact that a creditor of a bankrupt applied to a state court for a stay of proceedings in a pending suit against the bankrupt, and that his application was denied, does not affect the jurisdiction of the court of bankruptcy to stay such proceedings on application of the same creditor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 391.*]

[•]For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes. 165 F.—56

2. Bankruptcy (§ 446*)—Actions Against Bankrupt—Stay.

A District Court as a court of bankruptcy has exclusive power to determine whether a suit pending in a state court should be stayed or not, and the exercise of this power rests in the discretion of the judge, which will not be reviewed by an appellate court unless it appears to have been abused.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 446.*]

3. BANKRUPTCY (§ 391*)—ADMINISTRATION OF ESTATE—JURISDICTION OF COURT.

The jurisdiction of courts of bankruptcy in the administration of the affairs of insolvent persons and corporations is essentially exclusive, and the District Court in bankruptcy has power to stay a suit in a state court instituted within four months prior to the bankruptcy proceedings which involves practically all of the property of the bankrupt, and to administer such property itself, even though such suit is for the enforcement of liens.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 391.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

On Petition for Revision of Proceedings of the District Court of the United States for the Southern District of West Virginia, at Charleston.

On the petition of Ruffner Bros., the Frank Payne Shoe Company, the Dawley Furniture Company, and Lowenstein & Sons, creditors, duly filed in the District Court of the United States for the Southern District of West Virginia, at Charleston, on the 25th of March, 1907, the Cataract Colliery Company, a corporation under the laws of the state of West Virginia was, on the 18th day of April, 1907, duly adjudged bankrupt. Theretofore on the 7th day of February, 1907, J. M. Clark and C. E. Krebs, partners under the firm name of Clark & Krebs, had filed their bill of complaint in the Circuit Court of Fayette county, W. Va., against the Cataract Colliery Company, a corporation, New River Coal Land Company, a corporation, and the Frank Payne Shoe Company, a corporation. In this bill it was alleged that the Cataract Colliery Company is a West Virginia corporation, with authorized capital of \$50,000, and a paid-up capital for which stock had been issued of \$32,700. That the principal asset of the said colliery company was a lease of a thousand acres of land, let to the said company by the New River Coal Land Company, under the terms of which the Cataract Colliery Company was authorized to mine and remove the coal from the land upon payment of a royalty of eight cents (8¢) per ton, and a minimum rental of \$5,000 per annum, which minimum rental, however, it was alleged, had been waived by the owners of the land. The bill further alleged that the colliery company had built on the lands leased 25 dwelling houses, a storehouse, tipples, side tracks, haulways, entries, and many vast improvements, and had equipped the plant with the necessary machinery and appliances for mining the coal from the land. That in addition to the interest in the lease the bill alleged that the colliery company had a small stock of merchandise, 7 mules, 40 mine cars, 3 mining machines, 1 set of blacksmith tools, and a few other appliances. Further, that the said colliery company, in order to carry on its operations upon the leased land, had been necessitated to borrow money, and had become largely indebted and unable to pay its just and legal debts, which, as alleged, amounted to about \$36,000. The bill further alleged that the colliery company was indebted to complainant in the sum of \$11,662.26. That it owed the Charleston National Bank of Charleston, W. Va., \$6,200, which was indorsed by plaintiffs. That it owed Abney, Barnes & Co. \$812.83, which was indorsed and guaranteed by plaintiffs. That it owed Louis Hubbard & Co. \$456.98, which had been indorsed and guaranteed by plaintiffs. That it owed to the defendant the Chesapeake & Ohio Coal & Coke Company the sum of \$4,000, which had been indorsed and guaranteed by the plaintiffs. And that in addition it owed various and sundry creditors for goods, merchandise, etc.,

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all together amounting to \$36,000, as above stated. The bill further alleged that the creditors of the Cataract Colliery Company were pressing the company for payment of their claims, and that the defendant Frank Payne Shoe Company had instituted suit at law against the company for the debt due the said shoe company, and that other creditors were threatening to bring suits to enforce their claims. Further that the said colliery company had no money and no assets, except its coal plant and the personal property described, and that by reason of the cost of mining coal, etc., it had been unable to meet its obligations, and was, at the time of the filing of the bill, totally unable to pay any of its obligations other than its laborers and miners for work. The bill further alleged that by reason of the provisions of the lease under which the Cataract Colliery Company was operating it could not transfer or sell the lease or coal plant without the consent of the owners of the land, and that, in the event the creditors of the Cataract Colliery Company should obtain judgments and executions, the only property available to meet such executions would be the personal property above described, and which, it is alleged, would be totally insufficient to pay the debts. Thereupon the prayer of the bill was that receivers be appointed to take charge of the coal plant and property of the Cataract Colliery Company, with authority in the receivers to continue the operation of the coal plant under the contract of lease, and from the proceeds to pay the running expenses, and that the balance, if any, should be held subject to the order of the court, and for further relief as prayed for in the bill.

Upon the filing of the bill the court, on the 9th of February, 1907, appointed L. L. Abbott special receiver of the property of the Cataract Colliery Company, and the said receiver took possession thereof pursuant to the decree, and continued to operate the mining plant by virtue of the authority thus conferred

upon him.

On the 6th of March, 1907, the defendant the New River Coal Land Company filed its answer, which it also asked to be considered in the nature of a cross-bill. In this answer many of the allegations of the complainant's bill were denied, but the lease, as set out, was admitted. The defendant claimed, however, in the answer substantially that the Cataract Colliery Company had failed to comply with the terms of the lease; that it had not paid royalty on the coal mined; had left the taxes upon the property unpaid; and that, by reason of these and other failures to perform the contract according to the terms, the lease to the company had terminated and become forfeited to the New River Coal Land Company, and that the said last-named company had a right, under the terms of the contract, by reason of the default of the colliery company in the performance of the stipulations, to reenter without notice upon the premises, and to take possession of and have and hold all the property of the said colliery company located upon the leased premises as liquidated damages for the default. Others of the defendants named also filed answers in which debts were alleged to be due from the colliery company, or rights to have certain obligations of the colliery company carried out.

On the 9th of February, 1907, as appears from the record, the special receiver reported to the court that it would be impossible for him to continue the operation of the coal mines of the Cataract Colliery Company without the expenditure of large sums of money and without authority to purchase supplies, etc. Thus the status of the case in the state court appears to have remained until the 10th of May, 1907, after the adjudication in bankruptcy, when Ruffner Bros., as creditors of the Cataract Colliery Company, filed a petition in the circuit court of Fayette county, in the said chancery suit, and prayed that the proceedings therein might be stayed until the District Court of the United States, sitting in bankruptcy, determined the questions arising between the creditors and the said Cataract Colliery Company, bankrupt, and asked that the New River Coal Land Company and others be restrained from further proceeding in the case and from disposing of the property of the said Cataract Colliery Company.

The prayer of the petition of the Ruffner Bros., was denied by the circuit court of Fayette county. On the same day the said circuit court in the said cause entered a decree of forfeiture, in which it was ascertained that the

Cataract Colliery Company, in violation of the terms of the lease which was set up by the New River Coal Land Company in its cross-bill, had defaulted in the payment of royalty and taxes under the lease, by reason of which the said New River Coal Land Company had elected to terminate and have declared forfeited the said lease; and thereupon the court ordered and decreed that the said lease be forfeited, and that said New River Coal Land Company have the permanent possession of the real estate and lands mentioned and described in the lease because of the forfeiture, and so forth. It appears from the record, however, that said lands and property of the bankrupt still remained in the hands of the special receiver, and were in his custody and possession undelivered to the New River Coal Land Company on the 2d day of July, 1907, when the Ruffner Bros., as creditors, presented their petition to the District Court of the United States for the Southern District of West Virginia, in substance as follows:

That the Cataract Colliery Company had been adjudged bankrupt as before stated, and that no trustee of the estate had been appointed. That the suit of Clark & Krebs before referred to had been brought as stated, and proceedings had therein as set forth, including the appointment of the special receiver, the filing of the petition by Ruffner Bros. for stay, and the denial thereof by the court, the decree of forfeiture, etc.

It is further set forth in the petition: That the debts of the Cataract Colliery Company aggregate about \$60,000; that the value of the property of said company is greater than the claim of the New River Coal Land Company, and that the lien claimed by the said last-named company is not valid; that the leasehold and personal property are assets which should be administered for the benefit of the general creditors, and that a sale of the property would sacrifice the same to the detriment of the general creditors, if made by the special receiver.

Upon this petition the District Court was asked to stay by its order further proceedings in the suit in the circuit court of Fayette county, and also to enjoin the New River Coal Land Company from further prosecuting said suit, and for such other relief, etc. In response to this prayer, the District Court entered the following order:

"In re Cataract Colliery Company, Bankrupt.

"This day Ruffner Brothers presented their petition in the above-entitled cause, and the same is ordered filed.

"And it appearing from said petition that an injunction is prayed for to restrain the prosecution of a certain suit pending in the circuit court, in the county of Fayette and state of West Virginia, in which Clark & Krebs are plaintiffs and the New River Coal Land Company, a corporation, is defendant, and as such defendant has filed a cross-bill in said suit praying for affirmative relief.

"Upon consideration of said petition and exhibits therewith filed, it is ordered that the New River Coal Land Company, its agents, servants, attorneys, and counselors, be, and each of them are, inhibited and restrained from taking any further steps or proceedings in said suit now pending as aforesaid, for the purpose of causing Special Receiver L. L. Abbott or any other person to turn over and deliver to the New River Coal Land Company, its agents, servants, and employes, the personal property of the Cataract Colliery Company, or from causing a sale of said personal property by the said special receiver or other person, until twelve months after the 18th day of April, 1907, the date the said Cataract Colliery Company was adjudged a bankrupt, or if within that time the said Cataract Colliery Company applies for a discharge, then until the question of such discharge is determined or until the further order of this court in the premises. It is further directed that a copy of this order be served upon the New River Coal Land Co., and when so served the same shall be sufficient notice hereof."

The petition is filed here to superintend and revise in matter of law the foregoing proceeding in the United States District Court, and the grounds assigned by the petitioner are:

"(1) Because application for said stay and injunction was made in the first instance to the circuit court of Fayette county, W. Va., and was, by that

courf, refused; and the decree refusing the same has not been reversed, set aside, or appealed from, but is still in full force and effect. Such refusal thereby became res adjudicata so far as to render the District Court of the United States for the Southern District of West Virginia without jurisdiction to act upon the said petition subsequently submitted to it.

"(2) Because said order attempts to stay proceedings to enforce, in rem, in said circuit court of Fayette county, W. Va., a valid lien not affected by the bankrupt law; and also stays a claim in said proceeding from which a discharge would not be a release, and upon property which the said circuit court of Fayette county had taken possession of before, and was administer-

ing at the time of said bankruptcy and said injunction.

"(3) Because the circuit court of Fayette county had, before the commencement of said bankruptcy proceedings, acquired jurisdiction of the parties and possession of the property affected by said stay, to which property your petitioner had, also before the commencement of said bankruptcy proceedings, asserted an adverse claim by its said answer and cross-bill filed in said circuit court of Fayette county as aforesaid."

A. M. Prichard and John S. Eggleston (Braxton, Williams & Eggleston, on the briefs), for petitioner.

W. D. Payne, for respondents.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

BOYD, District Judge (after stating the facts as above). We cannot consent to the proposition laid down as the first ground assigned by the petitioner in this case—that the action of the state court upon the petition of Ruffner Bros., refusing to stay the proceedings in the case of Clark & Krebs, is final. If such was the law, then it would be within the power of the state court, in many instances, upon the action of a single creditor, to divest the District Courts of the United States of jurisdiction to administer the estates of bankrupts for the benefit of all the creditors. It is our opinion that notwithstanding this action of the state court the judge of the District Court, sitting in bankruptcy, had full power upon the application of the bankrupt itself, of creditors, or of the trustee, in case one had been appointed, to take such action as in the discretion of the court was necessary for the preservation of the bankrupt estate, the determination of existing liens, if such there were, and the collection, custody, and distribution of the bankrupt's estate in the manner and to the ends contemplated by the bankruptcy law. In the act forbidding courts of the United States to stay proceedings in a state court, the courts of bankruptcy are specifically excepted, and the bankruptcy law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) expressly confers upon these courts the power to issue injunctions to stay proceedings within this exception. We do not deem it necessary to further discuss the proposition stated in the first assignment

Coming, then, to the other two grounds assigned by the petitioner and treating them together, we are also of the opinion that, in view of the circumstances and conditions attending this case, they cannot be upheld. The court of bankruptcy has exclusive power to determine whether a suit pending in the state court should be stayed or not, and the exercise of this power rests in the discretion of the judge.

It is true that this discretion can be reviewed by a Circuit Court of Appeals on petition for review, but will not be interfered with by the appellate court unless it appears that it has been abused. Loveland (3d Ed.) p. 109, notes 23 and 24. A stay of a suit pending in the state court effected by an injunction issued by a court in bankruptcy is not a dismissal of the suit. It does not defeat the cause of the action pending in the state court; it merely suspends the proceedings in the state court so long as the injunction is in force. If, therefore, in the further proceedings in the bankruptcy court the petition in bankruptcy is dismissed, or if the injunction is dissolved, or if, in the end, the bankruptcy court should determine that the basis of the suit in the state court is a claim against which the discharge in bankruptcy is not a release, then the case pending in the state court may proceed as if it had not been interrupted. If, however, a bankruptcy court holds that the claim upon which suit is brought in the state court is discharged, then the bankrupt may go into the state court and plead his discharge as against the recovery. See note 60, p. 113, Loveland (3d Ed.).

Thus far what we have said applies more particularly to cases in which an injunction is sought to stay a proceeding in a state court, to the end that the bankrupt himself may have the benefit of the stay, where a personal judgment is sought against him, so that, if the suit in the state court is based upon a provable claim and one against which the discharge in bankruptcy would operate, an opportunity, as before stated, would be afforded the bankrupt after his discharge to go intothe state court and set it up as a defense in the action. The right of the court of bankruptcy to enjoin proceedings in a state court, in order to administer the estate of the bankrupt through the instrumentalities of the general bankruptcy law, is founded upon a different reason. The prime purpose of the bankruptcy act is to secure an equal distribution of an insolvent's estate among the creditors, and it is not only a power conferred upon the court in a bankruptcy proceeding to take jurisdiction of the unincumbered property of a bankrupt, but also of property to which liens attach, provided the judge of the court in bankruptcy shall determine that such property should be administered by that court. It has not unfrequently been the case that the bankrupt courts have issued injunctions to stay proceedings in a state court, to foreclose mortgages, to enforce other liens, and even to forbid state officers from proceeding with executions upon judgments where, in the opinion of the judge of the bankruptcy court, it was to the interest of the general estate to do so.

It is said in Re Watts & Sachs, Petitioners, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, that "the jurisdiction of the courts in bankruptcy in the administration of the affairs of insolvent persons and corporations is essentially exclusive." In the course of the opinion in that case Chief Justice Fuller, speaking for the court, says:

"* * And the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations, is essential-

ly exclusive. Necessarily, when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in the possession of the state courts. Such cases are not cases of adverse possession, or of possession in the enforcement of pre-existing liens, or in aid of the bankruptcy proceeding. The general rule as between courts of concurrent jurisdiction is that property already in the possession of the receiver of one court cannot rightfully be taken from him without the court's consent by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy, as to which the jurisdiction is not concurrent."

In the present case Clark & Krebs, creditors, had filed a petition against the Cataract Colliery Company in a state court of West Virginia, and in that proceeding the court had appointed a special receiver of the property of the said company. As above set forth, the New River Coal Land Company filed its answer and cross-bill in the suit, and set up a claim thereby to the entire property of the colliery company, basing the claim on amounts alleged to be due for royalties accruing under a contract of lease, for taxes paid, and for forfeiture of all said property as liquidated damages for the failure of the Cataract Colliery Company to fulfill the terms of said lease. The whole proceeding in the state court from the commencement of the action was within four months of the filing of the petition in bankruptcy and of the adjudication of the Cataract Colliery Company bankrupt. It is evident from the character of the suit and the condition of the colliery company, as disclosed by the pleadings, that at the time of the commencement of the suit it was insolvent; it was unable to meet its obligations or to carry on its work, so alleged in the bill filed, and by the cross-bill of the coal land company its entire property was claimed by one creditor to the exclusion of all others.

The appointment by a court of a receiver for an insolvent debtor is an act of bankruptcy on the part of such debtor. Section 67 of the bankrupt act provides that a lien created by, or obtained in or pursuant to, any suit or proceeding at law, or in equity, including a judgment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of the petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if, first, it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement would work a preference.

In order to meet the positions contended for by the petitioner in this case and the application of the authorities cited, we think it only necessary to call attention to the distinction which has been drawn as to the power of the District Court in bankruptcy to enjoin proceedings in cases of long standing in a state court, in which such court has acquired complete jurisdiction of the person and property of the bankrupt before the bankruptcy proceeding, and those which have been instituted within four months of the filing of the petition in bankruptcy. This distinction is emphasized in the case of Pickens v. Roy, reported in 106 Fed. 653, 45 C. C. A. 522, and again in 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128. In that case Pickens was ad-

judged bankrupt in October, 1899, upon his own petition. Theretofore, in 1889, Mrs. Dent, who during the litigation intermarried and became Mrs. Roy, filed her bill of complaint in the circuit court of Barbour county, W. Va., against Pickens, alleging certain indebtedness to her, and also charging the fraudulent conveyance of defendant's property. In the progress of the litigation she recovered judgment against Pickens for \$9,000, and in 1900 a decree was entered by the said circuit court setting aside the fraudulent conveyance made by Pickens, and appointing a commissioner and receiver to take charge of and sell the property described in the fraudulent conveyance to pay the debt of complainant and other debts of the defendant. In this situation Pickens filed his petition in the District Court of the United States for the District of West Virginia, setting forth the facts generally in regard to the litigation in the state court and his adjudication in bankruptcy, and asking that the receiver and commissioner be enjoined from making sale of the property under the decree of the state court, and that further proceedings in the said case be stayed. A temporary restraining order was issued by the court aforesaid, but on the return thereof Pickens' bill was dismissed and he was charged with the cost, whereupon he appealed to the Circuit Court of Appeals for the Fourth Circuit. The judgment of the District Court was affirmed by the Circuit Court of Appeals on the ground that the case in which the injunction was sought was of long standing, and that the state court had acquired complete jurisdiction of the bankrupt and his property long before the bankruptcy proceedings. In the case Goff, Circuit Judge, delivering the opinion, says:

"The federal courts will not interfere with the administration of affairs lawfully in the custody and jurisdiction of a state court, nor will they permit the courts of the states to interfere concerning litigation rightfully submitted to the decision of the courts of the United States.

"The bankrupt act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its detail, provided the suit pending in the state court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to, or interested in, the subject-matter of the controversy."

Upon appeal to the Supreme Court this decision of the Circuit Court of Appeals was affirmed, and the case is reported as before recited, and in the opinion, which was delivered by Chief Justice Fuller, the court reiterates with approval the last paragraph above quoted from the opinion of the Circuit Court of Appeals.

In the case here the whole proceeding in the state court was within four months of the time both of the filing of the petition in bankruptcy and of the adjudication, and the entire property of the bankrupt was involved in the litigation. The District Court, therefore, had the jurisdiction, and the right to assert it, to stay further action by the state court, and, if necessary to secure a just and equitable distribution of the bankrupt's estate, to take charge of the property to this end. The powers of the District Court in bankruptcy are ample to administer an estate with due regard to priorities or vested liens, and to protect all interests in such estate, whether they be legal or equitable.

For the reasons stated, we are of the opinion that the decree of the District Court should be affirmed.

Affirmed

LESAIUS v. GOODMAN.

(Circuit Court of Appeals, Third Circuit. November 30, 1908.)

No. 57.

1. BANKRUPTCY (§ 446*)—PETITION FOR REVIEW—SCOPE.

On a petition for review in bankruptcy, authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), the Circuit Court of Appeals can only revise the proceedings of the District Court in matters of law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.*]

2. Bankruptcy (§ 305*)—Secretion of Assets—Pleading-Variance.

Where a trustee's petition charged that the bankrupt had removed a dray load of clothing from his store and secreted the same in the house of his father, and that he had failed to account for \$10,000 in money, both of which allegations the bankrupt denied, an order of the bankruptecourt directing that the bankrupt deliver "gentlemen's furnishings and clothing to the value of \$4,000" was erroneous, as without the issues. [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 466; Dec. Dig. § 305.*]

3. Bankruptcy (§ 305*)—Order Without the Issues—Curing Error—Abandoned Petition.

Where an order in bankruptcy, directing that the bankrupt deliver certain gentlemen's furnishings and clothing of a specified value, was erroneous as without the issues, the error was not cured by a petition which had been abandoned, and on which no issue was joined.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. $466 \; [$ Dec. Dig. 305.*]

Petition for Revision of Proceedings of the District Court of the United States for the Middle District of Pennsylvania, in Bankruptcy.

For opinion below, see 163 Fed. 614.

R. L. Levy, for petitioner.

C. A. Van Wormer, for respondent.

Before GRAY, Circuit Judge, and BRADFORD and LANNING, District Judges.

LANNING, District Judge. This matter comes before the court on a petition to revise an order of the District Court. It appears by the record that on September 19, 1906, Henry Goodman, the trustee of the estate of Frank P. Lesaius, bankrupt, filed a petition in the District Court containing the following allegations:

"(1) That a large dray load of clothing was removed in the nighttime by the bankrupt from his store in Scranton, Pa., and secreted in the house of William Lesaius, the father of the bankrupt. That your petitioner is informed and believes that said property is now in the possession or under the control of said bankrupt, and is at present concealed from your petitioner as trustee.

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(2) That the bankrupt has failed to account for a large amount of money, to wit, the sum of \$10,000 and upwards, which is shown by his schedules filed herein and from examination of said bankrupt to have been in his possession, and your petitioner believes said money is now in possession or under the control of the said bankrupt."

The prayer of the petition was:

"That a rule may be granted upon said bankrupt to show cause why an order should not be made upon him to turn over to your petitioner, as trustee, said property and money in his possession or under his control."

A rule was granted, returnable September 22d, on which day the bankrupt filed an answer containing the following denials:

"(1) He denies that a dray load of clothing was removed in the nighttime from his store in Scranton, Pa., and secreted in the house of his father, and that the said property in question is now in his possession and under his control.

"(2) He denies that there is now the sum of \$10,000 and upwards in his possession or under his control, which he is now withholding from Henry Goodman, trustee."

Upon these pleadings testimony was taken, and the referee in charge of the case in May, 1908, made an order discharging the rule, for the reason that the evidence was not sufficient to satisfy him that the bankrupt had in his possession or under his control "any specific property or certain sum of money." The referee's order was then taken to the District Court on a petition for review, and reversed; that court adjudging "that the said F. P. Lesaius, bankrupt, at the time of the service upon him of said rule, had in his possession, and now has, goods and merchandise belonging to said estate which he neglects and refuses to turn over to his said trustee, to wit, gentlemen's furnishings and clothing to the extent and of the value of \$4,000, late a part of the stock of goods which he had in his store at Scranton, Pa.," and ordering that the bankrupt "forthwith produce and deliver or turn over to the said Henry Goodman, his trustee, at such convenient place in the city of Scranton as he may designate, the said goods and merchandise."

The last-mentioned order is the one now before us on the bankrupt's petition for revision. As that petition is filed under the provision of section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), we can only revise the proceedings of the District Court in matters of law. There were but two issues before the court—one relating to the dray load of clothing, and the other to the alleged fraudulent retention by the bankrupt of \$10,000 in money. On the former issue, the District Court found in favor of the bankrupt. The other issue presented the question as to whether the bankrupt had fraudulently retained \$10,000, or any part of that sum. The court's order, however, does not deal with that issue. It directs the bankrupt, not to pay over \$4,000 which he has fraudulently retained, but to deliver "gentlemen's furnishings and clothing to the extent and of the value of \$4,000."

We think the order is not supported by the pleadings, and that it must be reversed.

The effort of the trustee's counsel to support the order by another petition filed by the trustee on September 13, 1906, is unavailing. That petition was abandoned, or at least was not brought to a hearing; for the referee's certificate shows that, when he certified the proceedings to the District Court on the trustee's petition for review, he sent up the petition filed on September 19, 1906, and not the one filed September 13, 1906. Besides, the bankrupt's answer joined issue with the later, and not the earlier, petition.

But the unsatisfactory character of the bankrupt's answer, with its negative pregnant, denying "that there is now the sum of \$10,000 and upwards in his possession or under his control which he is now withholding from Henry Goodman, trustee," from which it may be inferred that he is withholding a less sum than \$10,000, and the clear evidence of fraud mentioned in the opinion of the District Court (see In re Lesaius, 163 Fed., at pages 619, 620), lead us, while reversing the order, to remand the case to that court, without prejudice to such further proceedings as justice may demand.

FOWLER v. GOWING.

(Circuit Court of Appeals, Second Circuit, November 16, 1908.)

No. 45.

1. COURTS (§ 352*)—FEDERAL COURTS—PROCEDURE—TRIAL WITHOUT JURY—FINDINGS.

Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), relating to procedure in actions at law tried by a federal court without a jury, do not contemplate the finding of separate conclusions of law, but judgment should be directed on the findings of fact.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926, 927; Dec. Dig. § 352.*]

2. Banks and Banking (§ 248*)—National Banks—Liability of Stockholders—"Person Holding Stock as Trustee."

Rev. St. § 5152 (U. S. Comp. St. 1901, p. 3465), providing that persons holding stock in national banks as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders, is not confined to express trusts, but applies to every one holding stock as trustee, and a father who invested funds belonging to his children in such stock, taken in his own name simply as "trustee," cannot be held personally liable for an assessment thereon, although the fund so invested arose from an investment of his own money previously made by him in their names and behalf.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 919; Dec. Dig. 248.*

Enforcement of statutory liability of stockholders in national banks, see note to Williamson v. American Bank, 52 C. C. A. 6.]

In Error to the Circuit Court of the United States for the Northern District of New York.

For opinion below, see 152 Fed. 801.

Fowler, Crouch & Vann, for plaintiff in error.

White, Cheney & Shinaman, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

WARD, Circuit Judge. This case, a jury having been waived in writing, was tried by the court. The parties stipulated the facts in 24 articles, which the trial judge adopted with 2 of his own as his findings of fact. Upon these he found six conclusions of law, and directed judgment for the defendant. Rev. St. U. S. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), do not contemplate separate conclusions of law such as are common in the state practice, and judgment should

have been directed on the findings of fact.

The findings of fact establish that the defendant in the year 1890 purchased with his own money, for and in the name of each of his five minor children, he being described as trustee, five shares of the installment stock of a loan association of the par value of \$200 each. He continued to pay dues until the association ran out in 1899, when he received the sum of \$5,000 on acount of the said shares, and he invested the same in 45 shares of the capital stock of the American Exchange Bank of Syracuse, standing in his name simply as trustee. Several dividends declared by the bank were invested by the defendant, together with a small contribution of his own, in 5 additional shares, so that he might hold 10 shares for each child. The bank was subsequently changed to a national bank, and, having become insolvent, a receiver was appointed, who assessed the shares at the rate of \$67 each, and brought suit against the defendant as a stockholder of the bank for this assessment on the said 50 shares.

We are quite satisfied that the defendant's children, though minors, were the owners of the stock of the building association (Laws N. Y. 1887, p. 724, c. 556, § 18); that the defendant received the proceeds of the same as trustee for them, and was their trustee for the bank shares purchased therewith. The cases cited arising out of deposits in savings banks depend upon the peculiar nature of that business, constitute a class by themselves, and do not throw light upon questions arising out of the issuance of corporate stock to one as trustee for another. So, also, cases as to the liability for assessments of persons who transfer stock in national banks directly to minors have no application, because the exemption claimed by the defendant depends upon section 5152, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3465):

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

We adopt the conclusion of Judge Coxe in Lucas v. Coe (C. C.) 86 Fed. 972, that this section is not confined to express trusts under deeds, wills, or orders of the court, but extends to every one holding stock in a national bank as trustee.

In view of the facts stipulated by the parties and found by the court, the admission of the account in the defendant's books with his children, to which exception was taken, was harmless, even if erroneous

Judgment affirmed.

CURTIS v. WILFLEY et al.

(Circuit Court of Appeals, Ninth Circuit. December 7, 1908.)

No. 1,598.

1. APPEAL AND ERROR (§ 515*)—RECORDS—DIMINUTION—EVIDENCE.

Where, on appeal from an order adjudging petitioner guilty of contempt for appearing in the United States Court for China, wherein he had not been admitted to practice, the transcript showed that he appeared and testified that he had been admitted to practice before the United States Supreme Court, before the courts of record of the state of New York, and before the United States Consular Court at Shanghai, and that the judgment was based solely on the fact that he had not complied with the rule of the United States Court for China relating to the admission of attorneys, it was not material that the record should also contain copies of petitioner's certificate of admission before the United States Supreme Court, the courts of record of New York, and the Consular Court at Shanghai.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2322; Dec. Dig. § 515.*]

2. APPEAL AND ERROR (§ 493*)—RECORD—CONTENTS—CITATION—SERVICE.

Where, on appeal from an order adjudging petitioner guilty of contempt, the transcript showed that the petitioner appeared and waived citation, it was not material that it should also show that no citation was issued, and that petitioner demanded a copy of the alleged citation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2284; Dec. Dig. § 493.*]

3. APPEAL AND ERROR (§ 496*)—RECORD—CONTENTS.

Where, on appeal from an order adjudging petitioner guilty of contempt in appearing as attorney for E. in the United States Court for China, the record showed that while E.'s statement made on August 22, 1907, was not under oath, he was sworn on August 26, 1907, in open court, and testified that he had read the transcript of his prior testimony, and that it was true with certain immaterial exceptions, petitioner was not entitled to have the record show that E. was examined without having first been sworn.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §\$ 2288, 2292; Dec. Dig. § 496.*]

4. APPEAL AND ERROR (§ 496*)-RECORD-CONTENTS.

Where, on appeal from an order adjudging petitioner guilty of contempt in appearing as attorney for E., petitioner did not allege that he had ever demanded permission to inspect the testimony of E. or to cross-examine him as to his statements, or that the record of the trial court indicated any such request, petitioner was not entitled to have the appeal record show that E. made his statement in the private rooms of the judge, and that the statement was thereafter sworn to by E. in open court, and without being read, and without any opportunity afforded petitioner to know its contents, or to examine said E. on the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2288, 2292; Dec. Dig. § 496.*]

5. Contempt (§ 63*)—Judgment-Modification-Second Judgment.

Where, in a contempt proceeding, the first judgment did not embrace the alternative of imprisonment in case the fine imposed was not paid, the court had power to enter a second judgment containing such alternative as its final judgment to take the place of the first.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 201; Dec. Dig. § 63.*

Liability of attorneys, see note to Anderson v. Comptois, 48 C. C. A. 7.]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

George F. Curtis, in pro. per. Robert T. Devlin, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The petitioner, who is the appellant from a judgment adjudging him to have been guilty of contempt of court in the United States Court for China, suggests a diminution of the record, and applies for certiorari to bring before this court certain portions of the record in the court below which it is alleged are not embodied in the transcript. The alleged contempt of which the petitioner was adjudged guilty consisted in his persisting in appearing as an attorney for one H. A. C. Emery in said United States Court for China, whereas he had not been admitted to practice therein. The portions of the record which are said to have been omitted from the transcript are:

1. Copies of the petitioner's certificates of admission to practice before the United States Supreme Court, before the courts of record of the state of New York, and before the United States Consular Court at Shanghai, of which latter court the United States Court for China is alleged to be the successor. It does not appear that any of these instruments is necessary to the presentation of the petitioner's appeal. The transcript shows that he appeared and testified before the court below, stating that he had been admitted to all of the courts so named, except the United States Court for China, and that there was no evidence to the contrary; and the transcript further shows that the judgment of contempt was based solely on the fact that the petitioner had not complied with the rule of the United States Court for China relating to admission of attorneys to practice in that court.

2. The petition alleges that no citation was issued to the petitioner to appear and answer as for contempt, and that he demanded a copy of the alleged citation issued against him in said contempt proceedings, and he asks that there be sent up a copy of the record of the fact that he demanded a copy of the citation. To this it is sufficient to say that the record in the transcript shows that the petitioner ap-

peared in the contempt proceedings and waived citation.

3. The petitioner demands the record of the fact that said H. A. C. Emery was examined as a witness in the contempt proceedings without having first been sworn. But the record shows that while Emery's statement was made on August 22, 1907, on question and answer, and not under oath, on August 26, 1907, he was sworn in open court and testified that he had read the transcript of the testimony so given by him, and found the same to be correct except in some few details which were of no consequence.

4. The petitioner alleges that Emery was called to the private rooms of the judge in the United States Court for China, where his statement was made, which statement was thereafter sworn to in open court without having been read in open court, and without permission to the petitioner to know the contents thereof or to examine said Emery on the same. The testimony of Emery thus given appears to have been taken to be used in his own behalf on contempt proceed-

ings against him, as well as in the contempt proceedings against the petitioner. The petitioner does not allege that he ever demanded permission to inspect the testimony or to cross-examine Emery as to the statements therein made, or that the record in the court below so indicates. There does not appear, therefore, anything in the record as to this feature of the case in the court below which has been omitted from the transcript. On the contrary, the judgment recites that the petitioner stated in open court that he had heard Emery's testimony read, and that he was ready to appear and explain his conduct in connection with the case.

5. The petitioner alleges that the first judgment rendered against him did not embrace the alternative of imprisonment in case the fine imposed by the court were not paid, and that that alternative was embodied in the second judgment, the judgment which appears in the transcript, the first judgment having not been modified, set aside, or reversed, and appeal therefrom having been denied. To this it is to be said that the court had it in its power to enter the second judgment as the final judgment of the court, and that the first judgment does not affect the interest of the petitioner, and could have no bearing upon the decision of this court upon the question whether he was properly adjudged guilty of contempt.

The petition will be denied.

In re KALB & BERGER MFG. CO.

(Circuit Court of Appeals, Second Circuit. November 18, 1908.)

No. 77.

1. RECEIVERS (§ 95*)—CONTRACTS—PERSONAL LIABILITY.

A receiver who contracts beyond his powers makes himself individually liable.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 174; Dec. Dig. § 95.*]

2. BANKRUPTCY (§ 115*)—FEDERAL COURTS—ACTIONS AGAINST RECEIVER— STAY.

A court of bankruptcy is without power to stay an action in a state court against its receiver, to charge him with personal liability, although based on acts done or contracts made by him as receiver.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 115.*]

3. Bankruptcy (§ 115*)—Actions Against Receiver—Leave of Court to Sue.

Act March 3, 1887, c. 373, § 2, 24 Stat. 554, and Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), which authorizes a receiver appointed by a federal court to be sued without previous leave of such court "in respect of any act or transaction of his in carrying on the business connected with" the property in his charge, applies to receivers in bankruptcy, but does not authorize a suit without leave against such a receiver unless he is carrying on the business of the bankrupt, or in respect to his acts relating merely to the care and preservation of the property of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 115.*]

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

F. W. Hamberg, for petitioner.

J. H. Hickey, for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The petitioner brought an action in a Municipal Court of the City of New York against Charles Weiser individually, and as receiver of the bankrupt corporation, to recover upon an agreement for the use of certain premises for the storage of property of the bankrupt estate. The District Court, upon the application of the defendant in said action, in his capacity of receiver, enjoined the prosecution of said action, and summarily determined the amount due the petitioner for the use of said premises. This is

a petition to review such action of the District Court.

While, ordinarily, a receiver acting within his powers is not personally liable upon his contracts, yet he may so contract as to bind himself; and if he acts beyond his powers he necessarily assumes individual responsibility. The action in the Municipal Court, in so far as it was against the defendant personally, could not be stayed by the District Court. The power conferred by the bankruptcy act to determine controversies with respect to the collection and distribution of the bankrupt estate cannot be extended to confer jurisdiction to stay proceedings against officers in their individual capacities. It may be that in this case the receiver acted within the scope of his authority and was not personally liable. If so, the Municipal Court will undoubtedly decide in his favor. But the fact that the receiver might interpose a good defense to the personal action against him gave the bankruptcy court no power to enjoin the prosecution of such action.

The order of the District Court, staying the action in the Municipal Court in so far as it was brought against the receiver as such, presents a more difficult question, in view of the fact that leave does not appear to have been granted to bring such action. Suits against receivers, as a general rule, cannot be brought in any other court than that of their appointment, without leave previously obtained from such court. An exception to this rule exists under certain conditions in case of federal receivers. The statute (Act March 3, 1887, c. 373, § 2, 24 Stat. 554, and Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582]) provides in substance that a receiver appointed in a federal court may be sued without leave of the court "in respect to any act or transaction of his in carrying on the business connected with" the property in his charge. It is held that this statute applies to receivers appointed in bankruptcy proceedings as well as other federal receivers. In re Kanter and Cohen, 121 Fed. 984, 58 C. C. A. 260; In re Smith (D. C.) 121 Fed. 1014; In re Kelley Dry Goods Co. (D. C.) 102 Fed. 747. But such receivers cannot be sued without leave unless they are carrying on the business of the bankrupt estate, as they may be authorized to do by the bankruptcy court. In the present case, however, it does not appear that the receiver was authorized to carry on or was carrying on the business. In this transaction he merely arranged for the storage of certain machinery which had come into his possession as receiver. His act related to the care and preservation of the property, but had no relation to any business carried on by him. In our opinion the contract of the receiver for the use of the premises was not an act or transaction in carrying on the business, within the meaning of the statute.

The action against the receiver as such having been brought without leave of the court which appointed him—the District Court—was properly enjoined by that court. This having been done, the District Court went forward and determined the terms of the contract between the parties and the amount due thereunder. The affidavits were conflicting, and the parties were fully heard upon the questions of fact involved. We are not disposed to disturb the finding of the District Court thereon, nor to hold that the petitioner is in a position to assert that any constitutional right was infringed.

The order of the District Court is reversed in so far as it stays the action in the Municipal Court as against the receiver personally, but otherwise it is affirmed. No costs are awarded to either party in

this court.

POSTLETHWAITE V. HICKS.

(Circuit Court of Appeals, Fourth Circuit. September 18, 1908.)

No. 833.

BANKBUPTCY (§ 461*)—ORDERS OF COURT-MODE OF REVIEW.

A decision of a court of bankruptcy allowing or rejecting a claim of \$500 or over is reviewable by the Circuit Court of Appeals only on an appeal taken within 10 days, as provided by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 461.*]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of West Virginia, at Bluefield.

D. E. French, D. M. Easley, and R. C. & Bernard McClaugherty, for petitioner.

Harold A. Ritz and Sanders & Crockett, for respondent.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

PER CURIAM. In this case M. B. Postlethwaite, trustee of Owen C. Phelps, bankrupt, filed his petition on the 15th day of June, 1908, to superintend and revise an order of the District Court of the United States for the Southern District of West Virginia, sitting in bankruptcy, entered on the 16th day of April, 1908. The facts in the case are that on the 16th day of November, 1907, Owen C. Phelps was duly adjudged a bankrupt, and at the first meeting of the creditors M. B. Postlethwaite was appointed trustee. At this meeting William Hicks filed and offered to prove a claim against the estate of the bankrupt

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—57

for \$1,080, based on a contract which had been entered into on the 15th of September, 1907, between the said Hicks and the bankrupt, in which the bankrupt contracted to lease from the said Hicks a storehouse in the city of Bluefield, W. Va., for a term of three years, beginning on the 15th day of October, 1907, at the rate of \$90 per month. The referee allowed Hicks to prove his claim for \$90 for the one month's rent which had expired after the contract was entered into and before the adjudication. The creditor filed his petition to have the district judge review this decision of the referee, and on the hearing of the same by the judge the decision of the referee was overruled, and the creditor, Hicks, was allowed by the order of the court to prove his claim for a period of one year, amounting to the sum of \$1,080, and the unexpired part of the lease was directed by the court to be held and disposed of by the trustee as a part of the bankrupt's estate.

As is shown above, the trustee filed his petition in this court on the 15th day of June, 1908, to superintend and revise in matter of law this proceeding of the District Court. The attorneys for the creditor, Hicks, move that the petition be dismissed, on the ground that a petition to superintend and revise is not the proper method by which to bring the case before this court. In this we think the counsel are right. Section 25a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) provides:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the territories, in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of \$500 or over."

In Re Mueller, 135 Fed. 711, 68 C. C. A. 349, Judge Lurton discusses the proper methods of bringing cases before the Circuit Court of Appeals for review in bankruptcy proceedings, and he lays it down that, where the question involved is one in which a claim for \$500 or upwards against the bankrupt estate has been allowed or disallowed, an appeal is the only proper remedy, and that such appeal must be taken within 10 days from the rendition of the judgment. That construction of the statute is in entire harmony with the decision of this court in the case of Cook Inlet Coal Fields Company v. Caldwell, 147 Fed. 475, 78 C. C. A. 17, in which case this court held that a judgment allowing or rejecting a debt or claim against the estate of the bankrupt of \$500 or over could only be reviewed in this court on appeal. We think these two cases, together with the case of Morgan v. Benedum et al., 157 Fed. 232, 84 C. C. A. 675, settle the question: but, even if we felt authorized to treat the petition to superintend and revise as an appeal in this case, the same was not taken within the 10 days limited by the law.

The petition to superintend and revise is therefore dismissed.

CHESTER FORGING & ENGINEERING CO. et al. v. TINDEL-MOR-RIS CO.

(Circuit Court of Appeals, Third Circuit. December 4, 1908.)

No. 54.

1. Injunction (§ 136*) — Preliminary Injunction — Authority of Court to Grant—Pending Demurrer to Bill.

While as a rule a preliminary injunction should not be granted while a demurrer to the bill is pending, such rule is subject to exceptions; and where on examining the bill and demurrer the court is not satisfied that the demurrer will be sustained, and on the proofs submitted allegations of fraud made in the bill are clearly proven, the court has, within reasonable bounds, a discretionary power to preserve the existing status of things by a preliminary injunction to prevent the carrying out of the fraud until the demurrer is disposed of.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

2. PATENTS (§ 299*)—SUIT FOB INFRINGEMENT—RIGHT OF ACTION FOR THREAT-ENED INFRINGEMENT.

A federal court of equity may entertain a suit to enjoin infringement of a patent where it is threatened, although no act of infringement had been completed when the bill was filed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 478, 479; Dec. Dig. § 299.*]

3. PATENTS (\$ 297*)-Suit for Infringement-Preliminary Injunction.

Where a bill for infringement of patents alleged that defendant had obtained the parts of the patented machines from complainant by fraud, and was engaged in putting them together with the intent to use the machines in infringement of the patents, and the proofs on a motion for a preliminary injunction clearly sustained such allegation, the fact that the validity of the patents had not been adjudicated did not require the court to refuse the injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 481; Dec. Dig. § 297.*

Grounds for denial of preliminary injunction in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 163 Fed. 304.

E. H. Fairbanks, for appellant.

Frank P. Prichard, for appellee.

Before DALLAS, Circuit Judge, and LANNING, District Judge.

LANNING, District Judge. The decree appealed from awarded a preliminary injunction restraining the defendants, during the pendency of this suit and until its final determination, from completing, using, or selling, the two machines referred to in the complainant's bill and in the opinion of the Circuit Court. Tindel-Morris Co. v. Chester Forging & Engineering Co., 163 Fed. 304. The bill charges that the defendants fraudulently secured from the premises of the complainant two complete sets of certain parts of two turning lathes, that each of those sets embodied the inventions set forth and claimed in

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

three patents belonging to the complainant, that the inventions described in the three patents are capable of conjoint use, and are so used by the complainant, in one and the same machine, and that at the time the bill was filed the defendants were using the sets in the construction of two machines, and threatening to complete and use the machines in infringement of the complainant's patent rights. Notwithstanding a demurrer to the bill was filed, the learned judge of the Circuit Court found, in the affidavits presented on the motion for a preliminary injunction, such convincing proofs supporting the charge of fraud that he granted an order for the injunction above mentioned. A few days later, he overruled the demurrer "except as to purely formal defects" in the bill, and gave leave to the complainant to amend as to those defects. The amendments were subsequently made.

It is now objected that a preliminary injunction ought not to be allowed while a demurrer is pending. Ordinarily, that is true, but there are exceptions to the rule. In a case where, on examining the bill and the demurrer, the court is not satisfied that the demurrer will, on the argument of it, be sustained, and where, on the proofs submitted, allegations of fraud pleaded in the bill are clearly proven, the court has, within reasonable bounds, a discretionary power to preserve the existing status of affairs by a preliminary injunction to prevent the carrying out of the fraud until the demurrer is argued and disposed of. Any other rule would open a wide door to the grossest injustice. Prima facie, the complainant's patents, in the case in hand, are valid, and since the demurrer admits, for the purposes of the argument of it, the fraud pleaded in the bill, we should not disturb the order for an injunction pendente lite unless we are satisfied that there is reasonable doubt as to the sufficiency of the bill in other respects than in the "formal defects" found by the court below, or unless, on an independent examination of the facts, we are satisfied no fraud has been shown. On the question of fraud, we think the proofs, as they now stand, support the conclusion of the court below. Whether they will do so on final hearing is quite another question, with which we are not now concerned.

As to the alleged defects in the bill, it is urged, in the first of the causes of demurrer, that "the charging part of the bill is vague, indefinite, and insufficient, in that it does not allege with certainty any cause of action arising under the patent laws of the United States within six years last past"; in the second, that the bill fails to show "a controversy arising under the patent laws of the United States, since it appears on the face of the bill that no infringing act was completed prior to the filing of the said bill"; in the third, that the bill "sets up no cause of action cognizable in a court of equity of federal jurisdiction"; and, in the fourth and last cause, that it appears by the bill that the plaintiff "is not entitled to the relief prayed by said bill against these defendants." The second of these causes was satisfactorily disposed of in the opinion of the court below. The defendants complain that the court ignored the other causes. We cannot assume that they were ignored merely because they are not referred to in the opinion. The question, therefore, is, were they of such a character that the

injunction should have been withheld until the demurrer had been formally set down for argument and disposed of? The only specific objections to the bill are that it fails to allege, as to each of the three patents, (1) that the subject-matter of the patent was not abandoned, (2) that its subject-matter was not patented in any foreign country more than two years prior to the application for it, and (3) that its subject-matter was not patented in any foreign country more than seven months (in the case of one of the patents), or more than twelve months (in the case of each of the other two patents), before the application for it in this country was filed. These were the "formal defects" which were cured by amendments, and we think that, in view of the fraud which seems on the present ex parte proofs to be established, those defects were properly regarded as not sufficient to defeat

the application for a preliminary injunction.

It is further objected that the injunction should have been denied because the patents in suit have not been adjudicated. Such an objection to the grant of a preliminary injunction is often a good one. But may a defendant fraudulently obtain from the complainant the parts of a machine that are covered by the complainant's patents, and busily engage himself in putting those parts together for the purpose of using them in violation of the apparent patent rights of the complainant, and then defeat an application for preliminary injunction to restrain such violation by saying "it is true I obtained the parts by fraud, and it is true that the patents are prima facie valid and cannot be adjudged invalid except after a careful and painstaking examination of the proofs adduced on final hearing, but, as they have not yet been adjudged valid in any judicial proceeding, I claim the right to perpetrate my fraud in the meantime"? We think no case has adopted so extreme a view of the law. The fraud proven in this case would of itself be a sufficient ground for the injunction allowed by the court below in any ordinary court of equity. It would be so in a federal court except for the fact that the record shows that the complainant and the defendants are citizens of the same state. Notwithstanding such identity of citizenship, the court below has jurisdiction to determine the rights of the complainant under its patents, and inasmuch as upon the present proofs the defendants are guilty of the fraud alleged, and that fraud appears to be an actual, palpable, and inexcusable one, and not a merely constructive one, the absence of adjudication of the patents is not a sufficient reason for reversing the order of the lower court.

Finally, the record does not disclose any motion to exclude the affidavits which it is now insisted should not have been considered, either because they were not entitled in the cause, or because they were without venue. These defects might have been remedied, if required, in the court below. They will not be regarded by this court. Modox Co. et al. v. Moxie Nerve Food Co., 162 Fed. 649.

The decree of the circuit court is affirmed.

KILBOURN KNITTING MACH. CO. v. LIVERIGHT et al.

SAME v. McCONNELL et al.

(Circuit Court of Appeals, Third Circuit. November 24, 1908.)

Nos. 21 and 22.

PATENTS (§ 328*)-Novelty-Openwork Stocking.

The Blood patent, No. 743,231, for a machine-knit seamless stocking knit from a single thread in one continuous operation, and having lace work down the front of the leg and over the instep, is void, there being no patentable difference between such stocking and the lace front stockings of the prior art, except in the means or method by which it is made and due to the machine.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 46; Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 159 Fed. 494.

L. P. Whitaker and H. T. Fenton, for appellant.

Frank S. Busser, for appellees.

Before GRAY and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

GRAY, Circuit Judge. These are appeals from decrees of the circuit Court for the Eastern District of Pennsylvania, in two suits for infringement of letters patent, No. 743,231, granted November 3, 1903, to the appellant, as assignee of George Blood, Junior, for an improvement in seamless hosiery. Infringement of claim 3 only of the patent in suit is charged in the Liveright & Davidson Case, and claims 3 and 4 only in the Marion Hosiery Mills Case. These claims are as follows:

"(3) A machine-knit seamless stocking having open or lace work meshes upon the leg of the stocking and down upon the front of the ankle and top of the foot of the stocking, the heel, foot and toe of the stocking being knit from a single thread, substantially as described.

"(4) A machine-knit seamless stocking knit from a single thread in one continuous operation, the said stocking having lace work upon the front of the leg of the stocking, said lace work extending down upon the ankle and

top of the foot of the stocking, substantially as described."

The defenses are, in general, non-patentability and non-infringement. In the view taken by the court of the first named defense, it is not necessary to differentiate the two cases. The patentee in his specification says:

"My invention relates to the art of knitting seamless hosiery, in which the leg, heel and foot and toe are knit in one continuous operation in the order named, or in an order the reverse of that just stated. My improvement more specifically stated is a seamless stocking, formed of a single thread knit in one continuous operation and having its front ornamented with a section or sections of open or lace work extending from the upper part of the leg over the instep and onto the foot of the stocking."

As also stated by the patentee, a form of machine was devised by him for knitting stockings of the improved construction set forth in

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the patent in suit, and an application for a patent for this device was filed nearly two years prior to the application for the patent in suit,

and it was granted in May, 1901.

The standard types of stockings, as agreed on both sides, old and well known at the date of the patent in suit, were (1) the full fashioned stocking knit on a flat or straight machine and in the form of a flat web, shaped to conform to the human leg and foot when the two edges are brought together after knitting and united either by sewing or looping, thus forming a seam, extending along the bottom of the foot and up the back of the leg; (2) the seamless single feed stocking which is knit upon a circular machine. This stocking is made of a single thread, knit on a circular machine spirally around and around to form a cylindrical leg, thence back and forth to form the heel, thence spirally around and around to form a cylindrical foot of the same diameter or circumference as the leg, and thence back and forth to form the toe pocket, which is united on its upper side to the top of the foot by the interlooping of the adjacent edges; (3) the seamless plural feed stocking is in all respects like the single feed seamless stocking, except that there are two or more threads, instead of one, forming two or more rows of loops or stitches that extend together spirally around and around, in echelon relation to each other, to form a cylindrical leg and foot, these threads being thrown out of action and another single thread thrown into action to form the heel and toe. This stocking is also knitted on a circular machine, the operation of which is essentially the same as that of a machine for knitting single feed stockings; (4) the transfer stocking made partly on one machine and partly on another. The leg is made on a circular machine out of a single thread, or a plurality of threads, and then the whole foot and toe are made, usually of a single thread, on another circular machine, and the two parts united by looping or sewing. The defendant's Liveright & Davidson stocking belongs to this class.

The first of the foregoing types of machine made stocking,—the full fashioned stocking, knit as a flat web on a straight machine, on account of its being fashioned so as to conform, when the two edges are united, to the shape of the leg and foot, is a most desirable, though a more expensive, type than the others. The advantages of the seamless stocking, whether single or plural thread, knitted around and around on a cylindrical machine, are economy in construction and the absence of a possibly uncomfortable seam on the bottom of the foot and back of the leg, but it lacks the advantages of conformity to the shape of the leg and foot. It is desirable, however, by reason of its cheapness.

A short time prior to the date of the patent in suit, straight knit or full fashioned stockings, having lace work down the front of the leg, over the ankle, and top of the foot, had been produced and were being sold in the trade, being much in vogue with low shoes and slippers. Such stockings could always have been made by hand, and doubtless were so made, but as soon as the fashion created the demand, as above stated, there was no difficulty in making stockings with such lace work down the front of the leg and foot of the stocking on a flat web or straight machine. But it was inevitable that, as the fashion became popular, there should arise a demand for a cheaper lace front stocking

than the full fashioned stocking produced on the flat web machine, and that there should be an attempt to apply the lace work to the front of the cheaper seamless stocking made on a circular machine. We therefore find that one Gilbert, who had an old patent for an improvement in circular knitting machines, whereby toe or heel pockets on the knitted tube could be formed automatically, had made cheap lace work stockings, the lace work extending over the instep and top of the foot, by a device attached to his old circular machine. This machine, however, was not a single thread, but the plural thread machine above mentioned, in which three or four threads were knitted around and around in an echelon progression. There was some difficulty, however, owing to the relative position of the plural courses of knitting, in attaching the toe pocket to the foot. This, however, was done by sewing by hand, creating in this way a seam, instead of the seam produced by the automatic interlooping of the stitches of the foot with those of the

toe pocket in a single thread machine.

It is admitted, or at least it is indisputable, that there was thus produced by Gilbert, prior to the patent in suit, on his circular plural thread machines, a lace front stocking, generically the same as that theretofore produced on the flat web machines, and generically identical with the lace front stocking of the patent in suit, unless patentably differentiated from the former by being produced on a circular machine, and from the latter by being knit with a plural thread and with the toe pocket united to the top of the foot as above described. We have, therefore, in the prior art, a lace front stocking made on the flat web machine, and a lace front stocking made on a circular plural thread machine, undistinguishable, except as above mentioned, from a stocking made in precise accordance with the patent in suit. It appears from the record, that at the time the lace front full fashioned stocking came into use, Gilbert was a user of plural feed seamless machines only, and therefore sought to adapt those machines to the manufacture of the lace front stocking. It is not an unfair inference from the testimony, that if he had been a user of single feed seamless machines, he would have adapted such machines to the production of the same stocking, which would have been the seamless single feed stocking of the patent in suit.

This statement brings us at once to the consideration of the important question in this case. The patent is for a product, which, for the purposes of this discussion, may be taken as sufficiently described in the fourth claim of the patent in suit, which in substance is "a machine knit seamless stocking knit from a single thread in one continuous operation, having lace work upon the front of the leg, extending down upon the ankle and top of the foot of the stocking." This is broadly the product produced by Gilbert, and can only be distinguished from it by being knitted with a single thread, which enabled the toe pocket to be united to the foot by automatic interlooping of the stitches of the one with the other. But this automatic union of the toe pocket with the foot was characteristic of the old circular machine, plain seamless stocking, and the addition to it of the ornamentation of lace work down the front and over the instep, was due to the function of the particular device combined with the circular ma-

chine, and for which a patent had already been applied for and obtained by the patentee of the patent in suit. As a distinct entity of the stocking making art, it did not differ from other lace front stockings (notably the flat web stocking and the "Gilbert" stocking) of the prior art, except in the means or methods by which it was made. But complainant below urges, with great ingenuity, that the stocking thus produced is of a structural character different from the other lace front stockings referred to, and that this peculiar structural character identifies it as a distinct commercial entity, and as a product or manufacture entitled to patent protection. We do not think so. This alleged structural peculiarity belonged to the plain seamless, machine-knit, singlethread stocking of the prior art, and necessarily was still present in that stocking, when, by the patented attachment to the seamless single thread machine, it was produced with a lace front. Such a peculiarity, attached to every variety of single thread, seamless, machine-made stocking, is not and cannot be made generically descriptive, in a patentable sense, of the stocking of the patent in suit. To call it a structural peculiarity, does not help the case. Whatever it may be called, whether considered separately or in combination with a lace front, it is the result of the machine on which it is made, and is not a product of the inventive faculty. There was no idea or mental concept of such a material entity as this stocking in a patentable sense. The patentable idea or conception, if any, was of a circular seamless machine so added to that it would produce substantially the lace front. stocking of the prior art. That there was stamped upon the lace front stocking of the prior art a slight peculiarity of structure, due to the machine on which it was made, does not serve to characterize it or differentiate it from the lace front stocking of the prior art. It can only differentiate it by those structural marks, due to the machine upon which it is made. These are too unsubstantial and accidental to create a new article of manufacture in the sense of the patent law, the production of which involves the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production. Collar Co. v. Van Deusen, 23 Wall. 530, 563, 23 L. Ed. 128; McCloskey v. Du Bois (C. C.) 19 Blatchf. 205, 8 Fed. 710.

If a lace front stocking is claimed as a patentable product, when made on a seamless machine with a single thread, in a continuous operation, every other well known form of stocking can be considered a patentable product when so made, which would amount to a practically indefinite extension of the monopoly originally granted by the patent for the seamless stocking. It must be admitted that it is somewhat difficult to properly define in general terms what is or is not a patentable "manufacture," and distinguish it from the mere effect or result of a process or machine. This difficulty possibly arises from what Robinson, in his work on Patents, calls the want of technical language that will clearly express all that the words "new and useful manufacture" in the patent law connotes. But however this may be, the difficulty is best met, as in the interpretation of all statutes, by a close adherence to the ordinary and common sense meaning and usage of the words employed to express the legislative will.

A new and useful product or manufacture must be differentiated from all other articles, by something that is fundamental and radical. In a machine-made, seamless, lace front stocking, we do not find this radical and fundamental differentiation from the subject matter of the patent in suit.

We think the principle upon which this court recently decided the case of Weierman v. Shaw Stocking Co., 85 C. C. A. 222, 157 Fed. 928, is clearly applicable, as found by the court below, to the case now before us. That case dealt with what is popularly called a product patent. It was old in the art to make what was called a split foot stocking; that is, a stocking with the leg and upper part of the foot of one kind of yarn, and the bottom or sole of the foot of another and distinct yarn. Long prior to the patent there in suit, such a stocking had been made from a knitted flat web, in which one half of the sole was knitted on one side of the web, and one half on the other. The web was then united by a steam down the back of the leg and the middle of the sole of the foot, thus making a split foot stocking, in which the upper part of the foot was of one yarn and the sole or bottom of another. The patent in suit was for this same split foot stocking, but made on a tubular machine, so adjusted and adapted as to have the top or upper part of its foot composed of one yarn or set of yarns, and the bottom or sole of the foot composed of another or distinct yarn or set of yarns, the said upper and sole parts being united in the form of a tube, by the reciprocal interloopments of the upper edges of said upper and sole at the sides of the foot. There was thus produced a machine-made seamless split foot stocking.

Adopting the language of the learned judge of the court below:

"The claim which was there involved will show the similarity of the two. Both stockings, as it will be seen, have the seamless feature, which was not new in either, and neither is the open work lace effect, which is found here, which in one form or another has been long known and practised in the stocking art. As therefore there was nothing patentable in the Shaw Case, in the conception of combining the seamless and the split foot ideas, which were both old, so neither is there anything patentable here, in bringing together in a single stocking structure the seamless and the lace work effect which are in the same position."

We therefore think that the decree of the court below should be affirmed.

PLUNGER ELEVATOR CO. v. STANDARD PLUNGER ELEVATOR CO.†, (Circuit Court of Appeals, First Circuit. December 4, 1908.)

No. 737.

PATENTS (§ 328*)—INFRINGEMENT—HYDRAULIO VALVE MECHANISM.

The Cole patent, No. 700,740, for valve mechanism for hydraulic elevators, designed to permit a quick start of the elevator and secure an automatic slow stop, construed, and held to be of a sufficiently primary character to be entitled to a reasonably broad application of the doctrine of equivalents, and, as so construed, infringed by a device in many respects similar to the Larsson patent, No. 786,654.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 8, 1909.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 153 Fed. 747.

Frank T. Brown (Francis A. Hopkins, on the brief), for appellant. Clifton V. Edwards (Louis W. Southgate, on the brief), for appellee.

Before PUTNAM and LOWELL, Circuit Judges, and ALDRICH, District Judge.

LOWELL, Circuit Judge. This was a bill in equity to restrain the infringement of letters patent No. 700,740, issued May 27, 1902, for improvements in hydraulic valve mechanism, granted to the complainant as assignee of Cole, the inventor. The Circuit Court dismissed the bill, and the complainant has appealed. The patent has 29 claims, and we find no enumeration of those which the complainant put in issue. The following may be taken to illustrate fairly the scope of the patent:

"(2) The combination with the main three-way valve, of means for opening and closing said valve in either direction, and automatic means for regulating

the opening and closing movements at different rates of speed.

"(3) The combination with the main valve for controlling the passage of fluid under pressure, of means for opening and closing said valve, and automatically-operated quick-opening, slow-closing means connected with said main valve, whereby the speed of opening and the speed of closing the main valve are regulated within independent limits, substantially as described.

"(4) In a hydraulic elevator the combination with a main valve, of a valvemotor, pilot-valve mechanism, and an opening and closing regulating means operated by movement of the main valve, whereby a quick opening and a slow

closing of the main valve are effected.

"(5) The combination with the main valve for controlling the passage of fluid under pressure, of motor means for opening and closing said main valve, secondary valve mechanism for controlling the motor means, and hydraulic opening and closing regulating means for automatically regulating the velocity at which the main valve may be opened and the velocity at which the main valve may be closed at independent rates, substantially as described."

The patent is concerned with the control of plunger elevators. Speaking generally, the car of a plunger elevator is borne upon a plunger, or large metallic rod with piston, which moves perpendicularly in a closed casing or cylinder. The plunger and car are raised by the admission of water to the cylinder beneath the plunger. They are lowered by the exhaust of this water. A quick upward start of the elevator can easily be secured by a quick supply of water beneath the plunger. A quick stop during the ascent can easily be secured by a quick cessation of the inflow. The converse is true of a descending elevator and of the exhaust of water beneath it. On the other hand, by throttling the supply and exhaust, by providing a slow cessation of the inflow and outflow, it is easy to secure a slow start and a slow stop. In experience, it has been found that a jerky stop discommodes the passengers, and, when carried to an extreme, causes the plunger to bound upon the surface of the water, giving a disagreeable jolt to the passengers, and in some cases straining the machinery of the elevator. Cole sought to obtain a control which both permits the quick start desirable in order to save time, and also insures a slower stop, the latter operated automatically, unaffected by the carelessness or ignorance of the elevator boy. This also could easily be secured if the start was always caused by the admission of water beneath the plunger, and the stop always caused by the cessation of the inflow; the inflow could be checked slowly. But the start of an ascending elevator is caused by the admission of water to the plunger cylinder, while the start of a descending elevator is caused by the exhaust of this water. The problem was to provide for a possibly quick start and a certainly slow stop of the elevator, whether the start was caused by the supply or by the exhaust of water; whether the stop

was caused by a cessation of the outflow or of the inflow.

The mode of operation of the patent in suit is stated in the specifications. The weight of the car being for the most part counterbalanced, the car is raised by the admission of water below the plunger, and lowered by the exhaust of the same water. Water enters the plunger cylinder below the plunger through the main valve, which is opened and closed by a piston moving in the main valve cylinder. The movement of the same piston also controls the exhaust of the water beneath the plunger. The main valve piston, as shown, is operated by the movement of a motor piston in a motor cylinder, the two pistons being connected so as to move backward and forward together. When the main valve piston is centered in the main valve cylinder, the main valves are closed and the elevator is at rest. When this piston is moved to the right, the main supply valves are opened, water enters beneath the plunger, and the elevator rises; when the main valve piston is moved to the left, the main exhaust valves are opened, and the elevator descends. The motor piston is moved in the motor cylinder by the admission and exhaust of water through the same port on one side of the piston; on the other side of the piston is a constant but lesser pressure in the other direction. The admission of water to the motor cylinder and the exhaust of water therefrom are controlled by the valves of the pilot cylinder. These pilot valves are opened and closed by the movement of the pilot piston, and this piston, through suitable connections, is moved by the operating lever. Stated in another way, the sequence of movement in raising the elevator is as follows: The operator moves the lever; the lever moves the pilot piston; the pilot piston opens the supply valve of the pilot cylinder, and thus admits water to the motor cylinder; the water in the motor cylinder moves the motor piston to the right, as shown in Figure 4: the motor piston, being connected with the main valve piston, moves that also to the right: the movement of the main valve piston opens the main supply valve; the main supply valve admits water below the plunger; the plunger is raised, carrying the elevator with it.

The combined movement of the main valve and motor pistons returns automatically the pilot piston in the pilot cylinder to close the pilot supply valve. Thus the further supply of water is cut off from the motor piston, and the motor piston and main valve piston remain stationary at the right. The main supply valve, however, remains open, and water continues to flow through the main supply valve be-

neath the plunger, and the elevator continues to rise.

When it is desired to stop the ascending elevator, the operator moves

the pilot piston by means of the lever. The pilot piston opens the exhaust pilot valve. Through this valve the water is exhausted from the motor cylinder by the counter pressure referred to, the motor piston is moved to the left, and with it the main valve piston is carried to the left to close the main supply valve. This movement, by appropriate connections, returns the pilot piston to close the exhaust valve of the pilot cylinder, and both main valve piston and motor piston are brought to rest in a central position, the main valve being closed and the water beneath the plunger being stationary.

In addition to these movements, and to the valves, cylinders, and pistons already mentioned, the patent contains an auxiliary piston and valve for the purpose of controlling and throttling the passage of water from or to the motor cylinder during the centering movement of the motor piston to stop the elevator. As has been said, the problem was to provide a possibly quick start of the elevator, either going up or down, and a certainly slow stop. The throttling mechanism, as shown, has two free and two throttled ports, a free port and a throttled port for the admission of a supply of water, and a free port and a throttled port for its exhaust. The throttled ports of the auxiliary valve are always open. The free ports are opened and closed by the movement of the throttling piston. This piston is connected with the main valve piston and the motor piston, so that when these two pistons are moved to the right in order to raise the elevator, as shown in Fig. 4, their movement thus extended moves the throttling piston to close the free exhaust port, leaving open only the throttled exhaust port. When, therefore, the pilot piston is moved to open the exhaust port of the pilot cylinder in order to stop the ascending elevator, as above described, the water exhausts from the exhaust port of the pilot cylinder only through the throttled port of the auxiliary valve. the exhaust is therefore slow, and the elevator stops slowly. When a descending elevator is stopped, the above-described movements are reversed, the supply port is throttled, and, as the elevator is stopped by the supply of water, the stop is still slow. Inasmuch as the main valve piston and motor piston are both at the right or at the left of Fig. 4 only when the elevator is in motion, either ascending or descending, while their return to the center means a stop of the elevator, it follows that the admission of water to the pilot cylinder to stop the descending elevator, and its exhaust from the pilot cylinder to stop the ascending elevator, must both be through a throttled passage, and hence the start may be quick, while the stop is necessarily and alwavs slow.

We next consider the defendant's device alleged to infringe. The defendant contends that it is exemplified in the letters patent No. 786,-654, issued April 4, 1905, to Larsson for "new and useful valve mechanism for hydraulic elevators." This is true in general, and so far as described below. In the Larsson patent there is no motor cylinder or motor piston, as distinguished from the main valve cylinder and main valve piston. The main valve piston is moved to open and close the main valves by the operation of water admitted directly from the pilot valve. To start a Larsson elevator upwards from the position

of rest, the operator lowers the lever and with it the pilot piston. The fall of the pilot piston opens the pilot valves. The opening of the pilot valves through suitable connections releases the water in the main valve cylinder to the left of the main valve piston. This release of water causes the main valve piston to move to the left under the constant pressure. This movement of the main valve piston to the left admits water through the main supply valve to the plunger cylinder beneath the plunger. From this description of the operation of Larsson's patent in starting the elevator to ascend may readily be prepared a list of the movements necessary to stop its ascent or to start or to stop its descent.

The movement of Larsson's main valve piston to left or to right in order to admit or to exhaust water from the plunger cylinder automatically rotates by a broad-faced pinion a perpendicular rod. A screw on the end of this rod enters a nut in such a way that the rod rises and falls perpendicularly by its own revolution. To this rod the pilot piston is so attached that they rise and fall together. The movement of the main valve piston, therefore, by means of the pinion, automatically raises the rod, and with it the pilot piston. The pilot valves, which had been opened by the fall of the pilot piston, are thus closed by its rise, and no more water is admitted to the pilot cylinder; but the main valve piston remains at the extremity of its cylinder, water continues to flow into or exhaust from the plunger cylinder, and the elevator continues to rise or to fall.

To the rod above mentioned are attached helices or screw cams. The casing in which the rod slides and turns also has cams attached thereto, having the same pitch as the screw and as the cams first mentioned. These sets of cams are so related to each other that the lever cannot be thrown from one side to the other, from a complete opening of the supply ports to a complete opening of the exhaust ports of the pilot valve, without permitting the main valve piston first to come to rest in the center of its line of operation. Hence the movement of Larsson's elevator cannot be changed from ascent to descent without an intermediate period of rest. This is the advantage set out in Larsson's specifications.

The defenses here set up are substantially two: First, the defendant denies that the defendant's machine in fact accomplishes or is intended to accomplish a quick start and a slow stop, but contends that its sole purpose is to prevent a careless operator from violently reversing the motion of the elevator. The defendant asserts that, both theoretically and practically, the start and the stop of the defendant's machine are of equal duration. The complainant, on the other hand, asserts that the arrangement of the cams prevents a free opening of the pilot valves when the pilot piston is moved to stop the elevator. If this defense is true in fact, manifestly the defendant does not infringe. Second, the defendant contends that, even if the defendant's machine permits a quick start while securing a slow stop, yet it accomplishes that result by a mechanism materially different from that of Cole, a mechanism which is outside the scope of Cole's patent properly construed. Here the decision depends upon the proper scope of

the doctrine of equivalents as applied to the Cole patent. We consider these two defenses in their order

The evidence that the defendant's pilot valves are so throttled as necessarily to cause a slow stop of the elevator is unsatisfactory. We disregard altogether the report of tests made apparently by a skilled operator, some of them in the absence of the complainant or of doubtful interpretation, and in all so few as to be valueless. Both parties have in effect agreed to stake the decision of the case upon an inspection of a nondescript model shown in court, one half of which was introduced by the defendant as an exhibit in the case, being the defendant's pilot valve and auxiliary mechanism. The other half of the model is a wooden chalk, asserted by the defendant to be a diagram substantially accurate, but depending for its accuracy upon precise measurements, and even upon an accurate employment of colors. The complainant, however, may fairly contend that this model amounts to an admission by the defendant. Both parties admit that the greatest possible throw of the lever, made while the main valve piston is accurately centered for closing the main valve and so while the elevator is at rest, and made in order to open the ports of the pilot valve and to start the elevator up or down, opens those ports more widely than they can be opened by any movement of the same lever while the main valve piston is at either extremity of its cylinder, i. e., while water is most freely admitted or exhausted beneath the plunger, and while the elevator is in motion. Moreover, it is plain that the rod bearing the movable cams which limit the throw of the lever, and which rod is revolved through a rack and pinion by the movement of the main valve piston, does not make a complete revolution while the piston is passing from its centered position closing the main valve to its extreme position at either end of the cylinder to open the supply or exhaust most fully. Perhaps the turn of the rod amounts to fivesixths of a revolution. Hence the distance of the revolving from the stationary cams is not the same at the two positions, and the possible throw of the lever is greater to start the elevator than to stop it. From inspection it also appears that the distance between the movable and stationary cams is greater when the main valve piston is accurately centered and the elevator is at rest than when the main valve piston is at either extremity of its cylinder and the elevator is in mo-These undoubted facts appear to contradict the defendant's statement above quoted.

But the defendant asserts that the initial movement of the main valve piston from an accurate centering does not immediately begin to open the main valve; that there is a certain amount of lost motion caused by the overlap of the main valve piston beyond the opening of the main valve. The defendant here contends, and the contention is borne out by an examination of the model, that, if the comparison is made between the possible opening of the pilot valves at the moment when the main valve piston just begins to uncover the main valve, and the possible opening of the pilot valves at the moment when the main valve piston just begins to cover the main valve, these possible openings are the same. Hence the defendant contends that

the pilot valves are in effect opened as widely to stop the elevator as to start it.

The defendant's argument thus made is not conclusive. In starting the elevator, the main valve piston has begun to move, and has acquired momentum before it begins to uncover the main valve, while, upon the return of the piston to stop the car, it begins to cover the main valve as soon as it begins to move. This increased momentum of the main valve piston appears to differentiate the start of the car from its stop. Still further, the complainant contends that various ports in the pilot valve, somewhat obscurely seen, remain open even to the time when the main valve piston is moved to its extremity, strengthening and quickening that movement, while, upon the return, these ports are closed early in the movement of the main valve piston, so that the elevator comes slowly to a stop.

While the court is embarrassed by the nature of the model before it, and by the want of expert testimony thereupon, yet upon the whole, considering that the model was produced and is now relied upon by the defendant, we find that the complainant has sustained the burden of proof which rests upon it to show that the defendant's elevator has an automatic slow stop, a stop which is slower than its normal start.

We are left to consider only if the means by which this stop in the defendant's machine is produced are the mechanical equivalent of those of the patent. It is urged that the defendant's valves are throttled, not by the movement of the main valve piston, as in the patent in suit, but by the operation of the lever in the hand of the elevator boy. In a sense this is true, but in the defendant's machine the movement of the main valve piston so arranges the cams which control the throw of the pilot piston by the lever that the throw of that piston in stopping the elevator cannot open the ports so widely as they are opened by the throw of the piston at the start. This throttled opening of the pilot valves, while not directly the automatic operation of the main valve piston, is yet produced by an arrangement of cams, automatically brought into proper arrangement by the movement of the main valve piston. In the patent in suit and in the Larsson patent the throw of the lever admits water to the pilot cylinder or exhausts water therefrom. If the lever is moved to stop the elevator, admission and exhaust are only through a throttled valve. So far the two patents are the same. In the patent in suit, the movement of the main valve piston then causes the throttling piston to close the free valve, leaving the water to pass only through a throttled valve. In the Larsson patent the movement of the main valve piston arranges a set of cams so that the pilot piston (which here acts also as a throttling piston) necessarily itself throttles the valves of the pilot cylinder. In both cases we may fairly say that the pilot valve is throttled by the movement of the main valve piston. Considering the nature of the invention, that it appears to be the first in which a comparatively quick start and an automatic slow stop were obtained by the throttling of the pilot valve through the operation of the main valve piston, we are of opinion that the doctrine of equivalents should

receive a reasonably broad application, and that the doctrine, when thus applied, establishes the substantial identity of the defendant's machine with the patent in suit. Neither complainant nor defendant have treated the claims in suit separately, and this has embarrassed our consideration of the question of infringement. Without saying more, we hold that the patent is valid and has been infringed by the defendant.

The decree of the Circuit Court is reversed, and the appellant recovers its cost of appeal.

PUTNAM, Circuit Judge (concurring). I concur in the conclusion reached by the court, but I think that the case does not depend on the model to which the opinion refers. It seems to me that the complamant's invention involves the following elements: The main valve comes to an easy rest on its return stroke—that is, in connection with the lever movement which stops the elevator; this easy rest necessarily results from an automatic action produced by the main valve; and the movement in starting the valve may be slow, moderate, or quick, as determined by the operator. In this I agree entirely with the expressions of the opinion, filed in behalf of the court, that Cole sought to obtain a control which both permits a quick start and also insures a slower stop, the latter operated automatically. also seems to me that, on the settled rule of the Supreme Court, as clearly stated by the learned judge of the Circuit Court, any claims broader than this statement of the complainant's invention are invalid.

It also seems to me that Prof. Main is the expert testifying for the respondent who is fully capable of mastering the mechanical laws involved in the complainant's invention, and in the patent on which the respondent relies, and which it claims to have adopted in constructing its machines; and that, looking at his testimony by and large, it contains an inevitable admission that precisely the elements found in the complainant's invention are found in the respondent's patent, and are availed of for the same purpose, with the addition of an incidental safety device which assists in preventing a sudden reversal. I note here only one extract from his testimony, as follows:

"X-Q. 19. In defendant's valve mechanism the main valve is positively connected to the pilot valve, and the two so arranged that by the automatic action of the main valve, which causes the pilot valve to cover or close some of the ports of such pilot valve, the flow is gradually cut off, and will gradually stop the movement of the main valve as it comes to central position. and thereby gradually stop the movement of the elevator. Is not this so? A. Undoubtedly.
"X-Q. 20. This is likewise true of the valve mechanism of the Cole patent

in suit, is it not? A. Yes.

"X-Q. 21. And in both defendant's valve mechanism and the complainant's patented valve mechanism the pilot valve is positively connected to the main valve, so that it is automatically returned to central position by the main valve through this positive connection. Is not this so? A. It is."

It would hardly be fair to pin Prof. Main too closely to these answers, or to assert that they cover the start, which he explains elsewhere; but, taking his entire testimony with all allowances, and with a fair reconcilement of apparent inconsistencies, I think it justifies what I have already said in reference to it. Looking at the whole record, I can see no fundamental difference between the respondent's mechanism as shown in the patent under which it claims, and the pith of the complainant's invention as I have explained it.

Therefore I conclude that, independently of the reasons stated in

the opinion of the court, the respondent infringes.

RANSOME CONCRETE MACHINERY CO. v. UNITED CONCRETE MACHINERY CO.

(Circuit Court, S. D. New York. December 23, 1908.)

PATENTS (§ 328*)—INFRINGEMENT—CONCRETE MIXER.

The Ransome patent No. 814,803, for concrete mixing machinery consisting of a batch-mixing drum, was not anticipated, and discloses patentable invention of quite a high order. It is not limited to the precise device shown, but is entitled to a fairly broad construction. Also held infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit to enjoin alleged infringement of patent and for an accounting.

Edward S. Beach, for complainant. Stephen J. Cox, for defendant.

RAY, District Judge. The patent in suit, and alleged to have been infringed, was issued March 13, 1906, to Ernest Leslie Ransome, on application filed April 1, 1902, for concrete-mixing machinery, and is numbered 814,803. Claims 2, 3, 5, and 7 are in issue, and read as follows:

"(2) A mixer having a revoluble drum adapted to receive material at one end and discharge it at the other, the drum having a centrally-orificed head at the discharge end, a shelf secured within the drum and extending along the inner side thereof diagonally with respect to the axis of the drum, the discharge end of the shelf extending to the head at the discharge end of the drum and forming a pocket in connection therewith, an additional shelf secured within the drum and extending diagonally of the axis thereof across the first-named shelf, and a means extending through the said orifice in the discharge head of the drum, for carrying off the material from the drum.

"(3) A mixing apparatus having a revoluble drum, adapted to receive the material at one end and discharge it at the other end, a lifting shelf secured to the drum against the inner side thereof, the shelf extending diagonally with respect to the axis of the drum for the major portion of the length of the shelf, and said major portion of the length of the shelf, and said major portion of the length of the shelf being relatively straight, and the shelf terminating at the discharge end of the drum in an offset portion, the concave side of which faces the direction of revolution of the drum, whereby to form a lifting pocket. * *

"(5) A mixing apparatus having a revoluble drum adapted to receive the material at one end and discharge it at the other end, a shelf secured in the drum against the inner side thereof, the shelf extending diagonally with respect to the axis of the drum for the major portion of the length of the shelf, and the shelf terminating at the discharge end of the drum in an offset portion, the concave side of which faces the direction of revolution of the drum, whereby to form a pocket, and an additional shelf secured in the

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

drum and extending diagonally of the axis thereof across the first-named shelf. * * *

"(7) A machine of the class described, having a revoluble hollow member provided at its discharge end with a head, a plurality of shelves secured to the inside of the member and having offset ends disposed relatively to said head to form a series of lifting pockets adjacent to the discharge end of the revoluble member, and other shelves extending across the first-named shelves."

This is a batch mixer. The inventor in his specifications, says:

"My invention relates to that type of mixers known as 'batch mixers,' in which the material to be mixed is placed into the mixer, a batch or charge at a time, and is in like manner discharged when mixed."

Those who know the character of concrete and its composition, gravel, sand, cement, and moisture, understand the necessity of a quick and thorough mixing and placing of the concrete when so mixed for use. The materials mentioned must not only be put together, but thoroughly intermixed quickly, and then quickly placed in the position for hardening. This batch mixer, in claim 2, calls for the following combination: (1) A revoluble drum having an aperture on the one end for receiving the material after a rough mixing or intermingling, and another aperture on the other or opposite end for discharging it after the real mixing process is completed; (2) this drum has a centrally-orificed head at the discharge end; (3) a shelf secured within the drum and extending along the inner side thereof diagonally, with respect to the axis of the drum, the discharge end of which shelf extends to the head at the discharge end of the drum, and, in connection therewith, forms a pocket; (4) an additional shelf secured within the drum and extending diagonally of the axis thereof across the first-named shelf, and (5) a means extending through the said orifice in the discharge head of the drum for carrying the material from the drum when mixed.

In claim 3 we have: (1) The mixing apparatus, having a revoluble drum adapted to receive the material at one end and discharge it at the other; (2) a lifting shelf secured to the drum against the inner side thereof, and which shelf extends diagonally with respect to the axis of the drum for the major portion of the length of such shelf, such major portion being relatively straight; and (3) said shelf terminating at the discharge end of the drum in an offset portion, the concave side of which offset portion faces the direction of the revolution of the drum whereby to form a lifting pocket.

Claim 5 has the mixing apparatus having the revoluble drum adapted to receive the material at one end and discharge it at the other, which means there is an aperture in each end of the drum; (2) a shelf secured in the drum against the inner side thereof, which shelf extends diagonally with respect to the axis of the drum for the major portion of the length of the shelf and then terminates at the discharge end of the drum in an offset portion, the concave side of which faces the direction of the revolution of the drum, whereby to form a pocket, and a second or additional shelf secured in the drum and extending diagonally of the axis thereof across the first-named shelf.

Claim 7 calls for a machine of the class described, having (1) a revoluble hollow member, provided at its discharge and with a head;

(2) a plurality of shelves secured to the inside of the member and the shelves, having offset ends, disposed relatively to said head to form a series of lifting pockets adjacent to the discharge end of the revoluble member; and (3) other shelves extending across the first-named shelves.

Claim 2 has two shelves, crossing each other; claim 3 only one, but this has an offset portion; claim 5 has two shelves crossing each other; and claim 7 has a plurality of shelves with offset portion and other shelves extending across them. In each we have a revoluble drum or hollow member with opposite heads, each of which has openings, the openings being substantially opposite each other, one of which is for receiving, and the other for discharging, the concrete. In each we have a shelf, or a series of shelves, diagonally arranged, with refererence to the axis of the drum, fastened to the heads and extending along the inner side of the drum from head to head on its periphery, and in all but claim 3 we have a shelf or series of shelves set diagonally with reference to the axis and set reversely to the first-mentioned shelves. These are set on the upper or inner edges of the first shelves or so as to rest thereon and extend part way from head to head; that is, part way from the discharge head to the receiving head. The "means" extending through the orifice in the discharge head of the drum is for carrying off the mixed concrete, and consists of a short discharge chute pivotally mounted at the discharge end of the drum so that its upper end may be inserted into the drum through the opening mentioned and receive the mixed concrete as it falls from the pockets when they reach the upper part of the drum on the discharge side, and, in consequence of being bottom side up, are in a dumping position. The discharge of thoroughly mixed concrete is continuous after the chute is inserted, if the drum is continued in motion. When the mixed batch is fully discharged, the chute is turned in its pivot so that it no longer enters the drum. Then another batch is put in at the receiving end of the drum, and the mixing of that batch proceeds until ready to be discharged, when the chute is turned into position and the revolution of the drum continuing the discharge process commences and continues until the drum is empty and ready for another batch.

The mixing process within the drum, including the transfer of the mixed material from one side to the other, is substantially as follows: The materials forming the concrete are heavy, and, as the shelf or shelves next the periphery of the drum is each set diagonally with reference to its axis, the moment the drum begins to revolve the unmixed concrete is carried forward and upward, and slides on the diagonally set shelf from the receiving end towards the discharge end and into the pockets, so far as their capacity will permit. So long as the concrete is being carried forward and upward, these act as lifting pockets, as do the first set of shelves or the shelf first mentioned. At a certain height it is evident the concrete materials will begin to fall out of the pockets and off the shelf or shelves, and mix or mingle with that below, and that the same pockets, the lifting pockets, then become discharging pockets. As the tendency of the

concrete actually carried in the pockets and on the shelf or shelves next the periphery is all the time to slide towards the discharge end, it is evident that the whole mass will eventually be carried to that end and dropped, and, when the chute is in position, caught by the chute and discharged from the drum. This operation of discharging does not begin, however, until the whole batch is thoroughly mixed. the drum revolves, the whole mass is carried forward and lifted to an extent, but that in position in front of the shelf or shelves is lifted and carried forward and upward, moving towards the opposite end of the drum until it falls off the shelves or out of the pockets, depending on where it is, and as it falls upon that below, and even as it falls, the materials being of a different specific gravity, the mixing operation is constantly going on. Now, by adding the second shelf or series of shelves above the first and extending them part way across the drum, from end to end, and diagonally across the first shelf as mentioned, the falling materials are caught and carried in part and in part thrown and scattered, the tendency being to move them back towards the receiving end of the drum; but these second shelves or this second shelf only extend part way, as it is desirable to prevent clogging, and especially to have the thoroughly mixed ingredients carried into the lifting and discharging pockets so as to be discharged through the chute after that operation commences. Hence the inner shelf or shelves must not or should not extend to the receiving end of the The further the mixing process proceeds, the more plastic and slippery the whole mass becomes. It is perhaps unnecessary to mention that mixed concrete or moistened cement hardens quickly. and that it is essential that the shelves and pockets be so constructed and arranged that no part of the mixed concrete shall remain in the drum. Hence the absence of retaining nooks and corners is desirable and essential to a successful mixer. Every mason knows this, and is careful to prevent accumulations in the corners of the ordinary stationary mixing boxes. It is also desirable that each end of the drum have a solid head sufficient to retain the concrete while the mixing is going on, and still have openings for receiving unmixed batches and discharging the mixed ones. It is also essential or desirable that the pockets be next the discharge end and easily reached for cleaning. That this device is easily handled and efficient in operation cannot be questioned. The patent or application for the patent was thoroughly considered in the Patent Office, as appears from the file wrapper in The defendant claims that complainant is limited by the action of the Patent Office to the details of construction shown, and that, so limited, defendant does not infringe; also that the claims of the patent in suit are clearly anticipated by the prior art. Some 19 patents are cited to show the prior art. The Ransome patents of 1885, No. 322,006, and of 1889, No. 410,292, and Hotchkiss patent of 1890, No. 441,563, and Smith patent of 1902, No. 690,783, are all for concrete mixers, but the Hotchkiss and Smith patents are for continuous mixers; that is, the materials are continuously fed into the one end of the mixer and continuously discharged mixed at the other end. The other patents relate to coffee and tea mixers, rotary sieves, carrying devices, etc., and would be utterly useless and inoperative as concrete mixers if enlarged and made stronger. A revoluble drum with some sort of lifting shelves and short shelves so formed and attached as to form pockets were not new in the art. See Fig. 1, patent No. 322,006, of July 14, 1885, to E. L. Ransome. Herehe has what he calls directing guides or flanges, and also oscillating or adjustable lifting flanges used solely for discharging the material. He says, among other things:

"My invention relates to that class of machines in which a rotating casing is employed to receive and mix the materials to form concrete; and my invention consists in a hollow rotating drum provided with side apertures, and having upon the inner surface of its periphery peculiar directing guides or flanges and oscillating or adjustable shelves or flanges for the purpose of lifting the materials as the drum revolves. Extending transversely and at an inclination through the drum is a discharge chute or spout supported independently of the drum by suitable standards or hangers, and provided with a swinging end gate. A small and independent hopper or chute and a platform in connection with the hopper are employed to facilitate the feed to the drum. Secured to and under the transverse spout is a pipe, perforated throughout its length, whereby water is introduced within the drum.

"The object of my invention is to provide a simple and effective machine for mixing concrete. * * *

"Upon the inner surface of the periphery of the drum are secured the angling or approximately V-shaped directing-flanges F. These in cross-section have the shape of a right-angle triangle approximately, the hypotenuse-facing the direction of rotation of the drum. These flanges may be arranged in any suitable series with relation to one another, the principle idea, however, being that the apex of one flange should be adjacent to the opposite flange; that is to say, that each pair of flanges or each set should be bent in opposite directions. I prefer the arrangement shown in the drawings, where the main flanges are bent in opposite directions, the spaces behind and between them being filled in by smaller angular flanges, also bent in opposite directions. The purpose of this arrangement I shall presently describe.

"G are the lifting shelves or flanges. These consist of oblong plates mounted upon oscillating shafts, g, journaled transversely in the drum, and adapted to be moved by means of a handle-lever, g', on their outer ends, which engages with a rack, g², on the outer surface of the side of the drum. By moving the handle, g', the flanges may be made to lie down close to the surface of the drum, or they may be moved to extend inwardly at a suitable angle to enable them to lift the material. There may be any number of these lifting-flanges within the drum, though I think it best to have about four. H is a small feed chute or hopper supported independently of the drum, and extending slightly within it, and h is a platform upon which a wheelbarrow containing the material to be mixed can be pushed, whereby its load can be dumped into the

directing-chute H, from which it is delivered to the drum.

"The operation of the machine is as follows: The drum is rotated by the mechanism described. The material to be mixed is delivered to the drum through the chute H, and water is also delivered through the perforated pipe E. The lifting-flanges G are turned to lie as flat as possible, so that they do not interfere with the mixing process, their function being merely one of discharging into the chute D. The material meeting the directing guides or flanges (the sloping sides of which lie in the direction of revolution, thereby avoiding any lifting function) is first directed to the center and then toward the sides of the drum, according as it meets the oppositely-bent flanges. In this way the various materials are thoroughly mingled, no one being allowed to keep to itself. When they have become thoroughly mixed, the material is picked up by the lifting-flanges G, which are turned inwardly to the proper angle. Small quantities are lifted by these flanges, and are discharged above into the spout D, down which the material runs or passes by its own gravity, and is discharged through the swinging gate, d'."

It is self-evident that this is not the concrete mixing machine of the patent in suit, although it has some of the elements, and that the operation is quite different. There was room for much improvement, as is seen by comparing this patent of 1885 with the one now in question.

In Ransome's patent of September 3, 1889, No. 410,292, he says:

"My invention relates to improvements in that class of machines in which a rotating case is employed to receive and mix the material to form concrete, and it is especially applicable to a machine patented to me July 14, 1885, in which a series of lifting shelves or flanges are fitted within the rotary casing of the mixer.

"My invention consists of an automatically-operating device by which the shelves or flanges may be turned upon their pivot or fulcrum pins, so as to either lie flat or stand, so as to discharge the material when properly mixed. * * *

"A is a hollow drum having openings at each end through which the material is introduced to and discharged from the annular space around the circumference within which the mixing is carried on. Angularly-placed flanges are fitted within the drum for the purpose of mixing the material, and a discharge-chute is supported so as to extend through the drum in such a manner as to receive and discharge the material when properly mixed. The material is lifted to a point where it can be dropped into this chute by means of the shelves or flanges G, which consist of oblong plates mounted upon shafts H, about which they may be turned, so as to lie in a position in which they will not lift the material until it has been properly mixed within the drum. They may then be turned to stand at such an angle that they will lift the material and carry it up to a point above the discharge-chute into which they will drop it.

"Upon the end of each of the shafts H is fixed a double-lever arm I, so that by turning this arm the shaft and the lifting-plate are moved as above described. Upon each end of this lever-arm I are pins J, which project inwardly or toward the side or flange of the drum A. Upon this side of the drum are fixed the two springs K, having the holes L made in them, as shown. These springs have one end each bolted or fixed to the side of the drum, and they are made so as to incline outwardly from the point where they are fixed, and shoulders M are formed in the springs, where they are again bent abruptly inward toward the side of the casing. These shoulders insure that the springs will be depressed, so as to clear the pins before the levers are moved. From this point the ends of the springs extend a short distance beneath the lever-arm I, and their elasticity causes them to be pressed against the inner faces of the levers. It will be seen that when the lever I of either of the lifting shelves or flanges is turned so that one of its pins J will drop into the hole L in the corresponding spring, which is beneath that end of the lever, the lifting-flange and lever will be rigidly held in that position until it be released from the spring.

"The operation will then be as follows: The lifting flanges or shelves lying flat or in a position not to lift the material which is being mixed within the drum, the pin J at one end of the lever I will be engaged by the hole L in the corresponding spring K, and will thus be locked in that position, where it will remain as long as may be desired. Whenever it is desired to turn the flange into a position where it will lift the material so as to drop it into the discharge-spout, the pin Q will be advanced by moving the lever O, and as the drum A continues to revolve this pin will engage the inclined portion of the spring K and gradually force the spring inward until the pin J is released from the hole L. The end of the pin Q, then passing over the shoulder or offset M, strikes the end of the arm I and turns this arm, and with it the shaft H and the lifting flange or shelf within the drum, to a position which will cause it to act to lift the material within the drum. The pin J, upon the opposite end of the lever I, will then engage with the hole L upon the opposite spring K, and will hold the flange in that position as long as may be desired. When it is desired to release the lifting-flange and allow it to be turned

into the position in which it will not lift, the lever O is moved so as to advance the pin P, and this, following the inclination of the other spring K, will force that spring inward until it is clear of the pin J of the lever I at that end. The continued movement of the drum A brings the pin into contact with that end of the lever I, thus turning it in the opposite direction until it is again locked with the other spring, as previously described. At the instant when this locking takes place the lever I is turned so far out of line as to allow the pin P or Q to pass by its end without further action upon it. The shoulders or offsets M upon the springs K are deeper than the length of the pins J, so that as they pass beneath the pin P or Q they will be depressed so far that the pins J will be entirely released from the locking-holes L before the end of the lever I is engaged and moved by the pin P or Q."

It is self-evident that this is not the device of the patent in suit.

Turning to the claims of the prior Ransome patent, it is self-evident that they differ from and do not cover the combination of the claims of the patent in suit.

Turning now to the Hotchkiss patent of November 25, 1890, No. 441,563, we find a portable frame carrying a pair of inclined rotary cylinders, elevators and hoppers for conducting the different materials which form the concrete to the entrance of the cylinders, the water pipe leading into and adapted to discharge water into one of the cylinders, and an engine and boiler for operating and propelling the machine.

This complex machine has two inclined mixing cylinders provided with longitudinal spiral flanges fixed to their inner wall surface and the patentee says:

"The spiral flanges of the cylinders are for the purpose of assisting in the mixing by carrying the materials partially about with them as they rotate with the cylinders, and when passing the center line, on the horizontal, permit it to fall, and thereby constantly keep taking the material nearest the bottom and turning it over to the top, thus most thoroughly mixing it. The action of the cylinders is the same without the flanges, but the mixing is more rapid and thorough with them. The object in arranging the said flanges spirally is so that their rearwardly-inclining surfaces, when in operation, will assist in forcing the material rearward, and also to equalize the rising and falling of the material during the mixing, for should they be arranged parallel they would gather a like quantity throughout their length, and when brought to a position at or above a horizontal plane with the axis it would all drop off at once and thus cause an intermittent jerking motion, which is wholly overcome by the arrangement shown and described."

This, in connection with the claims themselves, demonstrates that Hotchkiss neither shows, nor describes, nor claims the device of the patent in suit.

Turning to the Smith patent of January 7, 1902, No. 690,783, we find a concrete mixing machine of which the patentee says:

"The primary object of the invention is to provide a machine not only capable of mixing dry materials with great rapidity and thoroughness, but also of mingling dry and liquid materials to any consistency, or mixing liquids and discharging any desired quantity while the agitating process is going on.

"With the above primary object and other incidental objects in view, the invention consists of the devices and parts or their equivalents, as hereinafter set forth."

Of the drum and blades, the patentee says:

"Within each cone-section of the drum are a series of mixing-blades. In order to make the action of these blades clear, reference is hereby made

particularly to Fig. 4. The blades are shown as divided into sets; but it will be understood that this is not absolutely essential, being only preferably adopt ed for convenience in construction. Each blade of each set may be flat, although, if preferred, a slight spiral formation may be given thereto. At all events, the three blades shown as composing each set should be so arranged that if composed of a single continuous blade said continuous blade would have a spiral formation. The action of the drum is to give a rollingover movement to the material, and the blades deflect from the ends toward and past the middle, the rolling-over and alternating transverse motion being simultaneous and effecting a thorough commingling of the materials without spilling from the ends. There may be as many blades provided in each set as desired; but I prefer to employ three blades to each set, or each socalled 'set' of blades could be a single continuous blade, as hereinbefore stated. The blades in two sets, as will be seen by reference to Fig. 4, are correspondingly slanted, the blades in one of these sets being indicated by the numeral 27, and the correspondingly slanted blades in the other set by the numeral 27'. There are also shown in Fig. 4 two other sets of blades which are correspondingly slanted. The blades in one of these sets are indicated by the numerals 28, and the blades in the corresponding set by the numerals 28', or, in case each so-called 'set' of blades is a continuous blade, then there will be two of said blades which will correspondingly slant in one direction and two other blades which will correspondingly slant in the opposite direction. All the blades are at the same angle, or approximately so, to the element of the cone which passes through the centers or approximately the centers of the blades. It will also be observed that, as shown in the drawings, when there is a plurality of blades in a set, each successive blade is a slight distance from the preceding blade and begins where the preceding blade leaves off, thereby forming a step by step arrangement. It will further be observed that the inner end blades of the set or the inner end of a blade, as the case may be, passes beyond the middle of the drum, whereby the mixture is thrown back and forth.

"In the operation of the machine the different ingredients of concrete such as sand, cement, stone, and water—or the different ingredients of any other material to be formed, are fed into the drum through the feed-trough 26, and said ingredients settle in the bottom of the drum. These materials may be poured in either while the engine mechanism is stationary or is running. The engine mechanism of course will, through the connection herein shown and described, cause the drum to be rotated. If, for instance, the drum is rotating in the direction of the arrow, Fig. 4, the blades of a set as they successively pass through the material, or a single blade, as the case may be, scoop or lift up a quantity thereon. It will be supposed that the blades 28 are passing through the material. As these blades ascend, the material scooped up thereby is constantly slipping thereoff from one of said blades to the other, and after it passes off of the last blade of said set it thence flows onto the blades 27, thence from said blades 27 to the blades 28', and from blades 28' to blades 27', it being understood that the material at one period of the revolution of the drum will go through the movement just described and at other periods of the revolution will go through exactly the reverse movement as the different blades of the sets are brought into engagement with the material in the drum, so that the result is that with the continuous revolution of the drum the material is being constantly thrown from one cone-section of the drum to the other and back again, and at the same time, owing to the inclination of the different blades, the material is thrown at an angle toward the center of the drum, thereby resulting in a most thorough commingling of the ingredients, whereby the material is mixed into a homogeneous state before its discharge."

He claims a revoluble mixing drum with openings and spirally-arranged mixing blades disposed in alternate sets to deflect the material or contents from the ends toward and across the central plane alternately, and internal blades are arranged to feed from the ends toward the middle of the drum, the blades of each set stepped in a general

spiral. This patent has 47 claims, and a reading of them is conclusive in connection with the specifications that the Smith patent does not anticipate the patent in suit. This exhausts the prior art in concrete-mixing machines, and we find nothing in that art so simple, effective, and satisfactory as is the Ransome patent of 1906.

It is, however, urged that machines for mixing tea and roasting coffee are in an analogous art, and that the patent to Burns, dated November 13, 1900, No. 661,847, is an anticipation, in that it has special inclined shelves inside a rotating cylinder which aid to lift and scatter and mix the tea. To illustrate, claim 1 of that patent reads as follows:

"(1) A mixer or blender comprising a revolving drum provided with lifting blades, and a chute pivotally mounted on a stationary part independent of said drum and adapted to be moved to the outside or to the inside of said drum, to act either as an inlet or as an outlet, substantially as described."

These lifting blades are somewhat similar to those of the patent in suit, but they differ materially, and, if substituted in complainant's mixer, would fail to do the work properly or efficiently. However, I see no particular analogy between an apparatus for mixing tea and a machine for efficiently mixing concrete. At best, the Burns patent is suggestive merely, and not an anticipation.

In the Bartlett tea-mixer patent, No. 610,018, of August 30, 1898, the drum has internally projecting pallets at intervals around its circumference, each pallet extending from end to end, and each is bent at an intermediate point of its length to a wide-angled V form. It is evident that should we enlarge and strengthen one of these tea mixers, the concrete would be carried to the center of the periphery of the drum and there concentrated, and that the mixing operation would be imperfect and the discharge of the mixed concrete difficult. Ransome saw and appreciated the difficulty attending the use of the mixing devices shown in the prior art when applied to concrete mixing, and he set himself to the work of obviating or overcoming these difficulties. That he succeeded is beyond question, and I think that the device of the patent in suit discloses patentable invention of quite a high order. He certainly added something to the sum of human knowledge, and made the mixing of concrete cheaper, quicker, and much more effective. I think what he did was beyond the sphere of the work of the mechanic skilled in the art. I do not find that he was so limited by the action of the Patent Office that he is confined to the precise device or devices described and illustrated in the patent in suit.

Coming to the question of infringement, it seems to me, without going into the details of defendant's construction, that the defendant infringes. There is some change in the arrangement of the second set of shelves, but this change is so slight and immaterial that we have substantially the same action in defendant's machine that we find in the complainant's. It is obvious, I think, that the patent in suit for the first time discloses a device in the concrete-mixing art which by the same set of blades mixes and delivers the concrete. It is not necessary to stop the machine, or even slacken its movement between the mixing and the discharge operations, as the chute may be turned

into position while the drum is in full motion, and so soon as it is in position the discharge commences, and ends only with the exhaustion of the contents of the drum. There is no change or manipulation of the shelves, as they are fixed and stationary in the drum. The machine is not cumbersome or complex or liable to get out of repair, and it may be operated by a man able to handle a shovel and turn a chute on a pivot. The first machine constructed under this patent was made in 1901, and there have been large sales of the machine ever since, and they have been satisfactory to the users. A distinguishing feature of the patent in suit is the construction and arrangement of the shelves with offset portion forming pockets and the supplemental shelves, and this has been appropriated by the defendant. Infringement is not avoided by mere changes in construction when the same mode of operation is retained and the same result is attained.

After a careful consideration of all the evidence in the case, and a weighing of the conflicting opinions expressed, and a careful examination of the mixing machines of the prior art, I am satisfied that the patent in suit is valid, and that the defendant infringes.

There will be a decree accordingly, and for an accounting, with

costs.

KARFIOL v. ROTHNER et al.

(Circuit Court, E. D. New York. November 30, 1908.)

1. Patents (§ 328*)—Validity and Inflingement—Process for Making Lace Paper.

The Karfiol patent, No. 835,189, for a process for making lace paper by indenting the paper in the desired pattern and then grinding off the indentations, instead of cutting out the pattern, was not anticipated, and discloses novelty and invention; also held valid as against the defense of prior use and infringed. Patent No. 835,190, to the same patentee, for a multiple machine for practicing such process, held not infringed. Patent No. 835,283, for a single or unit machine, also held infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 52*)-PRIOR USE.

The fact that the method of a process patent had been previously used by another by chance, and without appreciating its merit or value, does not invalidate the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 70; Dec. Dig. § 52.*]

In Equity. On final hearing. See, also, 151 Fed. 777, 779.

James L. Steuart (Steuart & Steuart and Daniel W. Troy, of counsel), for complainant.

William Reiss (Reiss & Reiss, of counsel), for defendants.

CHATFIELD, District Judge. The complainant is the patentee of a machine and a method for the making of lace paper; that is, paper containing perforations in an ornamental design, more or less resembling lace or embroidery. The particular patents in question, Nos.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

835,189, 835,190, and 835,283, were issued upon the 6th day of November 1906, upon applications filed, respectively, July 5 and July 17, 1906, and July 5, 1906.

The first patent relates to the method of perforating the paper, and in general describes a change from the ideas of cutting perforations or holes with the aid of some tool and a subsequent brushing away of the severed particles. In Karfiol's specifications he claims that he indents the paper where the perforations are desired in the pattern, and that he then, according to claims 3 and 6, grinds or abrades "the indentations until the same are reduced to a plane flush with the surface of the sheet, while maintaining the latter in resilient engagement with the grinding tool." And in claim 4 he states that he cuts the "indentations from the material while maintaining the latter in resilient engagement with the cutting tool." The second patent relates to an improvement in perforating machines, specially adapted to the manufacture of lace paper, and in general relates to the mounting of several single machines or cutting elements upon one shaft, or in such a way as to be driven collectively. The third patent covers the construction of a single machine to carry out the method of the first patent, and is repeated in a multiple construction in the second patent described.

It may be assumed that the method described in the first patent and the form of construction of the third patent are applied in multiple form in the machine described in the second patent, and that any question of infringement by the defendants must be determined rather upon the validity of the inventions relating to method and the form of a single or unit machine; for there seems to be no evidence that the defendants are infringing, in the sense of making use of a multiple arrangement of machinery, as distinguished from their use of a single machine. It appears from the testimony that for some time prior to the filing of an application for this patent the complainant attempted to enjoin secrecy upon his employes not to publish his methods of operation, nor to give to the world any improvements which he may have devised. The defendants have disputed the allegations of the complaint that the improvements patented by complainant had not been in public use or on sale for more than two years before his application for a patent, nor in public use or on sale in this country before the invention or discovery of the same by the complainant, and for more than two years prior to the date of the application. Upon this rests substantially the defense.

But this issue, as well as all others in the case, depends upon the determination of the one question as to what use of certain elements was made by the complainant, both in his business and as described in his patent, and whether the use made of similar elements by other people in the same business is identical with that which the complainant has attempted to patent. In fact, the question as to whether the method claimed in the patent can be used or will produce the results claimed, except as the machinery is used in the old and well-known form, is a part of the issue that must be determined. The entire case depends upon this one question. Use has been shown by various witnesses of different parts of the machine constructed by Karfiol and of

some points of the method of operation for which the patent was granted. In fact, the original machines upon which he did his experimenting, and out of the use of which his patent grew, after one Erickson had been called upon to make mechanical changes in the arrangement of the parts of the machine, were built by one of the witnesses in the suit, who testified that the machines which he built, and which the complainant used, could not be operated in any way other than for the purposes long known in the trade, and for the accomplishment of which these very machines were originally built by that witness a number of years before.

A brief description of the parts of the machine and of their purpose must therefore be considered. As originally constructed the machine-drew paper from a roll. This paper passed between two cylindrical rollers, one of which had upon its face a series of cutting dies corresponding to the pattern desired. The other of these two rolls was made of some material, such as lead or composition, which received the impact of the cutting surfaces as they penetrated the paper when passed between. This paper, after being cut in the design of the dies, was carried over a revolving brush of some nature, which removed the cut particles, it having been found that these particles did not fall out, even though entirely severed, and the perforated paper was then roll-

ed upon still another roller, called a "take-up roll."

In the method patented by Karfiol the paper is drawn, as in the other processes, from the roll, and passed between two cylindrical rollers; but these rollers are so adjusted and so operated that the paper is indented or embossed, rather than being cut. The roller upon which the die or pattern exists is not pressed against the corresponding roll with sufficient force to perforate or cut the paper. In fact, this corresponding or opposing roll is described in the patent as having cut into its face the counterpart of the design of the roll upon which the pattern is carried. It is called a "matrix roll," and is said to be of softer material, and to receive its design by rolling engagement before the insertion of the paper. After this indenting and embossing of the paper, the paper is carried, by a mechanical and resilient pressure device, over an emery or other grinding tool, which revolves with sufficient rapidity to grind off the protuberances flush with the surface of the paper. From the grinding roll the finished paper passes to a take-up roll, as in the old machine. Karfiol in his specifications has claimed the right to remove the indentations by a cutting tool, such as a knife edge, or in any other way; but inasmuch as he describes his process to be that of raising indentations, rather than cutting a pattern with a die, and as the object he claims may be effected better by grinding than by cutting, he states that he prefers to grind the pattern, so that the perforations shall be flush with the face of the paper, and this is apparently the method which he has used in practice, and which the defendants have used in their alleged infringement.

As has been said, the entire defense is based upon the contention put forth upon the trial and the argument, rather than stated in the pleadings, that the complainant does not use any new method, and has made no patentable invention. The defendants, in effect, charge that Karfiol could not do successfully and commercially what he obtained a patent for, and the defendants claim that they do not infringe, inasmuch as they say that they, as well as the complainant, and the various paper manufacturers referred to in the testimony, are all using the old cutting method, rather than the protuberances and grinding method described in the patent. To support this some testimony was given by one of the manufacturers having a number of years before tried an emery roll for the purpose of brushing out the particles from the cut or perforated pattern. His use of an emery roll for that purpose was discarded, and his testimony does not show that he ever attempted it for the purpose or in the way in which the complainant states in his patent that he intends to have the emery or other grinder used.

The complainant, his lay witnesses, and his expert, all agree that the machines operated since the so-called invention, and which were in use at the time of the application for the patent, perform the functions described in the patent. These witnesses all agree that Karfiol's machines did not cut or perforate the paper. The testimony in the entire case also seems to show satisfactorily that the defendants were making use of the same methods as those which Karfiol employed under his patent, and Karfiol would seem to be entitled to an injunction restraining them from such use. The method covered by Karfiol's patent, and the change from the former ways of manufacturing, are sufficiently novel to be patentable, and as to that particular process no prior use nor anticipatory knowledge seems to have been satisfactorily shown.

The application of the idea is much like that held patentable in the case of Hillard v. Fisher Book Typewriter Company and Elliott-Fisher Company, 151 Fed. 34, affirmed by the Circuit Court of Appeals on January 7, 1908, 159 Fed. 439, 86 C. C. A. 469. If by chance any manufacturer of lace paper had accomplished the result in the way described in Karfiol's patent, it would seem to have been done inadvertently, and even at the present time not to have been appreciated as being a departure from the original and old methods of manufacture. This would not interfere with the patentability of Karfiol's idea, nor the validity of his patent. Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279.

If the defendants are making use of the old idea and the old methods, they will be free from punishment for further infringement. If they have or shall make use of the idea and methods covered by Karfiol's patent, they should be enjoined. The testimony shows that for a time at least they did make use of Karfiol's methods, and Karfiol, therefore, may have a decree establishing the validity of his patent, together with an injunction against further infringement, and with an accounting to determine damage for use already made by the defendants of the complainant's method and process.

UNDERWOOD TYPEWRITER CO. v. ELLIOTT-FISHER CO.

(Circuit Court, S. D. New York. December 21, 1908.)

1. PATENTS (§ 65*) — ANTICIPATION — PRIOR PATENT OR PUBLICATION — REQUISITES.

To constitute an anticipation, the prior patent or publication relied upon must, by descriptive words or drawings, or by both, contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art to make the article or practice the invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 80; Dec. Dig. § 65.*]

2. Patents (§ 62*)-Suit for Infringement-Proof of Anticipation.

Anticipation must be proved by evidence so cogent as to leave no reasonable doubt in the mind of the court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. § 62.*]

3. Patents (§ 328*)-Infringement-Tabulating Attachment for Typewrit-

The Gathright patent No. 436,916, for a tabulating attachment for typewriters, *held* not anticipated, valid, and infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit for alleged infringement of United States letters patent No. 436,916, to Josiah B. Gathright, relating to tabulating attachments for typewriters.

See, also, 156 Fed. 588.

Briesen & Knauth (Eugene Eble, of counsel), for complainant. Robert Fletcher Rogers, for defendant.

RAY, District Judge. The bill of complaint charges infringement of claims 4 and 5 of United States letters patent No. 436,916, to Josiah B. Gathright, dated September 23, 1890, applied for January 15, 1889. The claims relate to tabulating apparatus attachments and read as follows:

"(4) The combination of a stop-rod freely hung to the machine, a stop-lug thereon, and a supplemental spacing-key hung in the machine and adapted to move the said stop-lug into the path of a portion of the feed-carriage, and connection between the stop-rod and rack-bar, substantially as shown and described.

"(5) In a typewriter, the combination of the usual letter-keys and one or more spacing-keys having mechanism in common for permitting the carriage to move a definite space at each stroke, and a supplemental spacing or skipping key fitted to permit the carriage to move any desired number of said spaces, according to adjustment, said key provided with independent mechanism for releasing the carriage from the detent, and mechanism for simultaneously interposing an adjustable stop, substantially as shown and described."

In the specifications the patentee says:

"This invention relates to that class of typewriting machines which are provided with feed-racks, or equivalent means for moving a carriage to space between the letters upon each line—such, for example, as the Remington typewriter, and the following description is made with reference to that machine.

"Heretofore, in producing writings in which some of the lines are not filled, or in which open spaces occur, in order to bring certain words or figures into accurate vertical columns—such writings, for example, as bills of goods, in-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

voices, statements of accounts, etc.—It has been necessary for the operator to pass the carriage over blank spaces either by repeatedly striking a spacing-key which feeds the carriage the space of only one letter at a time, or by unlatching the carriage and sliding it to the desired point by means of a hand-lever. Both of these methods are tedious, and they keep the mind of the operator under constant tension to remember the point where the carriage is to be stopped to register with the column, as desired, and the practice is common among operators of striking the first figure lightly and then turning the carriage up to see whether that figure registers properly before printing it in full. This method evidently requires many experiments at the expense of time, and tends greatly to perplex the operator.

"The object of my invention is to obviate these objections by providing means for automatically locating with the typewriter one or more columns of words or figures, and of mechanically skipping any intervening space desired

to be left blank.

"To this end my invention consists in the construction and combination of parts forming a portion of a typewriting machine, as hereinafter described and claimed, reference being had to the accompanying drawings."

Then follows the description of the drawings, etc. The patent then says:

"By the words 'supplemental spacing-key' I mean a key like the key 18, which is exclusively devoted to the following duty, to wit: First, to disengage the carriage-rack from the detent, and to hold it disengaged until the carriage, traveling its usual path, has passed over a space including a number of letterspaces, which it was desirable to skip, to a stop whose location is adjustable, and was predetermined to fit said skipped space; and, second, to remove the said stop by the act of releasing the said spacing-key, thus permitting the carriage to resume service at the usual letter-spaces. Such a key I contrast with keys which allow the carriage to advance but one letter-space at a time; also with the common hand-lever, whereby the carriage may be raised from its usual path and be carried over any number of letter-spaces. I also contrast it with any key adapted by light pressure to advance the carriage a single letter-space, and by a heavier pressure to entirely release the carriage, so that it may travel over a number of letter-spaces to a stop. This latter key would be in constant danger of being overpressed, so that it would skip at the wrong time, thus keeping the operator's mind under constant tension to weigh the force of his stroke, which would defeat a prominent object of my invention. My supplemental spacing-key has only one service to perform. When it is pressed down in operation, it releases the carriage-detent and places an adjusted stop in the path of the carriage to arrest it at the desired point. On permitting the supplemental spacing-key to rise, it withdraws the stop from the path of the carriage, leaving it free to resume work, as usual."

The operation is then described, and then comes the following:

"It would require only ordinary mechanical skill to adapt my stop rod and lugs to any kind of a self-feeding typewriting machine by following out the principle of construction herein described. Therefore I deem it unnecessary to illustrate its application to the great variety of typewriting machines which have been invented.

"The great advantage of being able to skip a space of uncounted letters and stop the carriage again at a single stroke of a key, so as to accurately align figures or words in column, is too obvious to require further demonstration.

"Because of the necessary changes in details of construction that would naturally result from the adaptation of my invention to different styles of typewriting machines, I do not wish to confine my claims to the specific device herein described."

This patent has been the subject of considerable litigation and held valid by the Circuit Court of Appeals. Wagner Typewriter Co. v. Wyckoff Seamans & Benedict, 151 Fed. 585, 81 C. C. A. 129; and

see, also, Wagner Typewriter Co. v. American Writing Mach. Co., 151 Fed. 576, and 156 Fed. 588. The patents to Schulte, No. 450,592 to McCormack, No. 439,544, and to Yost, No. 401,990, have been fully considered on the question of anticipation and construction of the patent in suit, and I will not go into them in detail.

In addition to these patents, the defendant now urges the Raggett (English) patent, No. 1,864, granted to one John James Raggett May 6, 1880, as an anticipation. In the provisional specifications of that pat-

ent we find the following:

"I provide a device, termed the paper regulating stop, as follows: This is a stop fixed either on the traversing bars or in such a position that the carriage may come in contact therewith; it may consist of a ring made to slide on the traversing bar, and kept in position by a pin which shall fasten the ring to the traversing bar, and so stop the carriage at the required position to suit the size of the paper. I provide a device for regulating the spaces for £ s. d. and yds., ft., and ins., which may consist of a series of adjustable arms attached to a spindle, which arms stop the paper carriage at the required position."

And in the full specifications the following:

"I provide a device termed a paper regulating stop. This stop is fixed either on the traversing bar, or in such a position that the carriage may come in contact therewith; it may consist of a ring made to slide on the traversing bar, and kept in position upon the same by a pin, and so arranged as to stop the paper carriage at the required position to suit the size of the paper. I also provide a device for regulating the spaces for £ s. d., and yds., ft., and ins. This device may consist of an adjustable stop, as shown in side view in Fig. 46, or of a series of adjustable arms attached to a spindle, which arms stop the paper carriage in the required position."

What this device is, how it works, and what it accomplishes is a matter of conjecture. It is neither described nor illustrated. It points out nothing like the combination of the device of the patent in suit, which consists, in claim 4, of the combination of 1, a stop rod freely hung to the machine; 2, a stop lug on the stop rod; 3, a supplemental spacing-key hung in the machine which is adapted to move the stoplug into the path of a portion of the feeding carriage; and 4, connection between the stop-rod and rack-bar as shown and described. The mechanism and connections and supplemental spacing-key for making the device operative and of value are fully shown and described. Says the Gathright patent:

"10 represents the upper table of the fixed frame of the machine, and 11 a permanent vertical post thereof, to which I have pivoted an arm 12 by means

of a pivot-bolt 13.

"14 is my lift-slide and stop-rod, adjustable longitudinally of the machine through the upper portion of the arm 12, and 15 is a set-screw, whereby the rod may be firmly secured in the arm at any required point in the length of the rod. This rod is normally supported close beneath some cross portion—such as the arm 16 of bar 5—by means of the lever 17 and a connecting-rod 19. The lever 17 is pivoted to the frame of the machine at 20, and is provided with a supplemental spacing-key 18, whereby its forward end may be pressed down to raise its rear end and the rods 19 and 14, and with them to raise the rack-bar 5 out of engagement with the detent 6. That would permit the carriage to slide or be fed freely in the direction of the arrow 7.

"21 and 22 represent stop-lugs provided with set-screws, whereby they may be adjusted to any desired points upon the rod and there be fixed firmly to it, so that when the rod 14 is in service the lugs 21, 22, are in the path of arm

16 to stop it. There may be any desired number of these lugs, each serving as a shoulder upon the rod 14 to catch and stop the carriage from sliding farther. Then the key 18 being released, the rod 14 returns to its normal position, whereby the stopping-shoulder is removed, and the arm 16 is free to be fed along over the stop 21 by the regular operation of the machine.

"23 represents a spring attached to the post 11, and constantly bearing its free end against the arm 12 to insure the return of the whole skipping device to its normal position more quickly than it would do when actuated by

gravity alone."

I find no suggestion of this in the Raggett patent. With the Raggett patent before him, the mechanic skilled in the art would find nothing whatever to suggest the combination of Gathright except a lug on a rod or arms on a spindle which would stop the progress of the carriage when brought in contact with it or them. The defendant's experts have made certain drawings which they claim illustrate the Raggett device. The difficulty with these is that, in the light of the Raggett machine and the state of the art at that time, they are mostly, if not wholly, imaginary. In the light of the art as now developed they follow it, and evidently are based upon it. Raggett neither shows, nor describes, nor suggests what these experts illustrate as the Raggett invention. Raggett may have had some such device in mind, but he invented nothing of the kind, or if he did, so far as appears, he neither constructed it, had it constructed, nor described nor illustrated it. Whatever he had in mind, he left the world in substantially the same darkness that prevailed before, so far as this particular part of the art is concerned. The device of Raggett was neither a mechanical nor a commercial success. Clearly it was not a tabulating device.

It is well settled that to constitute anticipation the prior patent or publication relied upon must, by descriptive words or drawings, or by both, contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practice the invention. Also anticipations of patents must be proven by evidence so cogent as to leave no reasonable doubt in the mind of the court. Seymour v. Osborne, 11 Wall. 516, 555, 20 L. Ed. 33; Sewall v. Jones, 91 U. S. 171, 194, 196, 23 L. Ed. 275; Cohn v. U. S. C. Co., 93 U. S. 366, 370, 23 L. Ed. 907; Bates v. Coe, 98 U. S. 31, 44, 25 L. Ed. 68; Deering v. Winona, etc., 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153; Crown Cork & Seal Co. v. Standard Stopper Co. (C. C.) 136 Fed. 199. In this case it was held that-"a prior publication in a paper, patent, or otherwise will not negative the novelty of an invention unless it describes a complete and operative invention capable of being put into practical operation, or contains such a disclosure of the invention that any omission would ordinarily be supplied by one skilled in the art" (per Townsend, C. J.).

In American G. Co. v. Leeds (C. C.) 87 Fed. 873, 876, Judge Shipman said, in substance, that a court is not called upon to struggle to decipher an anticipation in the unfinished work and surmises of earlier students on the same subject, and I am of the opinion that a court is not justified in finding anticipation in an old and discarded device, the meaning of which is obscure and puzzles experts.

I have patiently read the evidence of the experts on the subject of this Raggett patent, as well as the Raggett specifications and claims. He evidently reversed the movement of his forced feed-carriage when writing figures. Just what he did or how he intended to operate when he used a "series of arms attached to a spindle," which arms stopped the paper carriage in "the required position," is a matter of conjecture, and I am unable to ascertain what the "required position" was. He gives no information on that subject. I cannot adopt the opinions of defendant's experts. And for a mechanic to say that he can base an opinion on the art as it existed when he was a boy, and not have that opinion affected by the art as it now exists, and which is far in advance of the old art, is to say that he has a mind capable of forgetting and ignoring all that is modern and really practical and must be impressed upon him, and only remembering that which is old and impracticable and of which he has no practical knowledge whatever

Entertaining these views, and having due regard to the opinion and holding of the Circuit Court of Appeals where the other alleged anticipatory patents were fully considered and to which reference has been made, I hold that the defense is not sustained; that the patent is valid, and has been infringed by defendant; but as the patent has expired no injunction can be granted, and there will be a decree for

the complainant for an accounting, with costs.

VICTOR TALKING MACH. CO. v. LEEDS & CATLIN CO.

(Circuit Court, N. D. New York. December 22, 1908.)

No. 2,208.

1. PATENTS (§ 328*)-INVENTION-SOUND RECORDS.

The Johnson patent No. 739,318, for a sound record of the disk type, having a tablet adapted to receive printed matter impressed in the material thereof, is not so clearly devoid of invention on its face as to justify its being so adjudged on demurrer to a bill for its infringement.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. Patents (§ 310*)—Suit for infringement—Requisites of Bill.

Under the weight of authority, a bill for infringement must allege the facts which are by statute made essential to the validity of the patent sued on, as that no application for a foreign patent for the invention was filed more than seven months before the filing of the application in this country, which would render the patent invalid under Rev. St. § 4887, as amended by Act March 3, 1897, c. 391, § 3, 29 Stat. 692 (U. S. Comp. St. 1901, p. 3382).

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

In Equity. Demurrer to bill of complaint for alleged infringement of United States letters patent No. 739,318, known as "Johnson Patent."

Stimson & Williams (Horace Pettit, of counsel), for complainant. Louis Hicks, for defendant.

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. The patent sued upon contains the following

"(1) A sound-record comprising a flat disk composed of a material which will soften under the application of heat, and having sound-waves impressed upon its surface, a thin tablet of a material which is adapted to receive and retain permanently printed matter, pressed into said disk when in a heated condition so as to be flush with the surface thereof.

"(2) A sound-record comprising a flat disk composed of a material which will soften under the application of heat, and having sound-waves impressed upon its surface, a thin tablet of fibrous material having a printed title thereon, pressed into said disk when in a heated condition so as to be flush

with the surface thereof.

"(3) A sound-record comprising a flat disk composed of material which will soften under the application of heat, having sound-waves impressed upon its surface, a centrally-disposed label pressed into said disk when in a heated semi-plastic condition, and secured to the record material by the adhesive properties of the record material when in the softened state, the said label being pressed flush with or below the surface of the record-tablet.

"(4) A sound-record comprising a flat disk composed of material which will soften under the application of heat, having sound-waves impressed upon its surface, a thin tablet of fibrous material pressed into said disk when in a heated semi-plastic condition, and secured to the record material by the adhesive properties of the record material, the said label being pressed flush

with or below the surface of the record-tablet."

It was granted September 22, 1903, on application filed August 8, 1900, and the claims are presumptively valid.

In addition to a detailed description of the alleged invention, the specifications say:

"My invention relates to certain improvements in sound-records, and particularly to the flat disk-record, such as are used on gramophones and other similar machines.

"The object of my invention is to provide a simple, inexpensive, and convenient means for marking records of this class in order that the title of the matter recorded on said record and the other matter usually engraved thereon

may be easily discerned.

"Heretofore it has been the practice to mark records of this class by engraving the necessary descriptive matter on the die from which the record is stamped or by etching the same upon the original record. This practice has been found to be quite expensive, inconvenient, and otherwise objectionable, and the records when so stamped are hardly legible on account of the color of the same, which is usually black or of a dark color and has to be held in a certain position, so that the light will properly fall upon the engraved matter before the same can be readily distinguished. My present invention is designed with a view of overcoming these objectionable features; and it consists in providing an inlaid tablet printed or marked with a color much lighter than that of the record adapted to the center of the said record, and having the descriptive matter printed thereon before the insertion of said tablet. * * *

"It is obvious that, by reason of the tablet being compressed into the record, the tablet or label is prevented from being defaced, and the printing or marks thereon are preserved from scratches and from being made illegible from contact with other objects.

"While I have illustrated the inlaid tablet as being circular, it will of course be understood that it might be rectangular or of any other suitable contour, and the edges of the same might be scalloped or notched in order to give it a more artistic appearance."

Two grounds of demurrer were urged on the argument: First, that the patent is invalid on its face for lack of invention; that by reason of matters of common knowledge and devices in common use, of which the court will take judicial notice, it appears from mere inspection of the letters patent that they are void for want of invention. Second, that it is not alleged in the bill that the alleged invention described and claimed "had not been patented in any country foreign to the United States on an application filed by said E. R. Johnson (the inventor), or his legal representatives or assigns, more than seven months prior to the filing of his application for said letters patent of the United States, or that, no application for a patent therefor had, more than seven months prior to the filing of said application for patent No. 739,318, been filed by him or his representatives or assigns in any country foreign to the United States."

I do not think this court can take judicial notice of the composition, form, etc. of all sound-records, and the mode and manner of impressing the sound-waves thereon; the usual mode of shaping and forming them and impressing thereon the sound-waves, and combining therewith a tablet having thereon printed matter giving necessary and valuable information to the owners and users of such record, or that there ever was such a combination or the mode and manner of impressing such information on such sound-records prior to the patent in suit and the cost of same, etc., except as shown in the specifications of the patent and decided cases. In fact, the patent itself alleges a new mode of combining this information with the sound-record itself, and says that this combination is more simple, less expensive, more convenient and useful, and that the information given by the printed matter is much more legible and easily read than the same information impressed on sound-records in the modes of the prior art. The claim is for a combination, not for a process, and I do not think it is self-evident that the claims fail to disclose patentable invention. If the conception was new, novel, useful, practicable, and has added something to the sum of human knowledge, made sound-records cheaper, better, more convenient for sale and use, shall it be said that patentable invention is not disclosed? Evidence of the state of the prior art and of analogous arts may show to the court on final hearing that there is no invention. The entire prior art is not before the court. I am not pointed to any decided case, book, or pamphlet showing the combination of the patent in suit.

Coming to the other question, the statute applicable reads (section 4887, Rev. St. U. S., as amended March 3, 1897, Act March 3, 1897, c. 391, § 3, 29 Stat. 692 [U. S. Comp. St. 1901, p. 3382]):

"No person otherwise entitled thereto shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented by the inventor or his legal representatives or assigns in a foreign country, unless the application for said foreign patent was filed more than seven months prior to the filing of the application in this country, in which case no patent shall be granted in this country."

That statute in effect provides that if an inventor takes out a patent for his invention in a foreign country, and files his application therefor in such foreign country more than seven months prior to the filing of the application for a patent in this country, no patent for such invention shall be granted in this country. And if a patent is taken out abroad and also here, the patent taken here is not to be declared invalid unless the application for the patent taken abroad was filed in such foreign country more than seven months prior to the filing of the

application in the United States.

It would seem that if an inventor applies for a patent in the United States, and it is granted, it is presumed that the Patent Office has inquired into all the facts prerequisite to the granting of same and has found that the applicant is entitled thereto. The patent when issued is presumptively valid, and, this being so, unless there is some statute or rule of court to the contrary, it is not necessary for the pleader to negative possible defenses. This point on this precise question has been passed upon. American Cereal Company v. Oriental Food Company (C. C.) 145 Fed. 649 (opinion by Judge Kohlsaat). He held that a failure to insert such an allegation did not make the bill demurrable. But there seems to be a weight of authority to the contrary. Moss v. McConway-Torley Co. (C. C.) 144 Fed. 128; Elliott & Hatch Book-Typewriter Co. v. Fisher (C. C.) 109 Fed. 330; American Graphophone Co. v. Phonograph Co. (C. C.) 127 Fed. 349.

It is better that I sustain this ground of demurrer and allow the complainant to amend. It must be understood that I do not entertain or express any opinion as to whether or not the patent discloses patentable invention. Where the work of the mechanic skilled in the art ends and executed mental conception constituting patentable invention commences is difficult to determine. In this case the judge at final hearing, with the proofs before him, can best decide. Many simple steps forward in an art have been held to show mental conception of a high or-

der, but I will not stop to cite the numerous cases.

The fourth ground of demurrer is sustained, the others overruled. Complainant may amend in 20 days. No costs.

HAARMANN-DE LAIRE-SCHAEFER CO. v. VAN DYK & CO.

(Circuit Court, S. D. New York. December 16, 1908.)

PATENTS (§ 328*)—INFRINGEMENT—ISOMERID OF IONONE.

The Laire patent, No. 600,429, for an isomerid of ionone and a process for producing the same, held valid and infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit to restrain alleged infringement of United States letters patent No. 600,429, dated March 8, 1898.

Briesen & Knauth, for complainant. George H. Bruce, for defendant.

RAY, District Judge. The patent in suit contains two claims reading as follows:

"(1) The described method of producing an isomerid of ionone, by treating ionone or pseudo-ionone with a concentrated condensing acid, such as suffuric acid, as set forth.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(2) The described isomerid of ionone, boiling in a pure state at about 140° centigrade, having a specific gravity of 0.946 at 17° centigrade, and having an odor of violets, as set forth."

I find no evidence that the patent sued upon is not valid, although the defendant denies its validity. The evidence is satisfactory and conclusive on this subject.

The complainant in its bill of complaint propounded five interrogatories, viz.:

"(1) Did the defendant since April 1, 1901, and prior to the commencement of this suit, make or sell a chemical product under the name of 'Violettan'? "(2) Is said violettan made by or for the defendant in the United States, or in a foreign country, and, if so, by whom?

"(3) Is said violettan prepared by treating pseudo-ionone with concentrat-

ed acid?

"(4) Did defendant, when ionone was ordered, fill such orders with violettan?

"(5) State the exact process employed by the defendant in the manufacture of said violettan."

The defendant answered the first two interrogatories in the affirmative; the third and fourth in the negative; and the fifth it declined to answer, claiming that its process is a secret process owned by the defendant.

I have carefully read the evidence in the case, and am satisfied that the defendant answered the fourth interrogatory untruly, and that it did so knowingly. The excuse seems to be that the purchaser to whom the defendant delivered violettan when it ordered ionone knew that it was getting violettan in place of ionone, and intended violettan when it ordered ionone. I do not think this was the fact. The evidence establishes to my satisfaction that violettan furnished and sold by the defendant is prepared by treating pseudo-ionone with concentrated acid. The complainant had a careful and competent chemical analysis made of the violettan prepared and sold by the defend-The defendant, although it had the opportunity, did not have a chemical analysis made of any of that violettan. The defendant claims to have had an analysis made of violettan taken from the same large bottle in its store from which it took the violettan sold and produced by the complainant. It may have been taken from the same bottle, but it may not have been the same violettan that the defendant was selling to others. It may not have been taken from the same bottle. There are other reasons which lead me to the same conclusion, and I am satisfied on the whole evidence that the defendant did prepare and sell, or caused to be prepared and sold, the article mentioned and described in the claims in suit and infringed the complainant's patent. It would serve no good purpose to go through the evidence and give all the reasons which lead me to this conclusion.

There will be a decree for the complainant, with costs.

UNITED STATES v. LOUISVILLE & N. R. CO.

(District Court, W. D. Kentucky, December 4, 1908.)

1. INDICTMENT AND INFORMATION (§ 70*)—STATEMENT OF OFFENSE.

As nothing in a criminal case can be charged by implication, intendment, or recital, every fact necessary to be proven to constitute the crime must be directly and affirmatively alleged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 192; Dec. Dig. § 70.*]

2. Animals (§ 31*)—Restrictions on Transportation—"Made"—"Promulgated."

Act Cong. March 3, 1905, c. 1496, § 3, 33 Stat. 1265 (U. S. Comp. St. Supp. 1907, p. 926), requires the Secretary of Agriculture to "make" and "promulgate" rules and regulations governing the method and manner of inspection, delivery, and shipment of cattle from a quarantined state or a quarantined portion of a state into any other state, and that he shall give notice of such rules and regulations as provided by the act, section 1 of which requires publication of notice of quarantine in such newspapers in the quarantined state as the Secretary may select, and the giving of notice to the proper officers of railroad, steamboat, or other transportation companies doing business in or through any quarantined state. Held, that the words "make" and "promulgate" were not synonymous; that the duty to "make" rules and regulations was sufficiently accomplished by writing them and signing them officially, but that to "promulgate" them required the giving notice thereof to the officers of transportation companies, etc., and their publication in the selected newspapers within the affected district.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 31.*

For other definitions, see Words and Phrases, vol. 5, pp. 4292-4294, vol. 6, p. 5684.]

3. STATUTES (\$ 241*)—CONSTRUCTION—PENAL STATUTES.

Criminal and penal statutes must be construed with reasonable strictness.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

4. Animals (§ 36*)—Contagious Diseases—Offenses—Indictment.

Act Cong. March 3, 1905, c. 1496, 33 Stat. 1264 (U. S. Comp. St. Supp. 1907, p. 925), authorizes the Secretary of Agriculture to establish cattle quarantines, and section 3 makes it the Secretary's duty to make and promulgate rules and regulations permitting and governing the shipment of cattle from a quarantined district. Section 4 makes it unlawful to move any cattle or other live stock from any quarantined district into any other state except in accordance with such regulations. Held, that an indictment against a carrier for moving cattle from a quarantined district, contrary to and in violation of the Secretary's rules and regulations, failing to directly allege facts showing the promulgation of such rules, or otherwise than that the rules and regulations were "duly and legally made and promulgated," was insufficient.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 36.*]

5. Indictment and Information (§ 147*)—Duplicity—Remedy.

Semble, that an objection that an indictment is duplicitous should be made by a motion to elect, and not by demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 493; Dec. Dig. § 147.*]

George Du Relle, Dist. Atty. Helm & Helm and Benj. D. Warfield, for defendant.

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

EVANS, District Judge. The indictment charges:

"That on the seventh day of September, in the year of our Lord nineteen hundred and seven, in the district aforesaid, and within the jurisdiction of this court, the Louisville and Nashville Railroad Company, a corporation created by and under the laws of the state of Kentucky, and a railroad company, did transport in Louisville and Nashville car number 18,771 a great many, to wit, twenty-two cattle from the town of Lawrenceburg, Lawrence county, in the state of Tennessee, to Louisville, in the state of Kentucky, which said town of Lawrenceburg was then and there situate in a portion of the state of Tennessee which was then and there duly and legally quarantined by the Secretary of Agriculture of the United States for splenetic, Southern or Texas fever in cattle, and which said city of Louisville was in a portion of said state of Kentucky which was not then and there quarantined by said Secretary of Agriculture for splenetic, Southern or Texas fever in cattle, and said Louisville and Nashville Railroad Company did transport said cattle from said quarantined portion of Tennessee into said city of Louisville, Kentucky, in a manner and under conditions other than those prescribed by said Secretary of Agriculture, and contrary to and in violation of the rules and regulations made and promulgated by said Secretary of Agriculture, and particularly in violation of and contrary to the rules and regulations made and promulgated by said Secretary of Agriculture governing the affixing of placards bearing the words 'Southern Cattle' to both sides of all cars carrying interstate shipments of cattle from quarantined areas into areas not quarantined, which said rules and regulations were duly and legally made and promulgated by said Secretary of Agriculture on the twenty-second day of March, 1907, and which became and were effective on and after April 15, 1907, and contrary to and in violation of rule I, revision II, to prevent the spread of splenetic fever in cattle, made and promulgated by said Secretary of Agriculture on March 30, 1907, and which became effective on and after April 15, 1907.

"And the grand jurors aforesaid upon their oaths aforesaid do further present:

"That no placard, not less than five and a half by eight inches in size, on which was printed with permanent black ink and in bold face letters not less than one and a half inches in height, in the words 'Southern Cattle,' was by the proper officers of said Louisville and Nashville Railroad Company securely or at all affixed or maintained to both or either side of said car carrying said interstate shipment of cattle, and that the waybill of said shipment of cattle did not have the words 'Southern Cattle' plainly written or stamped upon its face.

"Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided."

The accused has demurred thereto upon the ground that the indictment does not sufficiently charge a public offense, and, furthermore, that it is subject to the objection of duplicity as attempting to charge two separate offenses in a single count. The indictment is based upon Act March 3, 1905, c. 1496, 33 Stat. 1264 (U. S. Comp. St. Supp. 1907, p. 925), entitled "An act to enable the Secretary of Agriculture to establish and maintain quarantine districts; to permit and regulate the movement of cattle and other live stock therefrom and for other purposes." Omitting all language not applicable to this case, the act is as follows:

Section 1. That the Secretary of Agriculture is authorized and directed to quarantine any state or portion thereof when he shall determine the fact that cattle or other live stock therein are affected by any contagious, infectious or communicable disease, and he is directed to give notice of the establishment of quarantine to the proper officers of railroad, steamboat or other transportation companies doing business in or through any quarantined

state, and to publish in such newspapers in the quarantined state as he may select, notice of the establishment of quarantine.

Sec. 2. That no railroad company shall receive for transportation or transport from any quarantined state or quarantined portion of any state, any cattle or other live stock, into any other state except as hereinafter provided.

Sec. 3. That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern the method and manner of inspection, delivery, and shipment of cattle and other live stock from a quarantined state or a quarantined portion of a state into any other state, and he shall give notice of such rules and regulations in the manner provided in section 2 (sic, evidently meaning section 1) of the act, for notice of establishment of quarantine.

Sec. 4. That cattle or other live stock may be removed from a quarantined state under and in compliance with the rules and regulations of the Secretary of Agriculture made and promulgated in pursuance of the provisions of section 3 of this act, but it shall be unlawful to move any cattle or other live stock from any quarantined state or quarantined portion of any state into any other state in manner or method or under conditions other than those prescribed by the Secretary of Agriculture.

Sec. 6. That any person, company or corporation violating the provisions of sectious 2 and 4 of this act shall be guilty of a misdemeanor.

It is contended in support of the demurrer that Congress did not, by the act, constitutionally delegate to the Secretary of Agriculture the power to make rules and regulations, disobedience of which should become a criminal offense. The act authorizes the Secretary to determine the particular fact upon the existence of which his power to quarantine a state or a portion of a state depends, to wit, the question whether cattle or other live stock therein are affected with a contagious, infectious, or communicable disease. It also authorizes him to make and promulgate rules and regulations for the inspection and shipment of cattle and other live stock from a quarantined state or quarantined portion of a state into any other state, so as to permit the moving of cattle which are not diseased, and prevent the shipment of such as are. Although it is hard at times to distinguish between the rules applicable to different cases, we see no reason to doubt, notwithstanding the decisions in United States v. Eaton, 144 U. S. 687, 12 Sup. Ct. 764, 36 L. Ed. 591, and Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267, that the following authorities upholding similar statutes must control this case, to wit, Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Butt-field v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; In re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; and Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. However, we do not find it necessary to definitely pass upon the question, because we have concluded that the indictment is insufficient upon other and much narrower grounds.

In United States v. Post (D. C.) 113 Fed. 854, Judge Locke very accurately said:

"The well-established principle of criminal pleading, which requires direct, positive, and affirmative allegations of every point necessary to be proven, is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment, or recital, but every fact necessary to constitute the crime must be directly and affirmatively alleged."

These propositions are supported by United States v. Hess, 124 U. S. 486, 8 Sup. Ct. 571, 31 L. Ed. 516; Ball v. United States, 140 U. S. 135, 11 Sup. Ct. 761, 35 L. Ed. 377; Evans v. United States, 153 U. S. 587, 14 Sup. Ct. 934, 28 L. Ed. 830; Batchelor v. United States, 156 U. S. 426, 15 Sup. Ct. 446, 39 L. Ed. 478; Ledbetter v. United States, 170 U. S. 610, 18 Sup. Ct. 774, 42 L. Ed. 1162; Shaw v. United States (Circuit Court of Appeals, 6th Circuit, decided Nov. 5, 1908), 165 Fed. 174. The obvious reason for this rule is that the accused is entitled to have stated in the indictment fully and precisely all the elements of the offense charged against him, in order that he may know what he is to meet by testimony, and whether the facts charged constitute a crime, and, if so, that the judgment in the case may afford a bar to any further prosecution for the same offense. Applying the general principle to this case, we must hold that the accused is entitled to a statement of the facts showing that the rules and regulations have not only been "made," but that they have been "promulgated" in the manner required by the act, for, if not so made and promulgated, the defendant was not bound by them, and disobedience to them before they were legally promulgated could not be a criminal offense. The indictment manifestly is not based upon the mere fact that cattle were transported from the quarantined district in the state of Tennessee into the state of Kentucky, but upon that fact plus the other facts that this was done without putting upon each side of the car used in the transaction the necessary placard containing the words "Southern Cattle" in letters of the size prescribed by the regulations, and without stamping or writing in plain letters the same words on the face of the waybill. The offenses really charged are violations of the rules and regulations which the indictment avers were "duly and legally" made and promulgated by the Secretary of Agriculture on March 22, 1907. While the regulations need not be set out in hæc verba in the indictment, facts should be stated upon which a judgment of the court may be based as to the sufficiency of the allegation that they were "duly and legally" made and promulgated, for it may be that in this connection the indictment states only a legal conclusion. True, if the regulations were duly and legally made and promulgated, the court would take judicial notice of their contents and provisions Caha v. United States, 152 U. S. 221, 222, 14 Sup. Ct. 513, 38 L. Ed. 415, and cases cited. But does that rule require the courts to take judicial notice that the rules and regulations were duly and legally made and promulgated, when, as here, a particular mode at least of "promulgating" them is prescribed by the act? As the word "make" and the word "promulgate" are both used in the act, we must infer that they were not tautologically employed, but that each was intended to have a separate and distinct meaning in order to give effect to the purpose of Congress. Merely to "make" the rules and regulations is not sufficient under the act. To put them effectively in force they must also be "promulgated," in this respect differing from an act of Congress, which becomes effective when it is enacted, whether promulgated or not; promulgation not being a condition precedent to the taking effect of legislation. To "make" rules

and regulations would appear to be sufficiently accomplished by writing them and signing them officially, but to "promulgate" them under this act would seem to require something more, and we think that what that something more is, is clearly indicated by the provisions of section 3, which require that the Secretary of Agriculture shall "give notice of such rules and regulations in the manner provided in section 1" (as we have construed it) "for notice of establishment of quarantine," namely, by notifying "the proper officers of railroads doing business in or through any quarantined state, and by publishing such rules and regulations in such newspapers in the quarantined state as he may select." This notice and this publication would, we think, be a "promulgation" of the rules and regulations, and we think they cannot under the act become effective so as to be the basis of criminal prosecutions until they are thus publicly made known—that is to say, "promulgated." We think that a party criminally charged with disregarding or violating the rules and regulations which the act empowers the Secretary of Agriculture to make is entitled to have the indictment aver the facts constituting such promulgation before he can be called upon to plead to it. To entitle the government to show the facts at the trial, as indubitably it must if a plea of not guilty is entered, the indictment must contain express allegations in respect thereto, or otherwise a basis for their admissibility as testimony will be lacking, inasmuch as allegation and proof must correspond as well in criminal as in civil proceedings.

The requirements of the act as to the promulgation of any rules and regulations made under its provisions are so express and explicit that promulgation by the proper executive officer is an essential prerequisite to their being put in force against the people as parts of the laws of the country, any violation of which may be punished as a crime. The idea has not become obsolete that the laws, whether strictly statutory enactments or binding rules and regulations by which we are to be governed, must not be written so high upon the walls, or otherwise so secretly made, that those bound to obey them cannot ascertain what they are. Congress, therefore, must have had a just and wise object in view in requiring "promulgation" (that is to say, publication in the way it prescribed) of rules and regulations in the premises. While railroad companies are bound to take notice of the act of Congress itself, they are not chargeable with notice of the rules and regulations thereby authorized, nor is obedience to them obligatory or possible, until they are in fact "made" and in fact "promulgated" in the manner required by law. Congress intended that the persons affected should have an opportunity to know of the rules and regulations, and promulgation was required for that purpose.

It is elementary that criminal and penal statutes must be construed with reasonable strictness. No rule is better established. Logically, and we think necessarily, upon equally strong reasons a similar rule should be applied to the interpretation and to the manner of exercising authority given to executive officers under legislation like that now before us, so far, at least, as such officers are given power to increase the list of crimes and penal offenses. Their acts under such legislation, whereby certain things not previously so are made crim-

inal or penal, have a sort of quasi legislative flavor, and we have concluded that any addition by the executive department of the government to the catalogue of things which constitute criminal offenses should derive its vitality and force from a strict and exact compliance with the authority given by the legislative department for making such addition. Otherwise new crimes might be created by mere executive action alone, and not at all by legislation.

It results that we must hold that the indictment is faulty, because it does not aver in detail the facts showing a legal promulgation of the rules and regulations alleged to have been made by the Secretary

of Agriculture.

It is also insisted that the indictment is bad for duplicity in that it charges two offenses, to wit: First, that placards containing the words "Southern Cattle" were not placed on each side of the car during the transportation; and, second, that the waybill did not have those words plainly written or stamped on its face. It would seem to be obvious that these omissions were separate and distinct violations of the regulations which require each of those things to be separately done; but while the general rule that duplicity vitiates an indictment is recognized by the lower courts, we have not found that the rule has received much favor, if any, in the Supreme Court. The way that court treats the objection is illustrated by Connors v. United States, 158 U. S. 411, 15 Sup. Ct. 951, 39 L. Ed. 1033; In re Lane, 135 U. S. 448, 10 Sup. Ct. 760, 34 L. Ed. 219; Crain v. United States, 162 U. S. 634, 16 Sup. Ct. 952, 40 L. Ed. 1097; and Wiborg v. United States, 163 U. S. 648, 16 Sup. Ct. 1127, 41 L. Ed. 289. These cases seem to indicate the view of the Supreme Court to be that the fault of duplicity should be reached by a motion to elect, or in some of the other ways suggested by those opinions rather than by a demurrer.

In view of these considerations, and because of the technical strictness usually required in such matters by the rulings of the Circuit Court of Appeals of this circuit, we conclude that the demurrer must be, and it is, sustained. The indictment will be quashed, and the matter again submitted to the grand jury, if the District Attorney shall

so desire.

PLAUT et al. v. ONE HUNDRED AND SEIVEN BARRELS OF PORTO RICAN BAY RUM et al.

(District Court, E. D. New York. December 10, 1908.)

1. APPEARANCE (§ 17*)—JURISDICTION—WAIVER OF OBJECTION.

The filing by the United States of a notice of appearance in a suit in rem, and of claim to the property in the custody of the court, is an admission of the jurisdiction of the court to such extent as to preclude the subsequent filing of exceptions to the jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 70–75; Dec. Dig. § 17.*]

2. Replevin (§ 12*)—Action to Recover Goods Held by Customs Collector—Defenses.

Libelants instituted a petitory and possessory suit for certain goods which had been brought in a vessel from Porto Rico to New York, mak-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing the collector of the port a defendant, on an allegation that he had illegally taken possession of the goods under a claim that they were subject to a tax. The collector was not served, but a notice of appearance and claim was filed on behalf of the United States, alleging that the goods were subject to an internal revenue tax. The goods were taken by the marshal from the vessel, not having been entered at the custom house. Held, that the notice filed by the United States stated no ground of defense to libelants' suit, since no claim to a tax could be asserted or litigated prior to the entry of the goods, and that the goods should be returned by the marshal to the libelants, who had never been deprived of their rights of entry, and who must enter the goods according to law.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 103; Dec. Dig. § 12.*]

John David Lannon and William M. Stockbridge, for libelants. William J. Youngs, U. S. Atty., and Levi Cooke, for claimants.

CHATFIELD, District Judge, Albert Plaut and Joseph Plaut, as copartners, have filed a libel in a possessory and petitory action against Edward S. Fowler and a certain quantity of bay rum, which came to the United States from Porto Rico upon the steamer S. V. Luckenbach, arriving in Brooklyn on the 19th day of October, 1908. The libel in the action alleges that the 107 barrels of bay rum were a part of the cargo of said vessel, consigned to the libelants at New York, and that this bay rum was their property. The libel further alleges that one Edward S. Fowler, on the 19th day of October, 1908, illegally and without consent, etc., took possession of the said bay rum, and has ever since detained the same. Other allegations of the libel set forth that certain litigations had been had with reference to the legality of imposing an internal revenue tax upon bay rum imported from Porto Rico, and that the respondent Fowler was the collector of the port, who had taken and maintained possession of said bay rum solely for the purpose of keeping it subject to the orders of the collector of internal revenue of the First district of New York, for the payment of said tax, and that the said bay rum was not taken under any provision of law relating to customs or navigation, or any law providing for a penalty or forfeiture. The prayer of said petition was that process should issue against the said bay rum, and that the said Edward S. Fowler should be personally cited to appear and answer, and that the bay rum should be delivered to the libelants, and that Mr. Fowler should be condemned to pay costs.

The record of the case shows that Mr. Fowler was never served. The seizure of the bay rum by the marshal upon the process issued, as shown by the return and records of the marshal, occurred upon the 19th day of October, 1908, on board the steamer S. V. Luckenbach, at Brooklyn before the goods had been entered at the port of New York, or landed from the vessel, and at a time when the goods were still in the possession of the officers of the vessel. Subsequently to the seizure by the marshal a notice of appearance and claim was filed on behalf of the United States of America, by the United States attorney for the Eastern district of New York, who states in his notice that

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the United States claims the property in the possession of the marshal, and that this claim arises—

"from the fact that by the laws of the United States, and the regulations of the Treasury Department applicable thereto, the said bay rum is subject on its arrival at the port of New York to an internal revenue tax of \$1.10 per gallon, no part whereof has been paid."

Subsequently, and without order of the court or extension of time, the United States filed exceptions to the sufficiency of the libel and to the jurisdiction of the court. These exceptions were both too late in time of filing and are of no effect, inasmuch as the filing of a claim had admitted the jurisdiction of the court to the extent necessary for considering what questions could properly be raised under the libel. The exceptions, therefore, must be disregarded and stricken from the case. No answer, or pleading that can be construed as an answer, has been filed by any one.

The claim of the United States, filed by the district attorney, shows no ownership nor basis for claim of title in the United States; nor does the mere statement that the United States asserts its right to collect the tax, raise any issue or present any obstacle in this case. The marshal has never advertised for claims, nor has the libelant done anything to maintain his alleged cause of action as against Mr. Fowler, whom he did not have served, and as to whom the records of the case show no notice has been sent.

This court has not the power to interfere with the collection of a tax (section 3224, Rev. St. [U. S. Comp. St. 1901, p. 2088]), unless it has obtained jurisdiction of the question of the imposition and validity of the tax by some affirmative proceeding on the part of the United States. U. S. v. Neb. Dist. Co., 80 Fed. 285, 25 C. C. A. 418. In the case at bar the United States has stated that it claims the right to collect a tax; but that has nothing to do with the right to possession by the libelants of goods which they must enter at the port of New York, and which the proper official of the government must seize and hold subject to the tax, if the tax is to be collected. The question of the validity of this tax, if collected, or recovery of any amount so collected, must be determined according to law, if an attempt is made to collect the tax, and not before.

The assertion that the United States claims its right to this tax has nothing to do with the allegation of the libelants that the goods belonged to them at the port of New York, and that prior to entry, and as between them and the collector of customs, some dispute as to possession has arisen.

Upon the whole record, the marshal must be ordered to turn over the goods to the libelants, at the pier used by the steamer S. V. Luckenbach, and the goods will then be in the same condition as at the time of the original seizure, and must be legally imported into the United States, as if no seizure by the marshal had been had.

HOWELL v. SAPPINGTON.

(Circuit Court, D. Oregon. December 7, 1908.)

No. 3,250.

Public Lands (§ 103*)—Entry—Contest—Preference Right—Statutes.

Act Cong. May 14, 1880, c. 89, § 2, 21 Stat. 141 (U. S. Comp. St. 1901, p. 1392), providing that in all cases where any person has contested, paid land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which the land is situated of such cancellation, and shall have 30 days from the date of the notice to enter such lands, has no application to land sought to be purchased as a stone and timber claim.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 298; Dec. Dig. § 103.*]

Murphy, Brodie & Swett, for complainant. Ralph R. Duniway and Talmage & Johnson, for defendant.

WOLVERTON, District Judge. The bill of complaint in this case sets forth that one Kiger made application to the register and receiver of the local land office at Oregon City, Or., to purchase a certain tract of land (describing it), under the act of June 3, 1878, commonly known as the "Timber and Stone Act" (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]); that she made due publication as required by law, and tendered the purchase price thereof to the proper officials; that thereafter the complainant herein filed a contest against such application to purchase, and in due course, having provided the proper witnesses, paid the expenses thereof, and tendered the fees necessary to that end, and was successful; and that Kiger's application was on May 10, 1906, canceled by order and direction of the honorable Commissioner of the General Land Office. It is then further alleged that by virtue of the cancellation of said application. and under and by virtue of the provisions of the act of Congress approved May 14, 1880 (Act May 14, 1880, c. 89, 21 Stat. 140 [U. S. Comp. St. 1901, p. 1392]), the complainant became and was entitled to a preference right to enter said tract of land for a period of 30 days after notice thereof, and it became and was the duty of the land officials of the government of the United States to notify the complainant of the fact that he had, by virtue of his successful contest and the provisions of said act of Congress, acquired such preference right of entry. It is then further averred that complainant was not so notified, and that by reason thereof he is still entitled to the privilege under the law of exercising such preference right; but that, contrary to his right and privilege in the premises, the defendant made application to purchase the said land under the said act of June 3, 1878, and, having observed the provisions of law in that regard, has been issued a patent for the land by the general government. The complainant prays that the patent to defendant be canceled, so that he may yet have the privilege of exercising his preference right in the premises in

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

purchasing the land from the government. To this complaint a demurrer has been filed, and the question arises whether it is sufficient upon which to base the relief sought.

The preference right claimed is given by section 2 of the act of May

14, 1880, which provides:

"In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-amption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated, of such cancellation, and shall have thirty days from the date of such notice to enter said lands."

It has been definitely held, in the case of Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30, that the preference right there alluded to can only be exercised or granted in cases of cancellation of pre-emption, homestead, or timber culture entries, and in none other. The learned Circuit Judge Sanborn in deciding that cause, has this to say:

"After a deliberate consideration of all the terms of the act of 1880, in the light of the legislation for the disposition of the public lands in force when it was enacted, all doubt of its true construction has been dispelled, and we have become satisfied that the preferred right to enter land granted to the contestant by the second section of that act was granted to the successful contestant of a pre-emption, homestead, or timber culture entry only."

This authority is sufficient for the determination of the present cause, if complainant is otherwise in a position to maintain his suit, a matter I do not now decide.

The demurrer will therefore be sustained; and it is so ordered.

CONTINENTAL SECURITIES CO. v. INTERBOROUGH RAPID TRANSIT CO. et al.

(Circuit Court, S. D. New York. December 28, 1908.)

1. Pleading (§ 214*)—Demurrer—Admissions.

A demurrer admits allegations of fact, but not mere conclusions of fact or law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ $526\frac{1}{2}$, 527; Dec. Dig. § 214.*]

2. Pleading (§ 311*)—Exhibits—Effect.

Exhibits attached to a bill control the bill so far as their legal effect is oncerned.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 945; Dec. Dig. § 311.*]

3. EQUITY (§ 153*)—BILL—REASONING.

On demurrer to a bill to avoid an alleged conspiracy in restraint of trade, consisting of a monopoly created by a consolidation of street railway lines, the court could not adopt the reasoning of the bill and its deductions from the facts stated in order to find a conspiracy or monopoly, but must find its existence from the facts alleged.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 386; Dec. Dig. § 153.*]

4. Monopolies (§ 20*)-"Monopoly."

Stock Corp. Law N. Y. (Laws 1890, p. 1069, c. 564) § 7, as amended by Laws 1892, p. 1828, c. 688, declares that no domestic stock corporation

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 165 F.—60

shall combine with any other corporation or person to create a "monopoly" or the unlawful restraint of trade, or to prevent competition in any necessary of life. Held, that the word "monopoly" was not used in such section in its strict sense as requiring a control of all present existing means of carrying on a business, or doing a particular thing generally or in a particular place or locality, and the right to possess, own, or control all means of doing that thing in that place in the future, but was satisfied by an exclusive privilege to carry on a traffic or the possession or assumption of anything to the exclusion of other possessors, as where a man has acquired complete control of a business, and therefore embraces any combination or contract the tendency of which is to prevent competition in its broad and general sense.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.1

5. RAILROADS (§ 1*)—OPERATION—"BUSINESS."

The operation and management of railroads in carrying passengers is a "business," and part of trade and commerce.

[Ed. Note.-For other cases, see Railroads, Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 915-923; vol. 8, pp. 7593, 7594.]

6. Monopolies (§ 16*)-Street Railroads-Consolidation.

Several street railroad companies, including all the railway lines between the points mentioned, operated lines of railway from various points in the Bronx to the Battery in New York City under legislative franchises giving to each an exclusive right to its line and territory. combination of all of such corporations was effected by means of a transfer of stock to a business corporation created for that purpose by which the real ownership, control, and management of the previous competing parallel lines between substantially the same points or localities was merged. Held to constitute an illegal monopoly in violation of Stock Corp. Law N. Y. (Laws 1890, p. 1069, c. 564) § 7, as amended by Laws 1892, p. 1828, c. 688, providing that no domestic stock corporation shall combine with any other corporation or person to create a monopoly or the unlawful restraint of trade or to prevent competition in any necessary of life, and this though the consolidated road is still subject to such control as the New York Public Service Commission may see fit to exercise over it. [Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. \$ 16.*1

7. Corporations (§ 377*) — Consolidation—Stock Corporation Law — Construction.

Stock Corp. Law N. Y. (Laws 1890, p. 1073, c. 564) § 40, authorizing corporations other than moneyed corporations to purchase, hold, and dispose of stocks, bonds, and other evidences of indebtedness of any other corporation, etc., engaged in a similar business, if authorized to do so by a certificate of incorporation, or if a corporation with which it is authorized to consolidate, is limited by section 7, prohibiting the combination of corporations to create a monopoly, or the unlawful restraint of trade, or the prevention of competition in any necessary of life.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1532; Dec. Dig. § 377.*

Acquisition by corporation of stock of other corporation, see note to Anglo-American Land, M. & A. Co. v. Lombard, 68 C. C. A. 120.]

8. COURTS (§ 366*)—RULES OF DECISION—INTERMEDIATE COURTS OF APPEAL.

A federal court sitting in New York is not required to follow decisions of the different Appellate Divisions on the construction of a state statute

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merely because they refused appeals to the Court of Appeals, or in the exercise of discretion refused leave to prosecute actions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 866.*

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

9. Courts (§ 366*)-Federal Courts-Rules of Decision.

The lower federal courts are bound by decisions of the highest court of the state in which they are sitting, construing the Constitution or statutes of the state, except when the United States Supreme Court has decided otherwise, but are not bound by state decisions on questions of general commercial law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.*]

10. Courts (§ 96*)—Federal Courts—Rules of Decision.

Lower federal courts are bound by the decisions of the Supreme Court of the United States and by those of the Circuit Court of Appeals in their own circuit, but are not bound by decisions of a federal court of co-ordinate jurisdiction, or even the decisions of a federal Circuit Court of Appeals in another circuit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 327; Dec. Dig. § 96.*]

11. WORDS AND PHBASES-"COMITY."

Comity is not a rule of law, but of practice, convenience, and expediency, and, while it is something more than mere courtesy, its obligation is not imperative.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1279, 1280.]

12. Corporations (§ 189*) — Suit by Stockholder — Ninety-Fourth Equity Rule.

A bill by a stockholder to avoid an alleged illegal consolidation of street railroad companies was verified by the president of complainant company, the president giving the grounds and sources of his information and belief. The bill alleged that complainant was, at and prior to the time of the unlawful plan, combination, and conspiracy objected to, and then was, the bona fide and lawful owner "of record" of 300 shares of the stock of one of the defendants, which was one of the companies alleged to have entered into the combination and alleged conspiracy. The bill then charged that the suit was not collusive to confer jurisdiction on a court of the United States, and that plaintiff had made demand on a specified date on the corporation and its then president and on its board of directors to take steps to dissolve the consolidation, a copy of which written demand was attached. The bill also alleged that the demand was subsequently repeated, and recited in detail the reasons why action was not secured. Held, that the bill sufficiently complied with the ninety-fourth equity rule providing that every bill by one or more stockholders of a corporation against the corporation and others founded on rights which might be asserted by the corporation must be verified by oath and must contain an allegation that plaintiff was a shareholder at the time of the transaction of which he complained; that the suit was not collusive to confer federal jurisdiction; and should allege particularly plaintiff's efforts to secure action by the directors of trustees, and, if necessary, by the shareholders, and the cause of his failure.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 721; Dec. Dig. § 189.*]

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

13. Corporations (§ 189*) — Stockholders — Action Against Corporation—Pleading.

In an action by a stockholder against a corporation and others, an allegation that complainant is the bona fide and lawful owner "of record" of certain shares of the corporation's stock constituted a sufficient allegation that complainant was a bona fide and lawful stockholder, as the words "of record" did not detract from the force of the statement nor render it evasive.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 721; Dec. Dig. § 189.*]

14. Corporations (§ 170*)-"Shareholder."

A shareholder is one who holds or owns a share or shares in a joint-stock or incorporated company in a common fund or in some property, as a shareholder in a railway, mining, or banking company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 624; Dec. Dig. § 170.*

For other definitions, see Words and Phrases, vol. 7, p. 6480.]

15. Corporations (§ 65*)-"Share."

"Share" specifically is one of the whole number of equal parts into which the capital stock of a trading company or corporation is or may be divided, as shares in a bank or shares in a railway.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 165; Dec. Dig. § 65.*

For other definitions, see Words and Phrases, vol. 7, pp. 6473-6475.]

16. Corporations (§ 60*)—"Stock,"

"Stock" is the share capital of a corporation or commercial company; the fund employed in carrying on of some business or enterprise divided into shares of equal amount, and owned by individuals who jointly form a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 162; Dec. Dig. § 60.*

For other definitions, see Words and Phrases, vol. 7, pp. 6660-6664; vol. 8, p. 7804.1

17. Street Railroads (§ 58*)—Consolidation—Action—Parties—Receivers.

In a stockholder's bill to avoid a consolidation of several street railroads as creating a monopoly, receivers of certain of the roads appointed prior to the commencement of the suit were proper but not necessary parties

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

18. STREET RAILROADS (§ 58*)—ILLEGAL COMBINATION—RECEIVERS.

Where certain street railroad corporations entered into an illegal combination and consolidation, the appointment of receivers for two of the constituent companies was ineffective to remove them from the illegal combination.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. Demurrers by defendants to the bill of complaint.

Stephen M. Yeaman (J. Aspinwall Hodge, of counsel), for complainant.

Cravath, Henderson, & De Gersdorff, for Interborough-Metropolitan Co., Metropolitan St. Ry. Co., New York City Ry. Co., and Metropolitan Securities Co.

Alfred A. Gardner, for Interborough Rapid Transit Co.

Nicoll, Anable, Lindsay & Fuller, for Thomas F. Ryan and others.

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. The Continental Securities Company, a corporation organized and existing under the laws of the state of New Jersey, on its own behalf and on behalf of all stockholders of the defendant Interborough Rapid Transit Company who are similarly situated and who choose to come in, etc., brings this suit in equity against the defendants: (1) To have a certain alleged plan, scheme, and conspiracy set forth in the complaint, and pursuant to which there has been transferred or delivered to the Interborough-Metropolitan Company or to the Windsor Trust Company a large majority of the capital stocks of the Interborough Rapid Transit Company, Metropolitan Street Railway Company, and Metropolitan Securities Company, heretofore entered into by and between, or adopted by, or concurred in by the defendants in this action, adjudged unlawful, null, and void and of no effect, and also to obtain a decree that all acts done under or pursuant to the said plan, scheme, and agreements were and are in violation of the laws and public policy of the state of New York, of the rights of the Interborough Rapid Transit Company, of this plaintiff as a stockholder therein, and of other stockholders similarly situated, and were and are null and void and of no effect. (2) To have it adjudged and decreed that the transfer and delivery of the large majority of the capital stock of the Interborough Rapid Transit Company to the Interborough-Metropolitan Company, and the deposit with and pledge of said stock to the Windsor Trust Company, was and is illegal, void, and of no effect. (3) To have it adjudged and decreed that the said Interborough-Metropolitan Company now is, and since a date mentioned has been, an unlawful combination and monopoly in violation of the laws and the public policy of the state of New York, of the rights of the said Interborough Rapid Transit Company, and of those of the complainant and of all other stockholders similarly situated; and also to have a decree that all acts and things done or procured to be done by the said combination and monopoly, or by any of the defendants herein, under or pursuant to the said scheme and conspiracy, are and always have been null and void and of no force or effect. (4) To have a judgment or decree that a trust agreement entered into March 5, 1906, by and between the Interborough-Metropolitan Company and the Windsor Trust Company pledging the capital stock of the Interborough Rapid Transit Company to secure the payment of certain bonds of the said Interborough-Metropolitan Company, and issued in exchange for shares of the capital stock of the Interborough Rapid Transit Company, was and is illegal, null, and void and of no effect, and that the said bonds were issued illegally and without consideration, and are null and void and of no effect; and to have a decree that all the shares of the capital stock of the Interborough Rapid Transit Company held by the Windsor Trust Company under an agreement made March 5, 1906, belong to and are the property of the holders of certain collateral trust bonds, etc. Other relief by way of injunction, etc., is also demanded, but such relief and the right thereto is incidental to and dependent upon a right to the main relief demanded.

The defendant companies are New York corporations; defendant Thomas F. Ryan is a citizen and resident of the state of Virginia; the defendant Lane is a citizen and resident of the state of Massachusetts; and the other individual defendants are citizens of the state of New York.

The defendant Interborough Rapid Transit Company was organized under the railroad law of the state of New York in May, 1902, for the purposes of equipping and operating the Rapid Transit Railroad, which was then a subway being constructed in the city of New York, at the expense of the city, under a contract with one John B. McDonald. The capital stock was fixed at \$25,000,000, and \$9,200,000 of such stock was subscribed and paid for at par, and \$2,200,000 thereof was subscribed and paid for at the rate of \$110 per share, and the remainder, or \$13,600,000 thereof, was issued for the purpose of acquiring the capital stock of certain other corporations, including that of the Rapid Transit Subway Construction Company, and also the interests of all parties in the lease of the Rapid Transit Railroad theretofore made by the city of New York. In September, 1902, the capital stock of the Interborough Rapid Transit Company was increased to \$35,000,000 for the purpose of enabling the company to provide the

equipment for the operation of said Rapid Transit Railroad.

Up to the time of the formation of the combination and monopoly alleged in the complaint, the Interborough Rapid Transit Company was engaged in the maintenance and operation of said Rapid Transit Railroad and Subway, commencing at two points in the borough of the Bronx in the city of New York, and running through the borough of Manhattan in the city of New York to the Battery, and up to and including the month of January, 1903, was engaged in actual competition in the business of the transportation of passengers with the Manhattan Railway Company. Up to and including the time of the making of the alleged combination, conspiracy, and monopoly set forth in the complaint, it was also actively engaged in actual competition in the trade or business of operating railroads and transporting passengers in, to, or through the boroughs of Manhattan and the Bronx with the Metropolitan Street Railway Company and the Metropolitan Securities Company and New York City Railway Company, commonly known as the Metropolitan System of Surface Railroads. The Manhattan Railway Company was organized and exists under the railroad laws of the state of New York for the purpose of engaging in the trade or business of operating railroads and transporting passengers on elevated railroads above the streets in the boroughs of Manhattan and the Bronx, and which elevated railroads are parallel to, and until April, 1903, were in competition with, the Rapid Transit Railroad or Subway in the said boroughs operated by the Interborough Rapid Transit Company. In January, 1903, the entire railroad property of the Manhattan Railway Company was leased to the Interborough Rapid Transit Company for the period of 999 years, and since April 1, 1903, the Interborough Rapid Transit Company has operated said elevated railroad under said lease.

The Metropolitan Street Railway Company was organized under the railroad law of the state of New York with a capital stock of \$52,000,000, and owns or controls by lease or stock ownership in subsidiary companies all of the passenger railroads operated upon the surface of

the streets within the boroughs of Manhattan and the Bronx in the city of New York, including those owned or leased by the Third Avenue Railroad Company. In February, 1902, all the railroad properties of the Third Avenue Railroad Company were leased to the Interurban Street Railway Company, now known as the New York City

Railway Company.

The Metropolitan Securities Company is a corporation organized under the business corporation laws of the state of New York with a capital stock of \$30,000,000, and owns all the capital stock of said New York City Railway Company, which was incorporated under the laws of the state of New York with a capital stock of \$500,000. In February, 1902, said City Railway Company became lessee of the railroads of the Metropolitan Street Railway Company, including those owned by or leased to said Third Avenue Railroad Company for the term of 999 years from April 1, 1902. The capital stock of the New York City Railway Company has been increased to \$20,000,000, and all of its outstanding stock is owned by the Metropolitan Securities Company. From their organization and up to the date of the alleged illegal combination and monopoly complained of, the Metropolitan Street Railway Company, the Metropolitan Securities Company, and the New York City Railway Company were engaged, says the bill, in the maintenance and operation of the trade or business of operating railroads and transporting passengers upon all of the railroads operated upon the surface of the streets in the boroughs of Manhattan and the Bronx, city of New York, and up to that time were actively engaged in actual competition in said trade or business in said boroughs with the Manhattan Railway Company, and since October, 1904, the date of the opening of the Rapid Transit Railroad and Subway, and up to the said formation of the said combination and monopoly, the said metropolitan system of surface railroads was in active competition in the conduct of said trade or business with the Interborough Rapid Transit Company. Each of the railroad companies mentioned operated lines of road from points in the Bronx to the most southern point of Manhattan, known as the Battery, tapping the same territory and reaching common points, and under natural conditions were each and all competitors with each other in the trade or business mentioned, and prior to the combination, conspiracy, and monopoly complained of there was actual competition for business between the systems of the Interborough Rapid Transit Company, including the Manhattan Railway Company, and the system of the Metropolitan Street Railway Company.

The defendant Ryan and his business associates, through ownership of stock in the Metropolitan Street Railway Company and the Metropolitan Securities Company, held by them for several years prior to the alleged illegal combination, controlled and directed the business policy and management of the Metropolitan Street Railway Company and system, including all the street surface railroads engaged in the transportation of passengers in said boroughs of Manhattan and the

Bronx.

The defendant Belmont and his business associates, by the owner-ship of stock in said Interborough Rapid Transit Company held by

them and by virtue of his office as president of said company from its organization and up to the time of the alleged combination and monopoly, have had complete control and direction of the management and business policy of said company, including the trade or business of operating railroads and transporting passengers in the subway and upon the elevated structures in said boroughs of said city.

The illegal combination or conspiracy and agreement complained of is alleged to have been as follows: August Belmont and his associate stockholders of the Interborough Rapid Transit Company, owning or controlling a majority of the stock of that corporation, and Thomas F. Ryan and his associate stockholders of the Metropolitan Street Railway Company and the Metropolitan Securities Company, owning or controlling a majority of the stocks of those companies, acting for themselves as such stockholders, and on behalf of such corporations in which they owned or controlled a majority interest, in or about January, 1906, contriving and intending unlawfully to restrain the trade or business, and injuriously to affect such trade or business, of operating railroads and transporting passengers within the boroughs of Manhattan and the Bronx, city and state of New York, carried on by the Interborough Rapid Transit Company, the Metropolitan Street Railway Company, the New York City Railway Company, and the Metropolitan Securities Company, and (says the bill)—

"intending and contriving unlawfully to create a monopoly of said trade or business of operating railroads and transporting passengers within the boroughs of Manhattan and the Bronx, in the city of New York; and contriving and intending unlawfully to restrain and prevent all competition among said corporations in respect to the necessary transportation of passengers within and through the boroughs of Manhattan and the Bronx, in the city of New York; and intending and contriving unlawfully to deprive the public of the necessary facilities and advantages in the carrying on of such trade or business of operating railroads and transporting passengers, theretofore enjoyed through the independent competition of said corporations—entered into an unlawful combination or conspiracy to effect a virtual consolidation of the Interborough Rapid Transit Company, the Metropolitan Street Railway Company, the New York City Railway Company, and Metropolitan Securities Company, and to place restraint upon all competitive trade or business of operating railroads and transporting passengers within the said boroughs of Manhattan and the Bronx, carried on by them, and to create a monopoly of said trade or business, and to suppress all competition theretofore existing between said corporations in the said trade or business, through the instrumentality of and by the means following, to wit:

"That in or about the month of January, 1906, the defendants Thomas F. Ryan and August Belmont entered into an agreement with one another, whereby they undertook and agreed on their own behalf, and on behalf of their business associates, to effect, or endeavor to effect, in violation of law, a combination or merger of all of the elevated, subway, and street surface railroads engaged in the business of operating railroads and transporting passengers within the boroughs of Manhattan and the Bronx, and thereby to suppress competition in said business, and to create a monopoly thereof."

In pursuance of such scheme to suppress competition, to create a monopoly, and to unite under one control all the trade and business of operating all the elevated, subway, and street surface railroads and transporting passengers within and through the said boroughs, Ryan and Belmont and their associates proceeded and caused to be organized and incorporated, under the business corporation law of the state of

New York, a holding corporation under the name of Interborough-Metropolitan Company, with a capital stock of \$15,000, of which \$5,000 was preferred stock and \$10,000 was common stock, later increased to \$55,000,000 of 5 per cent. cumulative preferred stock and \$100,000,000 of common stock, and $4\frac{1}{2}$ per cent. collateral trust gold bonds of said company to the amount of \$70,000,000 on par value were authorized to be issued with said capital stocks, all to carry into effect

the said alleged combination and conspiracy.

This corporation was formed with the intent and purpose of acquiring, and it did acquire in exchange for its own capital stock and certain of such bonds, a large majority of the shares of the capital stocks of the Interborough Rapid Transit Company, the Metropolitan Street Railway Company, and the Metropolitan Securities Company. By such action, and thereupon the independent and competitive use and exercise of the respective rights and franchises of said last-named companies ceased and were abdicated by them in favor of the said Interborough-Metropolitan Company, and all competition between the said subway, elevated, and street surface lines was eliminated, and their respective properties, rights, and franchises merged in and were surrendered to the said Interborough-Metropolitan Company, and the interests of the individual stockholders in said merged companies who participated in said plan in the property and franchises of said companies were terminated, being thus converted (says the bill), "into an interest in the property and franchises of the said Interborough-Metropolitan Company"; and the individual stockholders in said companies who exchanged their stocks under the said plan and combination thereupon ceased to hold any interest in the properties, and ceased to draw their dividends from the earnings of the several companies in which they had been stockholders, and became stockholders in the Interborough-Metropolitan Company, with no other right than to draw such dividends as might be collected and distributed by said "illegal combination and monopoly, the holding corporation."

The bill then says:

"In this manner, by making the stockholders of each of the aforesaid corporations jointly interested in all of said corporations, and by practically pooling the earnings of all of said corporations for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each of said corporations in a common body, to wit, the pooling corporation, with not only the power, but the duty, to pursue a policy which would promote the interests, not of one corporation at the expense of the others, but of all at the expense of the public, all inducement for competition between the said several systems was removed, and a virtual and unlawful consolidation of the properties, franchises, and business of the said corporations was effected, and an unlawful monopoly of the trade or business of operating all of said railroads and transporting passengers within the said boroughs of Manhattan and the Bronx, which was formerly carried on by each of said corporations as independent competitors was established, in accord with the intent and purpose of the aforesaid combination and conspiracy."

"(10) That in pursuance of the unlawful combination and conspiracy above set forth, and in order to carry the same into effect, the Interborough-Metropolitan Company, in or about the month of January, 1906, entered into an agreement with the defendant August Belmont, whereby the said company agreed to purchase of the said Belmont the capital stock of the Interborough Rapid Transit Company, the Metropolitan Street Railway Company, and Met-

ropolitan Securities Company, or so much thereof as said Belmont could acquire. At the same time said defendant Belmont entered into an agreement with the defendants Edward J. Berwind, John D. Crimmins, Andrew Freedman, Thomas P. Fowler, Gardiner M. Lane, and Cornelius Vanderbilt, acting as a committee, whereby the said Belmont agreed to purchase all the stocks of the aforementioned companies, which might be deposited, under a call for deposit to be issued by said committee, and agreed to pay for such stock and bonds of the Interborough-Metropolitan Company."

The bill then sets out a circular notice and plan proposed and issued by these gentlemen, and states that it was declared operative March 1, 1906. The bill then charges that under the said plan and invitation the Interborough-Metropolitan Company has acquired in exchange for its own stock and bonds, and now holds, "in accordance with the aforesaid combination and conspiracy" and the said plan, a very large majority of the stock (giving figures and amounts) of the Interborough Rapid Transit Company, the Metropolitan Street Railway Company, and the Metropolitan Securities Company, and alleges that by such acquisition of such stocks the defendants Interborough-Metropolitan Company, Belmont, Ryan, Berwind, Crimmins, Freedman, Fowler, Lane, and Vanderbilt—"carried out the unlawful purpose of creating a monopoly of the trade and business of operating all the subway, elevated, and street surface railroads, and transporting passengers within and through the boroughs of Manhattan and the Bronx, and the unlawful purpose of restraining such trade and business, and of destroying all competition therein."

The bill then says:

"(11) The defendant the Interborough-Metropolitan Company, which has, as aforesaid, unlawfully acquired the absolute control and management of all the railroads engaged in the transportation of passengers within the boroughs of Manhattan and the Bronx, was not organized under the railroad laws of the state of New York, but the said company was organized under the business corporations law of the state of New York, for the express purpose of acquiring the capital stock and the control of all the corporations engaged in operating railroads and transporting passengers within and through the said boroughs, and with the preconceived intent and purpose of merging said several corporations and of creating a monopoly in the said business, and of destroying all competition therein, and of controlling, without let, hindrance, or competition, the supply of and facilities for the transportation required by the inhabitants of the said boroughs, and, as your orator is informed and believes, with the preconceived and wrongful intent and purpose of evading and circumventing the restraints and duties which are imposed upon railroad corporations by the laws of the state of New York."

"The said Interborough-Metropolitan Company was not organized in good faith to purchase and pay for the stocks of the said various companies engaged in the aforesaid business, but was organized for the express purpose of pooling and uniting all the stocks of the said other companies, their properties and franchises, under one sole management and control, and to carry into effect the unlawful combination and conspiracy heretofore charged; that said Interborough-Metropolitan Company is a mere depository, custodian, and trustee of the capital stocks of the Metropolitan Street Railway Company, the Metropolitan Securities Company, and Interborough Rapid Transit Company, in exchange for which it has made no payment, but has simply issued against the same the stock and securities of itself—an illegal monopoly—which are in reality but beneficial certificates designating the interests of the various hold-

ers in the unlawful monopoly and combination so effected."

The bill, giving facts and figures, then sets out the capitalization of said Interborough Rapid Transit Company, said Metropolitan

Street Railway Company, and said Metropolitan Securities Company, amounting in all to \$117,000,000, and alleges that said Interborough-Metropolitan Company had no means or assets to enable it to purchase said stocks for money. The bill then alleges what was done, giving facts and figures alleged to show that the said Interborough-Metropolitan Company issued in exchange for such stocks and some cash its stocks and bonds to the amount of \$200,272,600, without any adequate consideration, \$90,908,200 of which was issued without any consideration whatever, as there was no increase in property or property values, etc. The bill then proceeds to allege injury resulting from such combination to plaintiff, to other stockholders, and to the public. It contains other allegations to which attention will be called when discussing their sufficiency, viz., allegations as to plaintiff's ownership of stock, collusion, demands upon the corporation for action by it, etc. It is unnecessary to repeat them here.

A demurrer admits allegations of fact, but not mere conclusions of fact or of law. The allegations of this bill are supported by documents, letters, agreements, notices, etc., contained therein or annexed thereto and made a part thereof. These, of course, control so far as their legal effect is concerned. The combination and agreement do not constitute a conspiracy or a monopoly, for the reason they are denominated or denounced as such in the bill of complaint. It is not necessary to cite authority for this proposition. So this court is not to adopt the reasoning of the bill and its deductions from the facts stated, some of which have been quoted, but must take the facts al-

leged, discarding the matters alluded to.

The facts are set out with considerable detail and particularity, but the gravamen of this bill of complaint is that all the elevated, surface, and subway railway lines of Greater New York, extending from the Bronx to the Battery, a distance of many miles, and affording to the general public and the residents of that city the only means of travel and communication by railroad, whether steam or electric, between those points and to and from all intermediate points, and which had been and naturally are competing lines, entered into a combination, agreement, and so-called conspiracy to unite and merge themselves in one company and line of transportation, and under one head or management, and destroy or do away with the theretofore existing competition between them; that this was done by transfers of stock to one company organized or formed under the business corporation laws of the state of New York, and other means described, and that the purpose and intent was to create a monopoly in the business or trade of operating said parallel and normally competing lines of railway, and of transporting passengers within and through the said territory, the boroughs of the Bronx and Manhattan, city of New York, destroying and doing away with competition in such business in such territory; that such a monopoly, by the means and in the manner described in the bill, actually was created, and that the same was and is injurious to the public, to the residents of the city, and to complainant and all other stockholders similarly situated; and that the acts described and the result accomplished were and are in violation of the statutes of the state of New York, especially of section 7 of the stock corporation

law of said state, and contrary to the public policy of said state as enumerated in its statutes, and that such combination and conspiracy has destroyed competition, restrained trade and commerce, and was and is illegal and void, and should be so declared and thereupon dissolved.

It is not alleged in the bill that the members of this combination have obtained exclusive franchises for the construction and operation of railways through the city of New York from the Bronx, or that neighborhood to the Battery, or that vicinity, or that such franchises are not obtainable or may not be obtained in the future. Hence within the strict definition of "monopoly," if it be that a monopoly must include all present existing means of carrying on a business or doing a particular thing generally, or in a particular place or locality, and the right to possess, or own, or control all means for doing that thing in that place in the future, no monopoly has been created by the combination or conspiracy set out in the bill of complaint. Competent authority may grant franchises or a franchise to others to construct and operate other lines of railroad, one or more, from the Bronx to the Battery, and the grantees of such franchises will be at liberty to construct and operate other roads. But, in my judgment, we are to give no such strict meaning to the word "monopoly" as used in section 7 of the stock corporation law, state of New York (Laws 1890 p. 1069, c. 564, amended by Laws 1892, p. 1828, c. 688). The section reads:

"Combinations abolished. No domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."

If the section applies to railroad corporations at all, and I do not doubt that it does, it must have been intended to prevent the creation of a monopoly by such corporations, and those controlling them, in the business in which they are engaged or authorized to engage by the power creating them and defining their powers and the extent thereof. Railroad companies are not at liberty to construct and operate their lines anywhere and everywhere all over the state, but are confined to particular routes and territory. They are not at liberty to engage in all kinds of business, but are confined, generally speaking, to the transportation of passengers, baggage, and freight. Use the word in any such sense as I have mentioned, and it would be impossible for chartered railroad companies to create a monopoly. We must therefore give to the statute quoted a common-sense meaning and construction, such a construction as will make it effective to prevent the evils aimed at, if its words will permit such construction.

The Century Dictionary thus defines "monopoly": "An exclusive privilege to carry on a traffic." However, it further says: "(5) The possession or assumption of anything to the exclusion of other possessors: thus a man is popularly said to have a monopoly of any business of which he has acquired complete control." But even as first defined, "an exclusive privilege to carry on a traffic," the combination made, as described in the bill of complaint, constitutes a monopoly. The right given by the Legislature and city to each of the companies was, as to its line and territory, exclusive. There could be no com-

petition except by a further legislative grant to some other company. When these companies combined, they combined their exclusive privileges, and had an actual exclusive right to construct and operate railroads and transport passengers by railroad in and over that territory and the exclusive privilege to carry on that traffic. The combined action of the Legislature and capitalists was and is necessary to destroy or affect that right, unless the combination was prohibited by statute. I think this just such a monopoly as was aimed at by the Legislature. The Legislature has permitted one railroad corporation to purchase and own the stock of another; it permits or did permit one company to operate others; but it has limited and restricted that right by absolutely forbidding and declaring illegal the combination of one stock corporation, including railroad corporations, with another stock corporation "for the creation of a monopoly, or the unlawful restraint of trade, or for the prevention of competition in any necessary of life." This, in my judgment, includes a monopoly in the real ownership, control, and management of competing parallel railroad lines between substantially the same points or localities, whereby there is no incentive to regulate or lower fares, or better the cars, or service, or transportation facilities for the accommodation and better service of the public. Here, by this combination, the Interborough-Metropolitan Company absolutely controls and practically owns all the railroad lines, elevated, surface, and subway, between the Bronx and the Battery, subject only to such control as the Public Service Commission may exercise over it, and consequently absolutely and exclusively controls the transportation of passengers and such baggage as they may carry and the business of operating railroads between the points named. The operation and management of railroads in carrying passengers is a business; it is a part of trade and commerce. United States v. Joint Traffic Association, 171 U. S. 505, 570. The court said, 171 U. S. 570, 19 Sup. Ct. 25, 32, 43 L. Ed. 259:

"The building and operation of a railroad thus required a public franchise. The state would have had no power to grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between states such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several states."

In San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839, the court defined monopoly as signifying "the sole power of dealing in a particular thing or doing a particular thing, either generally or in a particular place." In Herriman et al. v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81, the court held that a certain combination did not constitute a monopoly—

"there being nothing to show that the parties to the contract by the combination of their business interests are in the control of that business in San Francisco to an extent to enable them to exclude competition therein, or control the price of such labor or business."

Here we have the elements of a monopoly, there lacking, as the bill shows that the combination is in the exclusive control of the business of constructing, repairing, managing, and operating railroads and transporting passengers by railroad between the Bronx and the Battery and intermediate points in the city of New York so as to absolutely exclude competition in that business in that place or territory. No individual or corporate agencies can prevent. Legislative action is impotent unless capital shall come to the rescue and ask leave to construct a competing line.

In Northern Securities Co. v. United States, 193 U. S. 197, 363, 24 Sup. Ct. 436, 467, 48 L. Ed. 679, Mr. Justice Brewer said:

"It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with state law, and within the letter and spirit of the statute and the power of Congress."

In Herriman v. Menzies, supra, the court said:

"A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein."

In Jones v. Carter (Tex. Civ. App. 1907) 101 S. W. 514, the court said:

"The word 'monopoly' embraces any combination or contract, irrespective of its form, the tendency of which is to prevent competition in its broad and general sense, and to control prices to the detriment of the public."

In Burrows v. Int. Met. Co. (C. C.) 156 Fed. 389, 392, Judge Holt held:

"A monopoly exists within the meaning of section 7, Stock Corporation Law, when every surface street, elevated, and subway railroad, in a locality are combined into one management and control, through corporate stock ownership."

This combination would have been legally impossible under Railroad Corporation Law, section 80 (Laws 1892, p. 1398, c. 676), which reads:

"Consolidation and lease of parallel lines prohibited. No railroad corporation or corporations owning or operating railroads whose roads run on parallel or competing lines, except street surface railroad corporations, shall merge or consolidate, or enter into any contract for the use of their respective roads, or lease the same, the one to the other, unless the Board of Railroad Commissioners of the state or a majority of such board shall consent thereto."

But, evidently, an attempt was made to evade this by organizing certain of the companies under the business corporation law, viz., Interborough-Metropolitan Company and Metropolitan Securities Company. It should be remembered here that section 7 of the stock corporation law evidently limits section 40 thereof.

My attention has been called to certain litigation in the state courts of the state of New York holding against the contentions of the plaintiff herein, and I am asked to follow the decisions there made as binding on this court. Matter of Application of Attorney General, etc., 125 App. Div. 804, 110 N. Y. Supp. 186, and cases cited; Matter of Application of Attorney General, 124 App. Div. 401, 108 N. Y. Supp. 823. On the facts alleged in this bill I do not see how the Appellate Division could have arrived at any such conclusion as it did in the case cited. Probably the facts alleged here did not appear there. Section 78, c. 565, p. 1106, Laws 1890, relates to the lease of one road to another; section 79 provided that one leasing another might acquire stock therein; but the following section, section 80, expressly provided that:

"Consolidation and lease of parallel lines prohibited. No railroad corporation or corporations owning or operating railroads, whose roads run on parallel or competing lines, shall merge, or consolidate, or enter into any contract for the use of their respective roads, or lease the same the one to the other."

Sections 78 and 80 were amended by chapter 676, p. 1398, Laws 1892, and, as amended, section 80 read as quoted. All these companies were not "street surface railroad corporations," and the bill expressly alleges that the Board of Railroad Commissioners of the state did not assent to the merger, consolidation, or agreement alleged and complained of in the bill. The bill alleges a bald violation of both the railroad corporation law and the business corporation law as they stood at the time of the doing the acts complained of. I am not at all impressed by the contention that a monopoly cannot exist where it is within the power of the Legislature, by legislative enactment, or the operations of some commission created by it, to remedy, obviate, destroy, or alleviate the evils that would or might result from the monopoly if left undisturbed. A monopoly is no less a monopoly for the reason that legislative power, if exercised, may destroy it, or regulate it, or lessen the evils of its existence. The power of the state to destroy a monopoly or a combination in restraint of trade does not negative its existence. The power of the courts, conferred by Congress, to dissolve combinations, etc., in restraint of interstate commerce affords no argument against existence of such a combination. A monopoly may exist even if fares may be fixed by the Legislature.

The highest court of the state of New York is our Court of Appeals, and when that court construes section 7 of the stock corporation law the federal courts will be bound by its construction. The federal courts are not bound by any decision of any Appellate Division of the Supreme Court of the state in any case. The Appellate Divisions cannot convert themselves into the highest court of the state or into courts of "last resort," within the meaning of the cases, by refusing appeals to the Court of Appeals or by exercising a discretion in refusing leave to prosecute actions. The lower federal courts are bound by the decisions of the highest court of a state giving construction to the Constitution or statutes of the state, except when the United States Supreme Court has decided otherwise, but are not bound by its decision on questions of general commercial law, etc. They are also bound by

the decisions of the Supreme Court of the United States and those of the Circuit Court of Appeals in their own circuit, but are not bound by those of a federal court of co-ordinate jurisdiction, or even the decisions of a federal Circuit Court of Appeals in another circuit. Courts are not mere machines to register and follow the opinions and decisions of some other court, unless that other court be one having appellate power in the same jurisdiction, or the highest court of a state and the decision gives construction to the Constitution or some statute of the state and the Supreme Court of the United States has not, as it sometimes does, decided in opposition to it. Of course, all these courts are entitled to consideration and are held in the highest respect, and their decisions are to be carefully considered and duly weighed, but, aside from appellate courts of the same jurisdiction and the highest court of a state in certain cases, such decisions are not binding on the Circuit or District Courts of the United States. The decision of one of the several Appellate Divisions in the state of New York is not binding on another, but all Appellate Divisions are, or should be, bound by the decision of the Court of Appeals. So the decision of one of the several Circuit Courts of Appeal in the federal courts is not binding on another, or even on the Circuit or District Courts of another circuit. How far one court shall be bound by another of co-ordinate jurisdiction is a question of comity, and on this question the Supreme Court of the United States has spoken in no uncertain terms. Mast. Foos & Co. v. Stover Manufacturing Co., 177 U. S. 485, 488, 489, 20 Sup. Ct. 708, 710, 44 L. Ed. 856, where Mr. Justice Brown, speaking for the court, said:

"Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades, but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views, that comity comes in play and suggests a uniformity of ruling to avoid confusion until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly, it applies only to questions which have been actually decided, and which arose under the same facts."

When, as here, we come to questions involving the proper construction of a state statute, if they do not involve the question of its being in violation of the Constitution of the United States, the decisions of the highest state court are, with the limitation stated, binding; but it must be the decision of the highest state court. Ex parte Tyler, 149 U. S. 137, 13 Sup. Ct. 785, 37 L. Ed. 697; City of Denver v. Porter, 126 Fed. 288, 61 C. C. A. 168; Morenci Copper Co. v. Freer (C. C.) 127 Fed. 199.

In Ex parte Tyler, supra, the court said:

"When the questions involved arise under the state Constitution and laws, the decisions of the highest tribunal are accepted as controlling."

Such is the holding in Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746. In Montana its Supreme Court is its highest court and court of "last resort." The same is true of Yazoo and M. R. R. Co. v. Adams, 181 U. S. 580, 21 Sup. Ct. 729, 45 L. Ed. 1011.

There may be, and, perhaps is, an exception, where the inferior courts of a state, by a long and uniform course of decision, have established rules which have become rules of property and action in the state, especially with regard to the law of real estate and the construction of its state Constitution and statutes, in which case, to avoid confusion and a disturbance of the settled law of the state and of settled rights, the federal courts may follow them if apparently sound. Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359, quoted with approval in Great Southern Hotel Co. v. Jones, 193 U. S. 542, 543, 24 Sup. Ct. 576, 48 L. Ed. 778. But such a rule would be showing more regard to the decisions of the inferior courts of a state than does the highest court of such state, which never hesitates to overturn the decisions of its inferior courts even on questions involving the Constitution and statutes of such state. But it is unnecessary to discuss this proposition, as we have no uniform course of decisions on the question involved here by the inferior courts of the state of New York. The whole duty of this court in this particular case is summed up by Mr. Justice Harlan in Great Southern Hotel Co. v. Jones, 193 U. S. 548, 24 Sup. Ct. 580, 48 L. Ed. 778, where he says:

"But the decision of the state court, as to the constitutionality of the statute in question, having been rendered after the rights of parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the Constitution or laws of the state."

For these reasons, this court is at liberty and in duty bound to follow its own best judgment and give its own construction to the statute in question, the New York Court of Appeals not having passed

upon the question.

It is urged that there has not been a sufficient compliance with equity rule 94, promulgated January 23, 1882, and framed in the light of Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827. And see Corbus v. Alaska T. G. M. Co., 187 U. S. 462, 23 Sup. Ct. 157, 47 L. Ed. 259; Venner v. Great Northern Railway, 209 U. S. 24, 33, 28 Sup. Ct. 328, 52 L. Ed. 666. That rule provides that every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must (1) be verified by oath; (2) contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or, etc.; (3) that the suit is not a collusive one

to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance; (4) it must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders; and (5) the cause of his failure to obtain such action.

It seems to me that the allegations of the bill are sufficient in these regards. First, the bill is verified by Clarence H. Venner, the president of the Continental Securities Company, which company is a stockholder and the plaintiff in the action, and Venner gives the grounds and sources of his information and belief. Second, the bill says the complainant "was, at and prior to the time of the unlawful plan, combination, and conspiracy which are hereinbefore set forth, and now is, the bona fide and lawful owner, of record, of 300 shares, of the par value of \$100 each, of the capital stock of the defendant Interborough Rapid Transit Company," one of the companies that entered into the combination and alleged conspiracy. Third, the bill says "this suit is not a collusive one to confer on a court of the United States jurisdiction of a cause of which it would not otherwise have cognizance." Fourth, the bill then alleges that the plaintiff made a demand July 25, 1906, on the Interborough Rapid Transit Company, and August Belmont, its then president, and on its board of directors, that the company take steps to dissolve the said illegal combination and monopoly, wrest the control of said company from the Interborough-Metropolitan Company, and restore the control of, and the property and franchises of, the said Interborough Company to its stockholders, and attaches to the bill a copy of the demand which was in writing. The bill also alleges that this same demand, giving it, was repeated July 10, 1907, and the bill gives in detail the reasons why he failed to secure such action.

Criticism is made of the allegation as to ownership of the shares of stock, in that it states the plaintiff was at the time of the transaction complained of, and now is, the bona fide and lawful owner "of record" of the shares of stock mentioned. The plaintiff certainly states emphatically that he was a bona fide and lawful shareholder of record at the time of the transaction of which he complains, and he emphasizes the fact by stating that his shares of stock were recorded in his name; that he was the bona fide and lawful owner of record. I do not see that the allegations that plaintiff was the bona fide and lawful owner "of record" detracts anything from the force of the statement. I do not think the statement evasive, or that it was so intended. It is not to be implied from such a statement that while complainant was and is the bona fide lawful owner of the stock, of record, some other person was and is the real owner, legal or equitable in fact. I think an allegation that a plaintiff is the bona fide and lawful owner of record of certain real estate is a direct and emphatic allegation of absolute and unqualified ownership. I am of opinion that a statement that a person is the bona fide and lawful owner of record of certain stock in a corporation raises the presumption that he is the sole, actual, bona fide, and lawful owner thereof, both legal and equitable, and that no other person has any interest therein. It is true that

certificates of ownership of shares of stock in a corporation may pass by indorsement and delivery and carry the ownership of the stock itself; that shares of stock may be recorded in the name of one man and be actually owned by another. If it shall turn out on the trial that Venner has adopted a subterfuge, has alleged an ownership of this stock "of record" in the plaintiff company, when in fact the stock was owned by some other person or corporation, the complainant will not get far in his action. This ownership is the foundation of the right of complainant to maintain this action at all, and if that allegation is put in issue the plaintiff will undoubtedly be put to proof thereof in the very beginning. I have examined all the cases cited by the defendants, and find nothing opposed to the views here expressed. Equity rule 94 by its very terms—and it is as binding as an express statute—requires the complainant in such an action as this to allege that he was a shareholder at the time of the transaction of which he complains. I have no doubt that "a bona fide owner of stock, of record," in a corporation, is a "shareholder" therein. "Shareholder: One who holds or owns a share or shares in a joint stock or incorporated company, in a common fund, or in some property; as a shareholder in a railway, a mining or banking company, etc." "Share: Specifically, one of the whole number of equal parts into which the capital stock of a trading company or corporation is or may be divided; as shares in a bank, shares in a railway." And, in finance, "stock" is "the share capital of a corporation or commercial company; the fund employed in the carrying on of some business or enterprise, divided into shares of equal amount, and owned by individuals who jointly form a corporation." Century Dictionary. Undoubtedly the bona fide owner of record of 300 shares of the capital stock of a duly incorporated railroad or business corporation is "a shareholder" therein. I think that equity rule 94 was complied with when the complainant stated facts which show that it was "a shareholder" in the company at the time of the transaction complained of. It is, of course, true that "a stockholder is one owning stock" (Mills v. Stewart, 41 N. Y. 384, 386), but, as stock in a corporation is a share or shares in the corporation and represents and entitles the holder thereof to a part or share of the fund put into and employed in carrying on the business, a stockholder or one owning stock is necessarily a shareholder. There is nothing to the contrary in Beal v. Essex Savings Bank, 67 Fed. 816, 817, 15 C. C. A. 128, which simply holds that one who holds stock as collateral security does not own the stock and is not a shareholder, but that the one who does own the stock and has simply pledged it as security for a debt, does own it and is consequently a shareholder; or in Matter of Bronson, 150 N. Y. 1, 8, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632, or Matter of Fitch, 160 N. Y. 87, 94, 54 N. E. 701. Both cases demonstrate that the ownership of shares of stock in a corporation makes the owner a shareholder therein, while ownership of its bonds does not; the certificate issued is mere evidence of the number of shares the holder is entitled to; the record of ownership of shares on the books of the company is evidence of the fact as against the company and even others, sometimes, but, nevertheless, the owner may have actually sold his shares and ceased to be in fact a shareholder and stockholder. McNeil v. Tenth National Bank, 46 N. Y. 325, 331, 7 Am. Rep. 341. The certificates of stock ownership are not the stock itself or the shares of the capital itself, but mere evidence of ownership of so many shares of the money put in the business as capital stock. I find no case, and am not cited to one, holding that such an allegation as that contained in the bill is not a compliance with the rule referred to. The allegation fairly means that the complainant was at the time referred to, not only the bona fide owner of the shares, or shares of stock of the company, but the recorded owner. It was not necessary for the pleader to use the very words of the rule.

The next contention in support of the demurrers is that the bill shows on its face a fatal defect of parties, in that the receivers appointed by the Circuit Court of the United States in the Southern District of New York are not made parties defendant. It is further contended that the present possession, control, and management of certain of the properties mentioned having passed into the hands of such receivers, the arm of this court, and consequently into the possession of this court itself, this action cannot be maintained. The bill explicitly alleges that all the surface railroads mentioned are in the hands of receivers appointed by Judge Lacombe in actions brought in this court and now pending herein, and which action was taken prior to the commencement of this action, and are being held, operated, and controlled by such receivers. The bill states that, as to the New York City Railway Company and the Metropolitan Street Railway Company, such action was taken "because of the then admitted inability of" said companies, naming them, "to pay and discharge its financial obligations which were then due or about to become due." As to the Third Avenue Railroad Company, the receivers were appointed in an action brought in this court to foreclose a mortgage on its property. The bill gives no further information as to the nature or object of these several actions.

The contention in defendants' brief seems to be that, as the court has assumed the administration of these surface railroads, their control and management, as the possession of the receivers is the possession of this court, and it holds and administers—that is, operates—the surface roads for the benefit of those persons or corporations which the court shall ultimately adjudge to be entitled to it, and as these surface roads are in the custody of the law (Porter v. Sabin, 149 U. S. 473, 479, 13 Sup. Ct. 1008, 37 L. Ed. 815; Atlantic Trust Co. v. Chapman, 208 U. S. 360, 370, 28 Sup. Ct. 406, 52 L. Ed. 528), it is self-evident that the Interborough-Metropolitan Company is not now violating section 7 of the stock corporation law hereinbefore quoted.

The gist of this contention seems to be that the action of this court in appointing receivers for the surface roads has taken them out of the illegal combination or monopoly, if one existed, and that it is already dissolved, as we now have competing parallel lines between the Battery and the Bronx, and no restraint of trade or business as competition is restored. I do not consider this to be the result of the

action of the court in appointing these receivers. The same contracts and agreements and stock issues and ownerships exist as heretofore. The court, in administering the affairs of the companies and in running and operating the roads, must recognize and treat such contracts, etc., as valid and subsisting. This court, by its receivers, has stepped in and taken possession, and must run and operate and manage the roads in conformity to existing contracts, agreements, stock ownerships, etc., and not in opposition thereto, subject, of course to its right in a proper proceeding to abrogate improvident contracts and direct proceedings to set aside illegal ones, etc. The court must recognize and treat as valid these contracts, agreements, and recognize these conditions, until they are assailed and set aside. The court may vacate these receiverships at any moment, and in such event the property and its control would be restored to those from whom it was taken or their successors. The duties of a receiver are substantially those of a trustee, although his powers are usually more limited. Foster's Fed. Pr. § 250, p. 556; and see Commonwealth v. Franklin Ins. Co., 115 Mass. 278; People v. National T. Co., 82 N. Y. 283. Suppose business conditions should be such that large earnings accumulate in the hands of such receivers applicable to the payment of dividends, would or would not these go to the persons entitled thereto under the alleged illegal consolidation agreement? As was said by Clifford, J., in Bank of Bethel v. Pahquioque Bank, 14 Wall. 400, 20 L. Ed. 840, as to the effect of the appointment of receivers, "the corporate franchise of the corporation is not dissolved, and the association, as a legal entity, continues to exist." It is possible that these cases in which receivers were appointed, properly, might be consolidated with this, or that the court might instruct the receivers to ignore the alleged illegal combination, etc. However, it has not done so, and the right of this complainant to have the illegal combination dissolved, if it has such right, is not even suspended by the pendency of the actions referred to.

As to parties, we find all the corporations and individuals who took part in the alleged illegal transaction, or who are to be directly affected by a decree, before the court. The complainant sues in behalf of all similarly situated who see fit to come in. The receivers do not own the property or any part of it. They are not indispensable parties, or even necessary parties, to this action. In my judgment they would be proper parties, as the pendency of this action and the information contained in the bill, if brought to their attention and to the attention of the judge appointing them, might affect their action or that of the court when giving them directions. An application to intervene or to have them brought in would properly be brought before Judge Lacombe, who would exercise his judgment and discretion in the matter.

If it be a defense, as to which I express no opinion, that this vast combination, affecting the population of a city having some four millions of people and other millions who visit the city for business or pleasure, taking under one management and control and ownership all its parallel and heretofore competing railroad lines, with their

feeders, is a benefit to the stockholders and the public, and that no injury has resulted or can result, that defense may be pleaded and the facts shown. The allegations of the bill are that injury has resulted and must result; that the rights of the public and of many stockholders have been invaded; that the statutes of the state, expressing the legislative will and the policy of the state, have been and are being violated; that the combination described is illegal and injurious. Concede the premises, and we have a proper case for the interposition of a court of equity. Whether the policy expressed in the statutes be wise or unwise is a question with which the courts have nothing to do. It is their duty to ascertain the law, and, when appealed to, to declare and enforce it.

The demurrers are overruled, with costs. Defendants may answer

in 30 days on payment of such costs, to be taxed by the clerk.

UNITED STATES V. FIFTY BARRELS OF WHISKY.

(District Court, D. Maryland. October 26, 1908.)

1. FOOD (§ 24*)—PURE FOOD LAW-ADULTERATION OR MISBRANDING-PRO-

CEEDING FOR FORFEITURE.

A preliminary examination by the Department of Agriculture of an alleged adulterated or misbranded food or drug product, as provided for by section 4, Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 769 (U. S. Comp. St. Supp. 1907, p. 929), is not a necessary condition precedent to the filing of a libel in rem for the condemnation of such product under section 10 of the act, 34 Stat. 771 (U. S. Comp. St. Supp. 1907, p. 934).

[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. § 24.*]

2. Food (§ 24*)—Pure Food Law—Proceeding for Forfeiture of Misbranded Article—Defenses.

In a proceeding by libel by the United States under Food and Drugs Act June 30, 1906, c. 3915, § 10, 34 Stat. 771 (U. S. Comp. St. Supp. 1907, p. 934), for the forfeiture and condemnation of a quantity of distilled spirits shipped in interstate commerce and alleged to have been misbranded contrary to the provisions of said act, it is no defense that the brand was placed upon the packages containing such liquor by the United States gauger upon information received from the distiller in accordance with the usual practice, or that the same kind of liquor had for a number of years been so branded and sold under such brand to the knowledge of the agents and officers of t' United States.

[Ed. Note.—For other cases, Food, Cent. Dig. § 17; Dec. Dig. § 24.*]

3. ESTOPPEL (§ 62*)—EQUITABLE ESTOPPEL—UNITED STATES—ACTS OF OFFICERS OR AGENTS.

The United States cannot be estopped to proceed for the violation of a federal statute by the acts of any of its agents.

{Ed Note.—For other cases, see Estoppel, Cent. Dig. § 152; Dec. Dig. § 62.*

As against state or United States, see note to State of Michigan v. Jackson, L. & S. R. Co., 16 C. C. A. 353.]

Libel by the United States for condemnation of alleged whisky for misbranding. On exception to libel, and charge to jury.

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This was a libel filed by the United States seeking the condemnation of 50 barrels, more or less, of alleged whisky. The libel charged that the product had been distilled at New Orleans, La., out of molasses, and had been there branded "Bourbon Whisky"; that such branding was a misbranding, in that whisky was a distillate of grain, Bourbon whisky a distillate of fermented mash of a mixture of grains—of which mixture corn constituted the larger part—and that to entitle the product to be called Bourbon whisky it must be distilled in certain localities, particularly in the state of Kentucky, and not in Louisiana. There was no allegation in the libel that there had been any hearing before the Secretary of Agriculture, as prescribed in sections 4 and 5 of Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 769 (U. S. Comp. St. Supp. 1907, pp. 929, 930). The claimants excepted to the sufficiency of the libel because of the absence of this allegation.

John C. Rose, U. S. Atty., and R. M. Allen, Special Asst. U. S. Atty.

Moses R. Walter, for the claimant.

MORRIS, District Judge (overruling this exception, and sustaining the sufficiency of the libel). In this case, which is a libel for the seizure and forfeiture of 50 barrels of distilled spirits alleged to be misbranded contrary to the provisions of the act of Congress of June 30, 1906, the libel does not allege that there had been any preliminary examination such as is provided for by section 4 of the act. The claimant has excepted to the libel upon the ground that the court has no jurisdiction unless such a preliminary examination has preceded the seizure. It is urged that the harshness of the proceeding in seizing goods alleged to be misbranded, without giving the owner the opportunity of being heard as to their true nature, is such that the court should, if possible, construe the law so as to require the examination as a prerequisite to seizure.

Such seizures are not unusual, and it is plain that, if the harshness were conceded, it would not justify the court in reading into the law a limitation which it does not contain. The act provides two different proceedings to enforce its provisions. One is by a criminal proceeding in personam; the other is by a proceeding in rem, by seizure of the offending thing itself, and forfeiture if found to be violative of the law. In this latter case there is no provision for a preliminary examination. Section 10 of the act provides that any article of food, drug, or liquor that is adulterated or misbranded, which is being transported from one state to another, shall be liable to be proceeded against and seized for confiscation by process of libel for condemnation. It is further provided that the proceedings for such libel cases shall conform as near as may be to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case. The libel alleges that 50 barrels of distilled liquor are now at a named place within the district, having been transported from the city of New Orleans, in Louisiana, to Baltimore, Md., branded "Bourbon Whisky," which brand indicates a liquor containing all the congeneric substances obtained by distillation from a fermented mixture of grain, of which Indian corn forms the chief part, and confined to whisky distilled in the state of Kentucky, and that the 50 barrels of distilled liquor in question, branded "Bourbon Whisky,"

are not whisky at all, but a distillate of molasses distilled in New Orleans, La. The libel then prays that the 50 barrels of liquor may be proceeded against and seized for condemnation, in accordance with the act of Congress approved June 30, 1906, and prays the court to order process of attachment in due process of law, and that all persons having, or pretending to have, any right, title, or claim in said liquor may be cited to appear and answer the premises. This is according to the course of proceeding in libels in admiralty, and in similar proceedings in rem for forfeitures for violation of the internal revenue laws. Such seizures are made in cases in which forfeiture of the goods is the penalty, without preliminary examination or proceedings of any kind, in cases of violation of the customs laws and the shipping regulations, as well as violations of the internal revenue laws.

The exception is overruled.

At the trial it was proved, and not denied, that the spirits libeled had been distilled in New Orleans, La.; that the material from which they had been distilled was the cheaper grade of New Orleans molasses (commonly known as "Blackstrap"); that to each 350 gallons of molasses was added about 1 gallon of sulphuric acid; and that this mixture was further diluted by the addition of $5\frac{1}{2}$ gallons of water to every gallon of molasses.

The libelant produced some 50 or more witnesses, being distillers of rye and Bourbon whiskies, retail liquor dealers, retail grocers, druggists, the chairman of the Revision Committee of the United States Pharmacopœia, physicians, chemists, and food experts, who testified that in their understanding the word "whisky" imported a distillate of grain; that the words "Bourbon Whisky" imported a distillate of mixed grains, of which mixture Indian corn constituted the larger part. Most of these witnesses were further of the opinion that the phrase "Bourbon Whisky" implied that the whisky had been distilled in Kentucky. All the chemical witnesses, on both sides, testified that in the present state of chemical knowledge it is not possible by chemical analysis, alone, certainly to tell whether a given product is brandy from grapes, whisky from grain, or rum from molasses.

The claimant proved that its distillery had always been surveyed and registered as a sweet-mash molasses distillery; that during the six years immediately preceding the seizure, 12,000 barrels of its product, were branded and entered as "Bourbon Whisky," and that, out of said 12,000 barrels, 9,000, of which the 50 barrels, more or less, seized were a part, had been withdrawn and sold to various persons as Bourbon whisky; that the said barrels so entered and withdrawn were reported by the claimant and the government storekeeper at the distillery to the collector of the district, by him reported to the Commissioner of Internal Revenue, and by the latter reported in his printed annual reports as entries and withdrawals of Bourbon whisky; that the branding of the words "Bourbon Whisky" had been put on each of the said barrels by the United States gauger in charge of such distillery. The claimant offered the annual reports of the Commissioner of Internal Revenue for the years from 1901 to 1907, inclusive, to prove that during most of these years there had been only one distillery in Louisiana, and that was the claimant's molasses distillery; that no material other than molasses was used for distillation in that district, and that these reports did not show that any rum had been distilled in the district of Louisiana. The claimant further offered said reports to show that for many years next preceding the seizure the records of the Internal Revenue Department purport to show that Bourbon whisky had been produced in some 10 states other than in Kentucky. These reports, in this respect, show that more than 90 per cent, of all the whisky branded "Bourbon Whisky" produced in this country was produced in Kentucky, and that the larger part of the small percentage not produced in Kentucky was produced in states immediately bordering on Kentucky. The claimant further offered chemical evidence to the effect that whenever starch, malted cereal, cane sugar, or grape sugar are subjected to the ordinary processes

preliminary to fermentation a common sugar is derived from them. So that, while there are chemical differences in the mash, depending on the material out of which the mash is made, a large part of such mash in each case consists of a sugar common to all. The claimant further offered chemical testimony to the effect that the character and kind and race of the yeast used in fermentation has an important effect upon secondary products and upon the flavor of the finished product; that a large part of the distinction in the aroma between American whiskies on the one hand, and Scotch and Irish whiskies on the other, is due to the circumstance that American whiskies are aged in charred barrels; that such improvement in the flavor of whisky in charred packages as takes place after the fourth year is due largely to concentration, and the oily appearance of matured whisky is due to material extracted from the charred packages, and that the body of whisky, so called, is due largely to the solids extracted from the wood. The claimant further offered evidence to the effect that sulphuric acid is used to invert the sucrose. so that fermentation can be accelerated, and ammonia is used as a yeast food; that there were no poisonous or deleterious substances in the whisky seized, and that chemical analysis showed that no sulphuric acid or ammonia remained in the whisky seized, those substances having been eliminated in the process of distillation.

The libelant proved in rebuttal that the gauger who branded the barrels in this case "Bourbon Whisky" received his information that the contents of the barrels were Bourbon whisky from the distiller, and that many gaugers in the service in other districts had habitually acted upon such information in determining what was the name, known to the trade, by which each package of distilled spirits should be branded. The government further proved that once a month the distiller made a sworn return of the quantites and kinds of spirits distilled by him, giving to each class of them the name by which he asserted they were known in the trade, and further proved an internal revenue regulation which provides that, as to the kind of spirits produced, the gauger should see that his returns agreed with those made by the distiller, and that the tables in the annual reports of the Internal Revenue Department read in evidence by the respondents were simply compilations of these distillers' monthly reports. The government offered evidence of a chemical expert, who has made a special study of fermentation and distillation, to the effect that it is not necessary to use sulphuric acid in distilling molasses for the purpose of accelerating fermentation; that he had made accurate experiments to determine whether the addition of sulphuric acid to the mash would increase the rate of fermentation, and the result of the experiment was to show that the addition of sulphuric acid made no difference either in the rate at which the sugar was inverted, as determined by examinations with the polariscope, or in the rate at which the sugar was fermented, as determined by the study of the rate at which the specific gravity of the liquid diminished; that there may at times be a very good reason for the use of sulphuric acid, and that is to check the multiplication of foreign ferments or acetic acid bacteria. A good many different antiseptic materials have been used for such purposes. Of these sulphuric acid is one, and it is also about the cheapest, and about as readily obtained as any.

Another way of preventing the existence of these false ferments is to keep the distillery clean.

The libelant offered three prayers and the respondent one prayer, which latter was as follows:

"The Louisiana Distillery Company, the claimant in this case, prays the court to instruct the jury that a portion of the product of its distillery, including therein the 50 barrels, more or less, seized in these proceedings, having been branded by the United States gauger, from time to time, during the seven years preceding the seizure herein, as 'Bourbon Whisky,' and having during that period been as 'Bourbon Whisky' entered in bond in the United States bonded warehouses of said claimant, the entries thereof reported as 'Bourbon Whisky' to the internal revenue collector in the district of Louisiana, and having been reported as 'Bourbon Whisky' to the Commissioner of Internal Revenue, and portions thereof, as shown by the evidence in the case, having been withdrawn from said bonded warehouses as 'Bourbon

Whisky,' and the said withdrawals having been reported as 'Bourbon Whisky' to the said collector, and by him reported to the Commissioner of Internal Revenue as 'Bourbon Whisky,' and the taxes on all said withdrawals having been paid to the United States government, and the said Commissioner of Internal Revenue having full knowledge during all this time that the said distillery was surveyed as a sweet-mash molasses distillery, and that molasses and not grain was used therein for the distillation of its spirits, and that the product thereof was during said period of seven years branded 'Bourbon Whisky,' and that the entries and withdrawals thereof were as 'Bourbon Whisky' and the taxes thereon paid as such, then the libelant is estopped from claiming that the contents of the said 50 barrels of whisky, more or less, were or are other than 'Bourbon Whisky,' and their verdict must be for the Louisiana Distillery Company."

MORRIS, District Judge (charging the jury). I will not call upon counsel for the United States to reply. The case as it is presented to the jury is a very clear one. I reject the only prayer offered by the defense. Really, that prayer concedes the misbranding of the liquor, and asks me to say to the jury that if they find that this was done under the control and by the agents of the United States, the United States, which is the plaintiff in this case, is estopped from proceeding to condemn these goods and forfeit the goods for misbranding. That proposition I reject. Every one who deals with agents of the United States deals with them with the knowledge imputed to him of the restriction upon their authority. It seems to me it cannot be successfully contended that any agent of the United States has authority to do a thing which is forbidden by law; and it is forbidden by this law passed in 1906, the pure food law, to misbrand any goods which are intended to be, or are actually, transported from one state to another. Of course, the gentlemen of the jury know, or should know, that the United States has no authority, under the Constitution of the United States, to forbid the manufacture and the sale of goods within the limits of a state. It is only when they are transported from one state to another, and become a part of interstate commerce of the country, that the United States has the authority to pass laws regulating them. So this liquor, without infraction of any law so far as I know, might have been offered for sale and sold in Louisiana, unless there is some law of Louisiana which prohibits the misbranding of or misrepresentation with regard to the constituents of an article that is offered for sale. It is only, therefore, when these goods become a part of the interstate commerce of the country that the pure food law of 1906 applies to them. That law provides that "misbranding" shall be the placing on the package of any statement which shall be false or misleading in any particular, and provides that any article misbranded, which is transported from one state to another for sale, is liable to confiscation. Therefore I do not think that anything that was done in the distillery in Louisiana, in New Orleans, in any way estops the United States or estops the authorities, or the agents of the United States in Maryland, from proceeding to condemn these goods upon the ground that they were misbranded. It would be destructive of the enforcement of many of the laws of the United States if the act of any agent of the United States could be set up as a defense against the explicit law; the explicit law in this case being that any goods that are misbranded shall be forfeited. If any gauger, at the request of a distiller or under a generally understood practice of the distillery, should misbrand an article of distilled liquor, it would be utterly subversive of the law, if the act of the gauger could be a defense to the positive enactment of the act of 1906 which forbids misbranding goods that are to be transported from one state to another. I therefore reject that contention on behalf of the claimant of the goods in this case.

The real issue which the jury are to determine is whether these goods are whisky as known to the trade and to the community generally, and to those who deal in whisky. If it is not whisky, the case is made out in favor of the United States. If the jury believes—and there is a great deal of testimony to that effect—that the word "whisky" is applied only to a distillate made of grain, that is an end of the defense in this case. If they so find, their verdict must be for the United States, because it is admitted in this case, and it is not a matter of dispute, that this liquor is not made from grain, but is a distillate of molasses with a slight infusion of sulphuric acid.

But the jury might possibly find that it could be called "whisky." Then there is a second question, can it be called "Bourbon Whisky"? There is a great deal of testimony to show that Bourbon whisky, in its most general sense, is a whisky made from grain of which corn is the larger constituent. If you find that this was not such a whisky, then it is not Bourbon whisky, and your verdict must be for the United States.

Then there is testimony also to the effect that Bourbon whisky, as understood in the trade, is confined to a whisky made in Kentucky. If you find that to be the fact—and that is for you, entirely, on the testimony—if you find that in the trade, and among those who deal in and who are familiar with the article, Bourbon whisky implies that it is made in Kentucky, then of course that is an end of the case so far as the claimant is concerned, because it is admitted that this liquor was made in New Orleans.

A good deal has been said about the hardship and injustice of condemning an article which once has been branded by the gauger, but I do not think that that appeals very strongly to any one's sense of morality, because a gauger is not a man who is to decide what is the trade-name of an article. He takes that largely from the distiller. He is not a dealer in liquor, nor is he a man of science who is to determine once for all, and incontrovertibly, whether it is what it is branded, or something else.

I will now give you the instructions asked for by counsel for the United States. The first prayer is as follows:

"The jury are instructed that if from the evidence they shall find that the word 'whisky,' as understood by scientific men, the liquor trade, and by the public generally, is confined to a distillate of grain, and shall further find that the contents of the barrels libeled in this case are a distillate of molasses, and that the said barrels were branded 'Bourbon Whisky,' then the said barrels were misbranded, and their verdict must be for the libelant."

The second prayer has reference to the restricted meaning of "Bourbon Whisky," as applying to whisky distilled in the state of Kentucky. It is as follows:

"The jury are instructed that if they shall find from the evidence in this case that the phrase 'Bourbon Whisky,' as defined in the standard works of reference in use in this country, and as understood by scientific men, the liquor trade, and by the public generally, imports a liquor distilled in the state of Kentucky, and shall further find that the contents of the barrels libeled in this case were distilled at New Orleans in the state of Louisiana, and shall further find that the said barrels were branded 'Bourbon Whisky,' then the barrels were misbranded, and their verdict must be for the libelant."

The third prayer has reference to what you may find from the evidence is the more general acceptation of the words "Bourbon Whisky," in case you find that the words do not necessarily require that it shall be made in Kentucky. The instruction is as follows:

"The jury are instructed that if they shall find from the evidence that the phrase 'Bourbon Whisky,' as understood by scientific men, the liquor trade, and the public generally, is confined to a distillate of grain made from the mixture of fermented grain, of which mixture corn constituted the greater part, and shall find that the contents of the barrels libeled in this case are a distillate of molasses, and shall further find that the said barrels are branded 'Bourbon Whisky,' then the said barrels are misbranded, and their verdict must be for the libelant."

I do not think there is anything further that I need say to the jury, except to remind you that there is no dispute at all as to the material out of which this distillate was made. The whole case, in my judgment, and I so instruct you, turns upon whether the general acceptation of the word "whisky" means that it is made from grain. Of course, this liquor was not so made.

Further, in regard to Bourbon whisky, if the term "Bourbon Whisky" implies that the article was made of corn in greater part—not made of molasses, but made of grain of which corn was the greater

part—then, of course, it was misbranded.

So, further, if you find that Bourbon whisky is confined to whisky made in Kentucky, and of grain, and that the larger constituent part must be corn, then, of course, this would not be Bourbon whisky, because it was not so made.

As to what the testimony has proved to your satisfaction are the proper meanings, accepted by the trade and by scientific men, of "whisky" and "Bourbon Whisky," those are facts to be found by you from the testimony, which I leave entirely to you. It is my duty to instruct you upon the law, and to leave the facts to be found by you.

The verdict was "for the libelant."

In re HOLBROOK SHOE & LEATHER CO.

(District Court, D. Montana. December 5, 1908.)

No. 559.

1. Bankruptcy (§ 225*)—Referee-Jurisdiction.

Where a bankrupt's trustee filed a petition for a summary order directing a corporation claimed to be a mere agent of the bankrupt to surrender possession of property which the trustee claimed belonged to the bankrupt but which the corporation claimed in its own right, it was the duty of the referee to hear the testimony in order to determine whether the corporation's claim was real or merely colorable.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 225.*]

2. Bankruptcy (§ 288*)—Adverse Claims to Property—Determination.

Jurisdiction to determine claims to a bankrupt's property by bill in the nature of a plenary suit does not preclude litigation of the rights of the parties in the bankruptcy proceedings, where the trustee applies for an order requiring surrender of possession on the ground that the property held belongs to the bankrupt and is held without color of right.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 288.*]

3. Bankruptcy (§ 225*) — Claims to Property—Referee's Jurisdiction—Extent.

Where, on a claim of a bankrupt's trustee to possession of property in the possession of another, the referee finds that the latter's claim is in good faith and probably real, but of doubtful validity or of questionable faith, it should then be determined by a plenary suit; but if he finds that the claim is without any actual merit or legal foundation, he should regard the property as subject to the bankruptcy court's jurisdiction as property of the bankrupt, and require its surrender to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 225.*]

4. Bankruptcy (§ 303*)—Fraudulent Corporations—Claims.

Evidence *held* to warrant a finding that defendant corporation was organized to take over the stock and property of the bankrupt, to hinder and defeat the creditors of the latter, and that property in defendant's possession, alleged to have been purchased from the bankrupt, was in fact its property, and subject to administration, in the bankruptcy proceedings, for the benefit of the bankrupt's creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

5. Bankruptcy (§ 308*)—Claims—Creditors Entitled—Fraudulent Organization of Corporation.

Where D., who was a director in a bankrupt corporation, participated in organizing the P. Company, which was established to take over the bankrupt's business in order to defraud its creditors, and D. purchased certain stock in the P. Company for \$1,200 in cash, and became a director thereof, he should be considered as a creditor of the bankrupt to the extent of such amount.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 308.*]

Binnard & Rodgers, for trustee. Clayberg & Horsky and H. A. Frank, for Packard Shoe Co. J. L. Wines, for bankrupt.

HUNT, District Judge. Max Fried, trustee in bankruptcy of the Holbrook Shoe & Leather Company, bankrupt, on June 5, 1908, filed with the referee in bankruptcy at Butte a petition for a summary order directed to the Packard Shoe Company, as agent of the bankrupt, to

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

surrender to him, as trustee, certain property within the possession of the Packard Shoe Company at Helena, Mont. Upon June 6th the trustee asked the referee for an order restraining the Packard Shoe Company from disposing of property in its possession. The allegations of this petition were, in substance, that the examination of the officers and directors of the bankrupt corporation had disclosed that the above-named bankrupt was the owner of more than eight-tenths of the subscribed capital stock of the Packard Shoe Company; that the Packard Shoe Company was a Montana corporation organized about August 29, 1907; that the directors of the Packard Shoe Company and of the bankrupt corporation were F. P. Holbrook, D. L. Dunn, and Henry Swanson; that since the adjudication in bankruptcy Dunn has possessed the stock of goods of the Packard Shoe Company, which said stock was valued at between \$4,000 and \$5,000; that about \$1,000 in money was deposited in bank at Butte, and that some money was deposited in Helena; that the stock of goods and the money in possession of the Packard Shoe Company were held by said corporation as the agent of said bankrupt, and that the officers of the Packard Shoe Company refused to turn over the same; that the officers of the Packard Shoe Company have conspired to cheat, deprive, and defraud the bankrupt of its interest in the Packard Shoe Company; and that in violation of the rights of the bankrupt and of petitioner, as trustee, they had passed a resolution, dated May 11, 1908, whereby D. L. Dunn, president of the Packard Shoe Company, was authorized "to sell, transfer, mortgage, execute deed of assignment, or take such other action as in his good judgment he may consider for the best interests of the company, of its assets." Petitioner then alleged that, with intent to cheat and defraud the bankrupt and the trustee. on May 11th the officers of the Packard Shoe Company fraudulently amended article 8 of the by-laws of the said company, by resolution, changing the by-laws so as to require a written request and six months' notice for a meeting, whereas, before such change, the by-laws permitted a meeting to be called merely after written request. It was also alleged that the Packard Shoe Company was insolvent, and that each of its directors was insolvent.

An order to show cause was issued. An answer was filed by the Packard Shoe Company, D. L. Dunn, as its president, F. P. Holbrook, as its vice president and treasurer, Henry Swanson, as its secretary, and D. L. Dunn, F. P. Holbrook, and Henry Swanson, as individuals. They denied that the stock of goods and money in the possession of the Packard Shoe Company was the property and money of the Holbrook Shoe & Leather Company, or that the same were being held by the said Packard Company, or its officers, as the agent of the bank-They denied all allegations of conspiracy and cheating. They admitted the passage of the resolution passed on May 11th by the board of directors of the Packard Company, but denied that it was passed with intent to cheat or defraud the bankrupt. They alleged that on the 22d of May, 1908, and prior to the filing of the petition for a restraining order, a meeting of the directors of the Packard Shoe Company was held, and the resolution referred to was recalled and rescinded. They denied that they were selling or about to sell

the goods in the possession of the Packard Shoe Company with intent to place the proceeds beyond the reach of the bankrupt or the trustee, or that any injury would come to the bankrupt by retaining the goods in their possession. They then set up that the Packard Shoe Company was incorporated in due form, and was engaged in the shoe business at Helena, and that the bankrupt company was the owner of 800 shares of the capital stock of the Packard Shoe Company; that Dunn was the owner of 150 shares of said company, and that Holbrook and Swanson each owned 1 share in the said company; that the Packard Shoe Company had about \$5,000 worth of merchandise, \$1,000 worth of fixtures, and cash, in about the sum of \$1,200, on deposit; and that its liabilities did not exceed \$150. The answer also alleged that the Holbrook Shoe & Leather Company, bankrupt, had no right or interest in the property of the Packard Shoe Company, save as the owner of 800 shares of the capital stock of the said Packard Shoe Company; that the said Packard Company was regularly conducting its retail shoe business; and that, by reason of the restraining order having been issued, the business of the Packard Company had been closed, and that it had been greatly injured.

Hearing was had before the referee, and on September 18th he

granted the summary order prayed for by the trustee.

Petition for review was filed, and three questions are certified by the referee: (1) Did the referee in the first instance have jurisdiction to proceed in said matter, and take testimony upon the petitions filed by the trustee and the answers filed thereto? (2) Does the testimony taken in this proceeding sustain the findings of the referee? (3) Was the referee without jurisdiction to make the summary order

by him made in this proceeding?

A very careful study of the record certified in this matter leads me to conclude that it was the duty of the referee to hear the testimony, in order to pass upon the question whether the claim of the Packard Shoe Company to the property in its possession had an actual basis; that is, was it a real or merely colorable claim? Power and duty to make such inquiry must exist under the bankruptcy act, else we cannot escape from the illogical conclusion that the mere assertion of what may be designated an adverse claim can oust the summary jurisdiction of the bankruptcy court, and, as a result, the trustee cannot expeditiously collect the estate for the creditors. But we are not without judicial authority in the premises, as the Supreme Court has expressly declared there is no such ouster, and that jurisdiction exists. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

But how much farther may the bankruptcy court go? Counsel well say it is a serious matter to adjudge that property claimed by one person or corporation shall be summarily surrendered to the trustee in bankruptcy for the creditors of another corporation, as belonging to the latter; and it is in recognition of the strength of this argument that no such order will be made unless it follows a most cautious scrutiny of evidence and consideration of the correct principles of law. On the other hand, we must be mindful of a correlative rule of care for preservation of rights of creditors, and that the bankrupt law is founded upon the doctrine of the need for prompt and simple pro-

ceedings, whereby it is made the express duty of the court "to cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto," except as otherwise provided in the bankrupt law. Jurisdiction by bill in the nature of plenary suit obtains, as was held in Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; but such jurisdiction does not preclude litigation of the rights of parties in bankruptcy proceedings, as distinguished from controversies by independent suits, where the trustee applies for an order requiring one to turn over property in his possession, basing the application upon the ground that the property so held belongs to the bankrupt and is held without color of right. This would seem to follow, because, the referee being bound to make the inquiry, if its extent is wholly circumscribed by power merely to ascertain whether there is any showing of right in another person, yet no power to proceed follows the ascertainment by the referee, practical good of the inquiry is nullified, for, upon the pleading filed by the one holding, there would generally appear to be facts sufficient to oust jurisdiction. Manifestly, the statute requires a broader construction, one that not alone authorizes the inquiry by the hearing of testimony, but which also requires a decision upon the merits by the referee. This decision may be that the claim is in good faith, but of doubtful validity or of questionable faith, yet is probably real, and hence that there ought to be an independent suit brought to try the questions; but if the decision is that the claim is without any actual merit or legal foundation, the referee should regard the property as subject to the jurisdiction of the bankruptcy court, as property of the bankrupt, and should therefore proceed to make an order requiring the actual wrongful holder to surrender to the court or trustee.

Now, after considering the evidence in the record of the present case, and without stating it at length, the only deductions that seem to me to be possible are that the Packard Shoe Company, incorporated about August, 1907, was organized for the purpose of taking over the stock and property of the Holbrook Shoe Company, so as to hinder and defeat the creditors of the latter. It was organized at a time when the Holbrook Company was insolvent, and was known by its directors to be insolvent, and necessarily by the organizers of the Packard Shoe Company, who were one and the same group of individuals. It cannot be successfully controverted that whatsoever vitality the Packard Shoe Company had was derived from Holbrook, Dunn, and Swanson, who were its organizers and directors, and who alone were the directors of the Holbrook Shoe Company. The evidence all goes to prove that, as directors of a failing corporation, these three, with knowledge of all the circumstances of the declining credit and losing trade of the Holbrook Company, and at a time, in the last days of August, 1907, when business conditions were generally depressed and commercial credit accommodation was restricted, deliberately organized the Packard Shoe Company, and, by their own votes as directors of the Holbrook Company, attempted to transfer the principle assets of the failing company to their new corporation, of which, as said, they were also the trustees, and the only trustees.

Eight hundred shares of stock out of a possible 1,000 shares in the new company, apparently transferred September 10, 1907, is claimed to have been the consideration for the transfer of the goods taken over or to be taken over by the Packard Company. Examination discloses that there was a pencil memorandum of this stock matter made in the handwriting of Holbrook, but there was no regular credit entry of this 800 shares in the books of the Holbrook Company—a vital matter to the Holbrook Company—until December 19, 1907, and no entry at all in the books of the Packard Company until about March 11, 1908, or several months after the transaction itself, and after the Packard Company was organized and doing business, and until just about the date of the assignment by the Holbrook Company. Again, Holbrook, president of the failing company, and owner of 90 per cent. of its stock, was treasurer of the new company, and while Dunn, the elected president of the Packard Company, was put in charge of the Packard Company store in Helena, the clear weight of evidence is that his authority was regarded by himself and by Holbrook as very limited. and that all matters of finance and purchase connected with the Helena store, and the books and entries, were controlled by Holbrook, and were purposely kept directly under his authority and supervision at Butte, and that many of the letters and orders from Dunn were addressed to Holbrook individually.

The Holbrook Company, having reached the point of actual failure, made an assignment for the benefit of its creditors on March 11, 1908, and thereafter, on April 21st, was forced into involuntary bankruptcy. On May 8th a trustee was appointed for the bankrupt. May 11th a resolution of the directors of the Packard Company was passed, authorizing Dunn, as president of the Packard Company, to sell, transfer, mortgage, or assign the assets of the Packard Company as he might think best, and a stockholders' meeting of the said company was held, whereat an amendment to the by-laws was passed, so as to require a six months' written notice of a change in such by-laws. These things passed and were done with the participation of Holbrook and Dunn, as directors and stockholders, but without any notice to the trustee of the bankrupt, who, respondents themselves say, held 800 shares of stock of the Packard Company.

For these last referred to recorded acts, there is no sufficient justification or explanation made. Critical examination of the testimony of Holbrook and Dunn reveals evasions, inconsistencies, and palpable reluctance to make full and candid disclosures. Dunn's statement that he feared that the stock of the Packard Company might fall into hostile hands, and that his thoughts were to protect the company, and also himself, is really, in view of all the facts, strong evidence of deliberate purpose to defeat the rights of the creditors of the Holbrook Company by making it possible for him to dispose of the stock held as the Packard Company's, without regard to the attitude of the lawfully appointed trustee of the bankrupt concern, who had rights to 800 shares of the stock. So Holbrook's statement to the effect that a creditor of the Packard Company for some \$800 was claiming an unjust amount, and that the resolution authorizing Dunn to assign or transfer, as he might think best, was to meet possible embar-

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rassments, is a most unlikely reason for having ignored the trustee, or for having made the change in the by-laws. Nor is the fact that the by-law was not acted upon, nor that Dunn did not assign or transfer the assets of the Packard Company, very material, considering that the trustee of the Holbrook Company, bankrupt, was active in asserting his rights in June, 1908, less than 30 days after May 11th, the date of the passage of the above-mentioned resolution. The fact of the passage of the resolution is, however, very material in exposing the methods and intentions of Holbrook and Dunn.

Another important point which, when weighed with the many other facts and circumstances, constrains the court to regard the transactions between the Packard Company and the Holbrook Company as having been carried on solely for the purpose of defeating the rights of creditors, is the action of the directors of the Holbrook Company in July, 1907, in raising Holbrook's salary, to date from January, 1906, and in distributing "the surplus account" to the various stockholders, and in not entering the credits for salary and dividends upon the books until December 31, 1907, when the business for 1907 was running at a heavy loss. Granting that such an unusual incident of business conduct, if standing by itself, might be reasonably explicable, on the ground of ignorance of the true state of the corporation's affairs or lack of knowledge of bookkeeping, or was bad business judgment, yet, when the acts themselves are considered with the many other acts of commission and omission, such as the failure to have entered on the books of the bankrupt a note for \$7,500 due to the State Savings Bank, it is inconsistent with any purpose other than a scheme of intentional diversion of the funds of the corporation to the benefit of those in charge of the company's affairs, and to the grievous wrong of innocent creditors of the corporation.

But in addition to the things referred to, Dunn was a director and an officer of the Holbrook Company, and is chargeable with knowledge of the duty he owed to the creditors of that corporation, and cannot escape responsibility for participating in the transfer of its property at a time when it was insolvent. He knew, too, that by the scheme of the transfer to the Packard Company, not only were the creditors of the Holbrook Company losing the merchandise belonging to that corporation, but that he, Dunn, as director and president of the Packard Company, and that Holbrook, as treasurer and director of such company, were issuing to Holbrook, as president and managing director of the Holbrook Company, and owner of 90 per cent. of its stock, 800 shares of the Packard Company. In view of all the circumstances, could there be a more flagrant attempt to serve two mas-Holbrook, Dunn, and Swanson, sole directors of the selling company, through Holbrook, as treasurer, paying out to Holbrook, treasurer, for Holbrook, Dunn, and Swanson, directors in the buying company. In the face of all these and many other circumstances, when, through the trustee, the rights of innocent parties are seeking protection, how can the courts regard these transactions as compatible with commercial integrity and fair dealing toward those who had given credit to the Holbrook Company? And how, under the test of what is just to such innocent creditors, can the Packard Shoe Company be

looked upon as anything but the Holbrook Shoe Company doing business under disguise of the fiction of a corporate organization and name, formed and taken as a shield for defeating the rights of innocent

parties?

Stress is laid upon the contention that Dunn in fact bought shares in the Packard Shoe Company, and, therefore, that if an order is made by which the referee's decision that the claim of the Packard Shoe Company is merely colorable is upheld, and that it must surrender the property held by it, the effect will be to deprive Dunn of his property without due process of law. Not so. Though the evidence is not strong upon the point, still it can be assumed that Dunn did, about September 12, 1907, put \$1,200 in cash into the shares of stock of the Packard Shoe Company, and yet the case is not materially changed, and for these reasons: As a director of the Holbrook Company, Dunn knew, as well as did Holbrook, that the Packard Shoe Company was organized for the purpose of hindering and delaying and defrauding the creditors of the Holbrook Company, and that, in pursuance of that plan, it was transferring its goods to the Packard Company, and that with such knowledge the Packard Company took them. He knew, too, as did Holbrook, that the Holbrook Company was insolvent when the Packard Company was formed. He knew, too, as did Holbrook, that the Holbrook Company, while unable to meet its liabilities, had voted Holbrook an increase in salary, and had directed a distribution of moneys on hand, to the great detriment of the rights of that company's creditors. He knew, as well as did Holbrook, that the Packard Company made its purchases through the Holbrook Company, and that the bills of the Packard Shoe Company were charged to the Holbrook Shoe Company, and were met by Holbrook, his co-director in the two companies. He knew, too, of the attempted change in the by-laws of the Packard Company, made after the trustee in the bankruptcy of the Holbrook Company had been appointed, and that the trustee in bankruptcy, holding the shares in the Packard Company, was not only ignored, but also that, in ignoring him, the Packard Shoe Company, through himself and Holbrook, directors, was taking further steps to make effective the previously laid plan of keeping the control of the new as well as of the old company, to the injury of the innocent creditors of the Holbrook Company. And he knew, too, that the Packard Company's funds were used by the Holbrook Company to pay the latter's bills.

What position, therefore, is the bankrupt in, and what position is Dunn, one of its directors, in, when it and he attempt to uphold the transfer made to a company acting through themselves and for themselves? Surely the law will not allow this mere form of corporate organization, a mere fiction, to be used to thwart the substance of right, and thus permit the innocent creditors to be deprived of what is theirs, but will disregard the corporate entity and hold the real parties as actually having in their hands the property which is lawfully in the custody of the law, as belonging to the bankrupt. It follows that Dunn must be regarded as but a servant and agent, running a branch store of the Holbrook Company in Helena, under the style of the Packard Shoe Company; and it must be held as establish-

ed that when he purchased his shares, and put the money in the shares of the Packard Company, he was really lending money to the amount of his subscription to the Holbrook Company, and so, in fact, became a creditor of the Holbrook Company, of which organization he was also a director.

The essential difference between the attitudes of Dunn and of the other creditors of the Holbrook Company is that Dunn, knowing the facts and wrong purposes of the Holbrook Company, furthered them and loaned his money to that concern to embark upon a new venture in Helena, whereby it was intended to defeat the other creditors, while the creditors other than himself did not know of any fraudulent purposes or conduct, and innocently dealt with the failing company. Whether this may affect Dunn's rights as a creditor in proving his claim is not here passed on.

This discussion sufficiently answers the questions of the referee. The order made by the referee is confirmed. In order to give ample opportunity to the bankrupt to preserve its rights in the premises, stay of all proceedings will be had for 15 days from this date.

In re RUSTIGIAN.

(Circuit Court, D. Rhode Island. December 22, 1908.)

1. Aliens (\S 40*) — Conflict Between Immigration and Naturalization Laws.

It was no part of the intended policy of Rev. St. § 1994 (U. S. Comp. St. 1900, p. 1268), providing that any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen, to annul or override the immigration laws, so as to authorize the admission into the country of the wife of a naturalized alien not otherwise entitled to enter.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. \S 100; Dec. Dig. \S 40.*]

2. Aliens (§ 70*) — Naturalization — Wife of Naturalized Alien — "Who Might Herself be Lawfully Naturalized."

Rev. St. § 1994 (U. S. Comp. St. 1901, p. 1268), provides that any woman married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen. *Held*, that the clause "who might herself be lawfully naturalized" limited such section to a woman lawfully within the country, her own capacity, independent of her marital status, being essential to attainment of citizenship, so that, where the wife of a naturalized alien was not entitled to enter the country under the immigration regulations because afflicted with a contagious disease, she would not become a citizen entitled to enter by the naturalization of her husband.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 157; Dec. Dig. § 70.*]

James A. Williams, for petitioner. Williams H. Lewis, Asst. U. S. Atty.

BROWN, District Judge. The petitioner is a subject of the Sultan of Turkey, resident in Burrillville, R. I. His declaration of intention

^{*}For other cases see same topic & \$ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to become a citizen of the United States was filed February 21, 1906.

His present petition was filed July 15, 1908.

Prior to July 15, 1908, his wife, Egsha Rustigian, a Turkish subject, had come to this country for the first time, and on June 18, 1908, was refused admission by the immigration officers at New York as an alien afflicted with a dangerous contagious disease, trachoma. She is detained at the Immigration Hospital at Ellis Island, New York.

The exclusion from admission to the United States was under Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1907, p. 391). Section 37 of this act makes express provision for holding, under such circumstances, the wife or minor children of an alien who has taken up his permanent residence in this country and shall have filed his declaration of intention to become a citizen, until it shall be determined whether the disorder will be easily curable, or whether such persons can be permitted to land without danger to other persons, and that they shall not be either admitted or deported until such facts have been ascertained.

Rule 11 of the immigration regulations also deals with this subject. Counsel for the United States opposes the granting of this petition upon the ground that, if granted, it will naturalize, not only the petitioner, but his wife as well, and thus entitle her to admission to the United States as an American citizen, since section 2 of the immi-

gration act excludes only aliens.

Both counsel for the petitioner and special counsel for the United

States agree in this interpretation of the law.

If it be true that a decree granting this petition, which was filed solely in the right of the husband, necessarily will have the effect of conferring American citizenship and a right of admission to the country upon a person otherwise in the excluded class, and thus override or avoid the provisions of the immigration acts, it is exceedingly doubtful if the petitioner, who seeks to bring into this country a person with a dangerous contagious disease, can meet the requirement of the naturalization act (Act June 29, 1906, c. 3592, § 4, par. 4, 34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 422]), and make it appear to the satisfaction of the court that he is well disposed to the good order and happiness of the United States.

With all sympathy for a husband who desires to bring his wife to his adopted country, we cannot disregard the higher consideration of the welfare and happiness of the citizens of the United States. If this proceeding is in substance for the naturalization of two persons, and is necessarily of joint effect, then the incapacity of one may well be regarded as sufficient cause for refusing naturalization to both.

It is no part of the intended policy of section 1994 (U. S. Comp. St. 1901, p. 1268), or of the naturalization laws, that they should annul or override the immigration laws. If the marital status makes it impossible to deal with the husband and wife separately, it is more consistent with the welfare of the citizens of the United States to deny them both than to admit them both; and it is quite as reasonable to deny both as to admit both.

I am unable, however, to approve of the soundness of the contention that the naturalization of the husband does change the political status of

a wife who has not actually gained admission into the United States. Zartarian v. Billings, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. Ed. 428, relates to the admission of minor children and to a statute with the phrase "if dwelling in the United States." Yet it contains expressions which seem to indicate that the political status of the alien wife cannot be changed until she comes within the territorial limits of the United States.

If her presence is a prerequisite to naturalization it should follow that naturalization cannot be resorted to to secure a right of entry. On page 175 of 204 U. S., page 183 of 27 Sup. Ct. (51 L. Ed. 428), it is said:

"It is pointed out by Mr. Justice Gray, delivering the opinion in United States v. Wong Kim Ark, 169 U. S. 649-686, 18 Sup. Ct. 456, 42 L. Ed. 890, that the naturalization acts of the United States have been careful to limit admission to citizenship to those 'within the limits and under the jurisdiction of the United States.'"

In Shanks v. Dupont, 3 Pet. 242, 7 L. Ed. 666, it was said:

"* * Marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil-rights, but it does not affect her political rights or privileges. The general doctrine is that no persons can by any act of their own, without the consent of the government, put off their allegiance and become aliens. If it were-otherwise, then a feme alien would by her marriage become, ipso facto, a citizen, and would be dowable of the estate of her husband, which is clearly contrary to law."

This case recognizes clearly that the marital status alone is not sufficient to confer upon the alien wife the political status of her husband. Van Dyne on Naturalization, p. 227.

It has been suggested, however, that section 1994 of the Revised Statutes (U. S. Comp. St. 1901, p. 1268) has the effect of conferring citizenship upon a feme alien married to an American citizen, irrespective of her presence within the jurisdiction of the United States. This section is as follows:

"Any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

An alien woman who is of a class of persons excluded by law from admission to the United States does not come within the expression "who might herself be lawfully naturalized."

The case of Kelly v. Owen, 7 Wall. 496, 19 L. Ed. 283, did not involve the question of the necessity of the wife's coming within the territorial limits of the United States. The persons whose citizenship was

in question were all resident in the United States.

The expression used by Mr. Justice Field, "The terms 'who might lawfully be naturalized under existing laws' only limit the application of the law to free white women," must be interpreted in its application to the special facts and to the incapacities under the then existing laws. The immigration laws have since added to the classes of persons who are incapable in their own right of naturalization. It is not enough under existing law that the applicant for admission to the country be

a "free white person." She must also be a person not within the class-

es excluded by the immigration laws.

The citizenship of the husband is extended to the wife by this statute only when she herself is a person who might be lawfully naturalized. Her own capacity is a prerequisite to her attaining citizenship. If herself lacking in that capacity, the married status cannot confer it upon her.

In Van Dyne on Naturalization, p. 233, it is said:

"Whether, under this law, residence in the United States is essential, in order to confer citizenship upon a woman of foreign nationality married to a citizen of the United States, is not entirely well settled, although the better view appears to be that such residence is necessary."

It is difficult to justify an interpretation of section 1994 which makes it applicable outside the territorial jurisdiction of the United States and which attributes to Congress an intention to change the political status of alien women resident in the country of their nativity and who have never come within our territory.

The language of Secretary Olney in 1896 (quoted in Van Dyne on

Naturalization, 237, 238) seems to express the better view:

"The naturalization laws of the United States being obviously framed to permit the bestowal of the franchise of citizenship upon certain persons of alien birth who are within its jurisdiction, and the application of these statutes being intrusted to the judicial branch, it is clear that they cannot operate to naturalize by indirection or by executive interpretation a person who is an alien by birth and origin, who has never been within the jurisdiction of the United States, and who at the time may be dwelling within a foreign jurisdiction."

The contrary interpretation is inconsistent with "the principle that citizenship cannot be conferred by the United States on the citizens of another country when under such foreign jurisdiction," etc. See Zartarian v. Billings, 204 U. S. 174, 175, 27 Sup. Ct. 182, 51 L. Ed. 428.

If, however, it was the intention of Congress in enacting section 1994 to confer citizenship upon any person who has never been within the territorial jurisdiction of the United States, it seems entirely unreasonable to hold that it was the intention of Congress to confer American citizenship upon an alien who is excluded by the immigration acts from admission to the country.

The petitioner has urged that his petition be granted in order that he may thereby gain the right to bring his wife into the country. I am of the opinion that a decree of naturalization cannot have this effect. If convinced that it did, I should be constrained to deny this

petition at once.

So far as I am informed, it has not yet been determined whether the disease with which the wife is afflicted is curable or incurable. If incurable, the wife will be subject to deportation. Whether, in this event, the petitioner will still persist in his application for citizenship, is uncertain. Under the peculiar circumstances of the case, and to avoid the decision of what may turn out to be moot questions, the case may stand continued until the determination of the character of the petitioner's wife's disease, or until the petitioner shall elect whether to proceed further in his application for citizenship.

In re WOLFF.

(District Court, E. D. New York. December 8, 1908.)

BANKRUPTOY (§ 143*) — PROPERTY PASSING TO TRUSTEE—LIFE INSURANCE POL-

A bankrupt held a life insurance policy payable to his wife if living at the time of his death, and, if not, to his legal representatives, but subject to his right to change the beneficiary at any time, and also, if living at the time of the payment of the last premium to himself receive a cash payment or other settlements specified. The policy had a cash surrender value, and had been pledged by both husband and wife for a loan, and the later premiums had been paid by the wife. Held, that under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), the bankrupt or his wife was entitled to retain the policy on payment to his trustee of its surrender value at the time the bankrupt censed paying the premiums, less the amount of the loan for which it was pledged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. § 143.*]

In Bankruptcy.

Louis W. Severy, for trustee.

Francis Ray Wadhams, for respondent Wolff.

Alexander & Green (William C. Diamond, of counsel), for Equitable Life Assurance Society.

CHATFIELD, District Judge. The bankrupt, William Wolff, took out a policy in the Equitable Life Assurance Society of the United States, on the 23d day of June, 1899, for \$5,000. The policy was made payable to the wife of the bankrupt, "if living, if not, then to the assured's executors, administrators or assigns, subject to the right of the assured to change the beneficiary." The policy further provided that all premiums should be forfeited, and the policy should lapse, upon the nonpayment of any premium when due, except that upon surrender within six months after said lapse, providing premiums have been duly paid for at least three full years of assurance, the society will give the assured the choice of a paid-up policy according to certain values, or the payment of a certain sum in cash according to an annexed table. The provision for the changing of beneficiaries is as follows:

"This policy is issued with the express understanding that the assured may, provided this policy has not been assigned, change the beneficiary, or beneficiaries, at any time during the continuance of this policy, by filing with the society a written request, duly acknowledged, accompanied by said policy."

It will be seen by this that the consent of the wife was not necessary to a change of beneficiary. Further, an option was given to the assured, if living at the time of the payment of the last premium, to receive a cash dividend, and to draw the entire cash value of the policy according to a certain table, together with this dividend, or to choose any one of several other plans which have nothing to do with this particular case. The premiums upon the policy have been paid up to the present time, and it is shown by affidavit that the bankrupt's wife has paid the various quarterly premiums from and including June 23, 1906, to the present. It thus appears that six of these

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quarterly premiums, aggregating \$281.40, had been paid by Mrs. Wolff prior to the adjudication in bankruptcy. It also appears from the affidavit that Mr. and Mrs. Wolff pledged the policy by an assignment dated August 6, 1907, to the Equitable Life Assurance Society, for a loan of \$300, and it further appears from the affidavits upon this motion that the surrender value of the policy at the time of adjudication was \$680. The trustee in bankruptcy demands that the estate in bankruptcy be secured for the amount of this surrender value, less such portion of the loan made by the Equitable Life Assurance Society, with interest, as is chargeable against the estate of the bankrupt. It is conceded by the trustee that Mrs. Wolff has the right to keep the policy in question alive, or that the bankrupt in the future may continue, from after-acquired property, to pay the premiums, and that the surrender value of the policy is the only portion

of the policy to which the estate has any claim.

Under the domestic relations law of the state of New York (Laws 1896, p. 220, c. 272, § 22), it is provided that a married woman, or any third person, may cause the life of the husband to be insured, and that such insurance shall be secured to her as her separate property, provided she survives the term of insurance, free from any claims of creditors of her husband, except that, where the premium has been actually paid out of the husband's property, such portion of the insurance money as was purchased by the excess of the premium over \$500 is primarily liable for the husband's debts. The United States bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), in section 6, provides that property of a bankrupt shall be exempt which is exempted by the statutes of the state in which the bankrupt resided. Holden v. Stratton, 198 U. S. 205, 25 Sup. Ct. 656, 49 L. Ed. 1018. And the courts of New York have interpreted the section of the domestic relations law above quoted to include a policy taken out by the husband but payable to the wife, even if she had no knowledge of the existence of the policy, and if the husband had paid all premiums thereon. But this is only in a case where the policy is payable absolutely to the wife. Brick v. Campbell, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259; Whitehead v. N. Y. Life Insurance Co., 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787. In the present case the policy is payable to the wife, if living at the time of the death of the bankrupt. This in terms makes her estate contingent upon survivorship, and the insured, as has been stated above, was given the privilege of changing the beneficiary, or, if he survived the full period, of diverting the payment from the wife by acceptance of certain of the conditions. The policy was therefore in the nature of what is sometimes called a semitontine policy, payable to the bankrupt at a certain date, or, if he should die before that time, to the wife if living. The latter form was passed upon in the case of In re Diack (D. C.) 100 Fed. 770, and the wife was there held to be entitled only to the proportionate part of the policy represented by the premiums which she had actually paid. The same idea has been expressed in a number of cases (In re Boardman [D. C.] 103 Fed. 783; In re Phelps, 15 Am. Bankr. Rep. 170; In re Coleman, 136 Fed. 818.

69 C. C. A. 496), and has been followed in the courts of the state of New York in Waldron v. Becker, 33 Misc. Rep. 182, 68 N. Y. Supp. 402. In those cases it has been stated that the only policies which are entirely exempt under the state statutes, such as the New York domestic relations law above mentioned, are those in which the wife is the sole beneficiary. The result of this would seem to be that the trustee in bankruptcy was entitled to claim as of the date of adjudication the surrender value of whatever portion of the policy in question had been obtained or had accrued from the premiums paid by the bankrupt himself. A loan having been made by the Equitable Life Assurance Society, and the policy assigned as security, it makes no difference whether this loan was procured for the benefit of Mr. or Mrs. Wolff, inasmuch as they both joined therein. Inasmuch as the surrender value was at all times security for the loan, the surrender value was thereby reduced to the extent of the principal of the loan with interest, and this should be deducted at the outset.

The premiums from the date of the loan to the time of adjudication were all paid by Mrs. Wolff, and she has therefore in equity become entitled to whatever proportion of the surrender value has been acquired through the payment of these premiums. It therefore becomes necessary to determine the surrender value of the policy at the time she began the payment of premiums, viz., June, 1906, and for the difference between that surrender value, viz., \$520, and the amount of the loan, the trustee in bankruptcy will be held to have a lien upon the policy, which can either be paid in cash by Mrs. Wolff, or can be carried as an interest in the policy, if it be kept in force, and this lien be not removed, until such time as the policy may mature or a lapse render the surrender value available for the discharge of the liens. The bankrupt and the beneficiary will be required to make the neces-

sary assignments to carry out this decision.

It is apparent that in most instances of bankruptcy the premiums upon any life insurance carried by the bankrupt will prove to have been paid more than four months prior to the bankruptcy, and usually at a time when no question of insolvency, or intent to defraud creditors, can be predicated upon the bankrupt's financial or mental state. Further, a life insurance policy, or the premiums thereon, can be made the subject of a valid gift by a solvent individual, and subsequent bankruptcy would not affect the validity of the gift. Under such circumstances the creditors of such a bankrupt would seem to be entitled only to the premiums paid within four months and while insolvent, or paid with actual intent to defraud. The doctrine of the New York cases of Brick v. Campbell, supra, and Whitehead v. New York Life Insurance Co., supra, shows the trend of public policy in favor of protecting insurance for the benefit of widows and persons dependent upon the bankrupt, when no intent to defraud creditors existed. Since the decision of those cases, and following the general progress of statutes looking toward facility in the transaction of business, and toward the possibility of making loans upon policies which have acquired a present or so-called surrender or loaning value, the form of insurance policies has more and more approached that of a contract with the person whose life was insured to pay him, upon the happening of certain events, an increasing sum of money, but with a tontine or survivorship feature for the benefit of the wife or other person in the sole event that his death should occur prior to a certain time.

It may be noted that such provisions seem to be inserted in insurance policies for the sake of making them attractive to the person insured, and to give a large return for the premiums paid. This is the result of competition and also better methods of administration in the insurance companies. But the result, nevertheless, is that the estate of the person insured is increased thereby, the insured makes the choice of the form of policy and the contract, which is more for the benefit of himself than of the wife or other beneficiary under the later forms of policy, and at the present time such policies as those under consideration are not exempt from the claims of the creditors, even though the insured has supposed, and may have actually desired, his wife or his beneficiary to be protected to the extent of this insurance. The case of Holden v. Stratton, supra, in which the Supreme Court of the United States upholds the law of the state of Washington making a policy of this sort exempt, illustrates what can be done if the desires of any state are manifested by legislation exempting such policies. In New York at the present time (and the conditions of exemption in New York are those which in the present case must be considered under section 6 of the bankruptcy law), the surrender value of the policy would seem to be the property of the bankrupt estate, rather than that of the bankrupt's possible beneficiary under the policy, and such a situation exists as would seem to have been contemplated in section 70 of the bankruptcy law, in the proviso to subdivision 5, that "when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representa-* * pay or secure to the trustee the sum so tives, he may ascertained and stated," etc. Under the doctrine of Brick v. Campbell, supra, this right to elect might be transferred to the beneficiary, and she might also be limited to the same period within which to exercise the privilege given to the bankrupt by the section quoted.

This does not change, however, the present situation, and the trustee in bankruptcy has title under section 70, subd. 5, of the bankruptcy law to so much of the surrender value as has been indicated above, viz., \$520, less the loan, with interest to the date of adjudication.

McFARLANE v. WADHAMS.

(Circuit Court, E. D. Wisconsin. October 1, 1908.)

1. GUARANTY (§ 6*)-EXCEPTIONS.

During correspondence relating to the purchase of mining machinery by a corporation, plaintiff inquired how the corporation would like to make payments, and stated he would prefer to have defendant or anothre become personally responsible. Defendant replied that the corporation had paid for another mill within two or three weeks after it was in opera-

^{*}For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion, and stated that he would personally guarantee payment by the corporation. In answer to this, plaintiff replied that the time was too long, and requested payment of \$1,000 on receipt by defendant of invoice and bill of lading. Held, that such letter was not a complete and precise adoption of the proposition contained in the guaranty, and was therefore not an acceptance thereof.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 8; Dec. Dig. § 6.*]

2. Guaranty (§ 6*)—Acceptance—Necessity.

Where a guaranty was made at the request of the guarantee, its delivery to and for the latter's use completed the communication, and constituted a contract without further acceptance.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 8; Dec. Dig. § 6.*]

3. Guaranty (§ 12*)—Delivery—Deposit in Post Office.

Where plaintiff requested defendant to guarantee the obligation of a corporation, the delivery of a letter of guaranty was complete when it was deposited in the post office by defendant for transmission to plaintiff through the mails.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 12.*]

4. GUARANTY (§ 2*)-WHAT LAW GOVERNS.

Where defendant executed in Milwaukee a guaranty of the debt of a corporation to plaintiff in Colorado, and deposited the guaranty in the mails for transmission to plaintiff, it was a Wisconsin contract and governed by the laws of that state.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 2.*]

5. Frauds, Statute of (§ 108*)-Guaranty-Consideration.

Under the Wisconsin statute of frauds, a written guaranty in which no consideration was expressed was void.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 216; Dec. Dig. § 108.*

Sufficiency of expression of consideration in memorandum within statute, see note to Choate v. Hoogstraat, 46 C. C. A. 183.]

6. Pleading (§ 36*)—Conclusiveness of Allegation on Pleader.

Where plaintiff proceeded against defendant as guarantor on the theory that a corporation was the principal contractor, he could not on demurrer claim that defendant was in fact primarily liable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § S1; Dec. Dig. § 36.*]

At Law.

This is a general demurrer to the complaint in an action at law. The complaint, after suitable averments showing diverse citizenship, is as follows:

"Second. That at the times hereinafter mentioned the said plaintiff was engaged in business at said Central City, in the state of Colorado, in the manufacture of mining and milling machinery, doing business as a sole trader under the name and style of McFarlane & Co.

"Third. That this plaintiff is informed and verily believes, prior to the 1st day of May, 1906, and at all of the other times hereinafter mentioned, a corporation known as the Milwaukee Leasing Company, of which the said defendant, E. A. Wadhams, was the principal stockholder, was engaged in the mining business at Milford, in the state of Utah, and at and prior to the said 1st day of May, 1906, and at all the times hereinafter mentioned, one S. A. Tarbet was general superintendent of said Milwaukee Leasing Company, and the said defendant, Wadhams, was one of the principal officers of said Milwaukee Leasing Company. That said Milwaukee Leasing Company, through its superintendent, Tarbet, prior to the 5th day of May, 1906, requested this plaintiff to quote a price for the furnishing of the ironwork for a certain stamp-

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

mill proposed to be erected by the said Milwaukee Leasing Company at Milford, in the state of Utah. And this plaintiff alleges that on the 5th day of May, 1906, by a letter bearing date that day, this plaintiff made to the said Tarbet, as superintendent of the said Milwaukee Leasing Company, a proposition to supply the ironwork for a 20-stamp, long-drop Gilpin County type mill, at a cost of \$2,930 f. o. b. cars at the city of Denver, in the state of Colorado."

The complaint then sets out the following correspondence out of which the contract arises:

"Received at Central City, Colo.

"No. 6 Hf. Mc, 9 Paid.

"Milwaukee, Wis., 14th 06.

"McFarlane & Co., Central City, Colo.:

"Commence work on Stamp Mill as per specifications.

"E. A. Wadhams, "4.35 p. m."

"Milwaukee Leasing Company.

"McFarlane & Co., Central City, Colo.

"Milwaukee, Wis., 5/14/06.

"Gentlemen: I wired to-day to commence work on the stamp mills. This refers to the twenty stamps according to the specifications sent Mr. Tarbet-Yours truly,

E. A. Wadhams."

"Mr. S. A. Tarbet, Milford, Utah.

"May 17, 1906.

"Dear Sir: We received on the 14th a telegram from Mr. E. A. Wadhams to commence work on mill, which we immediately did. Today we got Mr. Wadhams' letter confirming the telegram and we are now hard at work filling the order and hope to ship within the specified time. In a few days we will have foundation plans ready for mailing to you.

"In regard to payments, there has been nothing said thus far about that part of it, and I ask you to kindly write me and state how you would like to meet them. We would prefer to have some one man of your company, yourself or Mr. Wadhams, to become personally responsible. We ask this because we do not know anything about your organization or Co. but we await your letter of advice in regard to this before saying anything to Mr. Wadhams. Very truly yours,

McFarlane & Co."

"Wadhams Oil Company.

"McFarlane & Co., Central City, Colo.

"Milwaukee, Wis., 5/26/06.

"Gentlemen: I am in receipt of your letter of May 17th to Mr. Tarbet, at Milford. I note your remarks in regard to payment. The mill we purchased of the Power Mining Mach'y Co., we paid for some few weeks after the mill was in operation, i. e., two or three. We imagine that payments in that time for your mill would be satisfactory I will say that I will personally guarantee the payment of this bill by the Milwaukee Leasing Company.

"Trusting this will be satisfactory and that you will make as early shipment as possible, I remain, Yours truly, E. A. Wadhams."

"Mr. E. A. Wadhams, Milwaukee, Wisconsin.

"May 28, 1906.

"Dear Sir: We have yours of the 26th inst. in regard to the payments of your 20 stamp mill for Milford, we will say in reply that we note that you will personally guarantee the payments, on contract, and we thank you for that favor, but we think the time you require is too long as it may take from two to three months to erect the mill ready to run after it is on the ground. We do not object seriously to your proposition but we think we are entitled to one thousand dollars on account on receipt by you of invoice and bill of lading showing whole shipment. Trusting you may see your way clear to pay us that \$1000 at that time, we are, Very truly yours,

McFarlane & Co."

"Eighth. This plaintiff further alleges that thereafter, and pursuant to the orders so given by the said defendant, Wadhams, and the guaranty so made by him, this plaintiff did manufacture the ironwork for the stampmill hereinbe-

fore mentioned, and duly delivered the same to the Milwaukee Leasing Company as provided in and by its proposition for the manufacture thereof. And this plaintiff further alleges that thereafter, and on or about the 1st day of July, 1906, this plaintiff sent to the said defendant, Wadhams, an invoice or bill for said sum of \$2,930, the contract price of said stampmill machinery. That thereafter the said defendant, Wadhams, under date of July 14, 1906, wrote to this plaintiff acknowledging receipt of plaintiff's letter of July 1st, in which was inclosed said bill or invoice, and, among other things, states: 'I received a letter from Mr. Tarbet saying the mill has arrived and apparently all right. As soon as he checks up will either send you some money on account or send you paper you can use, possibly both;' and thereafter, and upon the 12th day of September 1906, the said defendant, Wadhams, wrote to this plaintiff inclosing a check or draft for \$475, being \$430 on account of the purchase price of said stampmill machinery, and \$45 interest, and two notes signed by said Milwaukee Leasing Company, and each of which was indorsed by the said defendant, Wadhams, one of said notes being for \$1,000 for three months, and one for \$1,500 for four months.

"Ninth. And this plaintiff further alleges that thereafter and from time to time, at the request and for the accommodation of said defendant, Wadhams, said notes were from time to time renewed, the last renewal of the \$1,500 note being under date of January 15, 1907, and the last renewal of the \$1,000 note being under date of March 15, 1907; that neither of said notes has been paid; that both of said notes are in the possession of said plaintiff, and this plaintiff avers that he is ready to bring the same to court for delivery to the said

defendant, Wadhams.

"Tenth. This plaintiff further alleges that no part of said purchase price of said machinery of \$2,930 has ever been paid, except the sum of \$430 herein-before specified, and interest upon \$1,500 down to the 15th day of January, 1907, and upon \$1,000 down to the 15th day of March, 1907; and that there is now due and owing to this plaintiff for and on account of the purchase price of said stampmill machinery, the sum of \$2,500, with interest on \$1,500 from the 15th day of January, 1907, and on \$1,000 from the 15th day of March, 1907; that payment thereof has been demanded from the said Milwaukee Leasing Company and from said E. A. Wadhams personally, and has been refused." Prayer for judgment against Wadhams for appropriate amount.

Bloodgood, Kemper & Bloodgood, for plaintiff. Marshutz & Burnham, for defendant.

QUARLES, District Judge (after stating the facts as above). It appears that the plaintiff having sent to the Milwaukee Leasing Company proposals and specifications to construct a mill for a definite price for delivery by a certain time f. o. b. Denver, and Wadhams having, presumably on behalf of the corporation, accepted the proposal by his telegram and letter, a complete contract had been concluded thereby. In the absence of any stipulation as to time of payment, the contract price would be payable on delivery of the mill. Thereupon plaintiff, under date of May 17, 1906, notified Tarbet, the superintendent of the corporation, that he had commenced work on the order and hoped to complete same within the contract period. In the same letter plaintiff inquires how the corporation would like to make payments, as nothing has been agreed; states that he would prefer to have Tarbet or Wadhams become personally responsible. This was practically a request for a modification of the original contract by inserting specific terms of payment. Mr. Wadhams intimates in reply that, when the company bought a mill of another contractor, payment two or three weeks after the mill was in operation was deemed satisfactory, and that the same rule ought to be satisfactory. In the next sentence he says: "I will say that I will personally guarantee the payment of this bill by the Milwaukee Leasing Company." Thus it will appear that the guaranty is based upon and coupled with certain terms of payment suggested by him. Instead of accepting this proposition in its entirety, the plaintiff in his reply annexed another and different condition, namely, that he ought to have \$1,000 in cash when the invoice of the completed machinery was transmitted.

The law seems to be well settled that an acceptance to be available must be a complete and precise adoption of the proposition, without change or variation. The leading federal case is Eliason v. Henshaw, 4 Wheat. 226, 4 L. Ed. 556; which has been followed in Carr v. Duval, 14 Pet. 77, 10 L. Ed. 361; Ins. Co. v. Young, 23 Wall. 106, 23 L. Ed. 152; Tilley v. County, 103 U S. 155, 161, 26 L. Ed. 374. See, also: N. W. Ins. Co. v. Mead, 21 Wis. 474, 94 Am. Dec. 557; Baker v. Holt, 56 Wis. 100, 14 N. W. 8; Clark v. Burr, 85 Wis. 649, 55 N. W. 401; Mygatt v. Tarbell, 85 Wis. 457, 55 N. W. 1031; Salomon v. Webster, 4 Colo. 353; Gowing v. Knowles, 118 Mass. 232; Harlow v. Curtis, 121 Mass. 320; Baker v. County, 37 Iowa, 186. Therefore, if the guaranty required acceptance to make it a binding contract, the letter of the plaintiff falls far short of the legal requirements.

It appears from the correspondence incorporated in the complaint that plaintiff had suggested that he wished a personal guaranty of the contract price from defendant, or from Tarbet, the superintendent of the contracting corporation. Therefore the proposition emanated from the plaintiff, and compliance by either of the persons named would amount to an acceptance and a meeting of the minds of the parties, which is essential to the consummation of the contract. No further action on the part of the plaintiff would be required. In Davis v. Wells, 104 U. S. 159, 166, 26 L. Ed. 686, it is held:

"If the guaranty is made at the request of the guarantee, it then becomes the answer of the guaranter to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract."

The same doctrine is adhered to in Davis Co. v. Richards, 115 U. S. 527, 6 Sup. Ct. 173, 29 L. Ed. 480. See, also: Bank v. Goldstein, 86 Mo. App. 519; Nelson Company v. Shreve, 94 Mo. App. 523, 68 S. W. 376.

The delivery of the guaranty was complete when the same was deposited in the post office in Milwaukee by defendant. Tayloe v. Ins. Co., 9 How. 390, 13 L. Ed. 187; Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 866, 37 L. Ed. 790. This guaranty, therefore, having been executed in Milwaukee, became a Wisconsin contract. It is elementary that every written contract must be interpreted and construed by the lex loci contractus. By the terms of the Wisconsin statute of frauds, the guaranty was absolutely void because no consideration was expressed therein. We are therefore relieved from the delicate duty of determining the sufficiency of this guaranty under the peculiar phraseology of the Colorado statute, which has not been definitely construed by the court of last resort in that state.

The contention urged upon us by plaintiff's counsel, that defendant was in fact the primary contractor, is not open to the plaintiff in this case. He has by his complaint chosen the corporation as the principal contractor, and has proceeded against Wadhams as guarantor. Such a change of front cannot be tolerated. Under the present record plaintiff must establish the liability of defendant as a guarantor, or he must fail in his action.

Several other points were argued by counsel in their elaborate and able briefs, which it is unnecessary to consider in view of the conclusions which we have reached.

It results that the demurrer to the complaint must be sustained, and judgment be rendered dismissing the complaint, with costs, unless by the November rule day the plaintiff amend his complaint, if so advised.

WESTINGHOUSE MACH. CO. v. ELECTRIC STORAGE BATTERY CO.

(Circuit Court, D. New Jersey, December 15, 1908.)

Depositions (§ 11*)—BILL to Perpetuate Testimony—Federal Courts.

Under Rev. St. § 866 (U. S. Comp. St. 1901, p. 663), which provides that "in any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage," on a bill to perpetuate testimony the court must determine whether or not such necessity exists, and a bill which alleges only that defendant threatens to bring a suit against complainant for infringement of a patent, but has delayed doing so; that complainant claims the patent to be invalid, but can only establish such defense by the testimony of certain witnesses who reside in another state—does not state a case of necessity within the statute, the age or condition of health of the witnesses not being shown.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 26; Dec. Dig. § 11.*]

In Equity. On demurrer to bill.

Augustus B. Stoughton, for demurrant.

John S. Green and Melville Church, for complainant.

CROSS, District Judge. This matter comes before the court upon demurrer to the bill of complaint, which may be briefly summarized as follows: That on December 31, 1907, letters patent No. 875,213, for improvements in secondary or storage batteries, were granted to the defendant upon the alleged joint invention of Hugh Rodman and George M. Howard; that all interest and rights under said patent are now vested in the defendant; that the complainant is manufacturing batteries which the defendant claims infringe its patent; that the defendant has notified the complainant and its customers of the complainant's infringement (a copy of the notice being set forth in the bill), and has threatened to bring suit against the complainant and its customers under said letters patent; that said letters patent are invalid and void, because the said alleged invention was not a joint in-

^{*}For other cases see same topic & \ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vention as claimed in said letters patent, but was that of Hugh Rodman alone, and also because the said alleged invention was in public use and on sale by the defendant for more than two years prior to the filing of the application for said letters patent; that the complainant, in case suit were brought against it, would rely for its defense upon the invalidity of said patent, for the reasons above given; that the first of said defenses can only be proved by the testimony of Rodman, Howard, and one Edward W. Smith; that the second defense can be proved only by the testimony of said Smith and one Hugh Leslie; that all of said witnesses reside in the state of Pennsylvania, and their testimony is material and necessary to the defense of any suit that may be brought against the complainant or its customers under said patent; that the complainant is advised and believes, and therefore avers, that the defendant has neglected and still neglects to bring suit against the complainant under said patent, and that the complainant is unable to bring its rights to a judicial determination; that the defendant, notwithstanding the said notification and threats, is, as the complainant believes, purposely refraining from bringing suit under said patent against the complainant or any of its customers, in the hope that the said witnesses may die, remove beyond the jurisdiction of the court, or otherwise become unavailable to the complainant; that the complainant has reason to believe, and does believe, that it may thus be deprived of their testimony; that the complainant is advised and believes that its said defenses to said patent are difficult to establish, except by proof of the highest grade and most convincing character, and that any loss or diminution in the number of witnesses in support of said defenses may seriously jeopardize its rights and render unavailable its defenses, unless the testimony of said witnesses shall be perpetuated.

The defendant has demurred to the bill of complaint, and assigned several causes of demurrer, only the fifth of which, however, will be

set forth. It is as follows:

"The averments of the bill do not present a case where it is necessary, in order to prevent a failure or delay of justice, that the depositions be taken perpetuam rei memoriam."

Section 866 of the Revised Statutes (U. S. Comp. St. 1901, p. 663) is as follows:

"In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; and any Circuit Court, upon application to it as a court of equity, may according to the usages of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five, shall not apply to any deposition to be taken under the authority of this section."

The grant of a dedimus potestatem by the United States courts is controlled by that section, and is limited to cases "where it is necessary, in order to prevent a failure or delay of justice." Under this clause of the statute the court must determine, from the facts presented in any case, whether such necessity as is mentioned exists, and to

this extent the statute limits the former chancery practice, which is set forth in Daniell's Ch. Plead. & Pr. (4th Ed.) p. 1572, as follows:

"A bill to perpetuate testimony must show that the facts to which the testimony of the witnesses proposed to be examined is conceived to relate cannot be immediately investigated in a court of law or equity, or that, before the facts can be adjudicated upon, the evidence of a material witness is likely to be lost by his death or departure from the realm."

The foregoing rule, in so far as we are now concerned with it, is laid down in Hall v. Stout, 4 Del. Ch. 270, in the following language:

"Bills to perpetuate testimony proceed, not on the ground of imminent risk of loss before a pending suit can reach trial, but on the ground that, the party not being in a situation to bring his title to a trial, his evidence may be lost through lapse of time, the risk affecting all the evidence, irrespective of any particular condition of a witness. The right to this relief, therefore, does not depend upon the condition of a witness, but upon the situation of the party, and his power to bring his rights to an immediate investigation.

"It is true, as stated by Sir John Leach in Angell v. Angell [1 Sim. & St. 83], that this jurisdiction is open to objections, but these are practically obviated by requiring, in the first place, that the party seeking the relief show his total inability to bring his title to trial, and also by keeping the testimony, when taken, sealed and not to be opened except by special order upon evidence showing the death or absence of the witness, or his inability to attend

the trial-a rule rigidly enforced."

The complainant relies largely upon the foregoing case, which is supported not only by the authorities therein cited, but by many others, among which are Ellice v. Roupell, 32 Beav. 299; May v. Armstrong, 3 J. J. Marsh. (Ky.) 260, 20 Am. Dec. 137; Story's Eq. Plead. § 303; Booker v. Booker, 20 Ga. 777. These cases, in substance, hold that where a party is threatened with suit, but its institution is delayed and the complaining party cannot himself institute a proceeding to try his right or title, the evidence of his witnesses may be perpetuated, irrespective of their age, disability, or threatened removal. But, as already stated, this rule is modified by section 866, under which the right to a dedimus is not absolute, once a given state of facts is presented, but is limited to cases where its allowance is necessary to prevent a failure or delay of justice. Again, the proceeding invoked herein never was, and is not now, looked upon with especial favor by the courts. In referring to it, Judge Wallace, speaking for the Circuit Court of Appeals for the Second Circuit, in Flower v. MacGinniss, 112 Fed. 377, 378, 50 C. C. A. 291, 292, says:

"The right of parties to obtain testimony, where it is necessary in order to prevent a failure or delay of justice, is carefully preserved by section 866 of the Revised Statutes, but this must be pursued by application to the court and upon such application the court will not sanction a merely inquisitorial proceeding."

In Zych v. American Car & Foundry Co. (C. C.) 127 Fed. 723, Judge Thayer, at page 727 of 127 Fed., says:

"The right to a dedimus exists, as it seems, under this statute, when there is a well-founded apprehension of a failure or delay of justice. In many cases which might be supposed it might be found necessary, after a suit is brought, to obtain the testimony of a witness in advance of the trial to prevent a failure or delay of justice, and no good reason occurs to the mind of the court why a dedimus should not be granted when to refuse it would lead to a denial of justice or to unreasonable delay in obtaining it. The usual ob-

Jection that is made to granting a dedimus for the taking of testimony in advance of the trial is that parties are often disposed to abuse the privilege by inquiring needlessly into the private affairs of others, and taking reams of testimony having no relation to the pending suit, for some ulterior purpose. This practice, as a matter of course, should be discouraged by every means within the control of the court. A court is not bound to award a dedimus simply because it is asked for or on account of every shallow pretense that may be advanced. It should take pains to inquire into the good faith of the application and the grounds upon which the application is based, and never hesitate to refuse a dedimus unless it is satisfied that the trial will be unduly delayed or that there may be a failure of justice if the application is not granted."

Again, Judge Hunt, in Magone v. Colorado Smelting & Mining Co. et al. (C. C.) 135 Fed. 846, referring to the statute in question, says:

"If the complainant were seeking to procure a dedimus as specified in section 866, it would be necessary that he make a showing of the necessity for taking such depositions to prevent the failure or delay of justice."

The statute in question is, however, not difficult of construction. What it says upon the question under consideration, it says plainly and pointedly. It did not prescribe, as had been the practice, that upon allegation in proper form of certain facts a dedimus should issue as a matter of course, but, on the contrary, it provided that the court should pass upon the facts and allow the dedimus if and when necessary to prevent a failure or delay of justice. For anything that appears in the bill of complaint, I cannot see, even if a dedimus is denied, but that justice is as likely to prevail in the threatened suit, if it shall be instituted, as it would in almost any other imaginable case, since in all cases witnesses are liable to die, become incapacitated, or disappear. In the case at bar the witnesses whose testimony it is sought to perpetuate all reside in an adjacent state, and nothing whatever is averred in the bill as to their age, infirmity, or intention to leave the country. It is true the bill alleges that the complainant has reason to believe, and does believe, that it may be deprived of the testimony of said witnesses by reason of their death, removal, or otherwise; but such allegation is unavailing in the absence of any reason for such belief, or any facts from which the court can determine whether there is any reasonable foundation for such belief. We have presented in this case, then, a threatened suit and certain alleged defenses which can only be proved by the persons named in the bill of complaint, coupled with an allegation of belief that said suit is delayed from improper motives. Do these facts show that there will necessarily be a failure of justice in case the testimony of the witnesses is not taken and preserved? If so, it would seem that a dedimus might properly issue, if asked for, in practically every case in which a suit were threatened, but not immediately instituted. To open the door so widely would not only congest the equity side of the court with proceedings of this character, but—and this is more to the point —would, in my opinion, plainly violate the direction of the statute. I think the statute does not contemplate any such loose procedure; if it did, it would have been so stated, and nothing committed to the discretion of the court. It is true that in the case of New York & Baltimore Coffee Polishing Co. v. New York Coffee Polishing Co.

(C. C.) 9 Fed. 578, a dedimus was granted by Judge Benedict in a patent case, but it appears that the witness whose testimony was ordered to be preserved was upwards of 90 years of age. That case is therefore materially unlike and clearly distinguishable from the one at bar. Neither of the defenses set up against the defendant's patent is in any wise extraordinary or unusual, either in its essence or method of proof, while that of prior use may truly be said to be one of the most common in patent cases. Counsel for the defendant upon the argument stated that if the complainant would admit that it was infringing the defendant's patent, if valid, the defendant would institute suit thereon at once. This circumstance, while not regarded as controlling, nevertheless tends to show that the defendant is not delaying its suit for the purpose alleged in the bill.

For the reasons above given, I am constrained to sustain the fifth

cause of demurrer.

CYCLONE MINING CO. v. BAKER LIGHT & POWER CO. et al.

(Circuit Court, D. Oregon. December 7, 1908.)

No. 3,201.

1. Corporations (§ 636*)—Foreign Corporations—Power of State to Exclude Restrict, or Regulate.

A state may exclude foreign corporations from doing business therein, or may impose such terms as conditions precedent to the right to do business as it may deem for the interest of the public.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2505; Dec. Dig. § 636.*

Exclusion, regulation, and taxation of foreign corporations, see note to McCanna & Fraser Co. v. Citizens' Trust & Surety Co., 24 C. C. A. 13.]

2. Corporations (§ 661*)—Foreign Corporations—Right to Sue—Failure to Comply with Statute.

A corporation of another state operating a mine in Oregon without having complied with Act Or. Feb. 16, 1903 (Laws 1903, p. 44), requiring all foreign corporations before transacting any business in the state to file a declaration of their purpose, pay a filing fee, and appoint an agent to accept service, and providing that until it has done so no foreign corporation shall transact any business within the state nor maintain any action in its courts, cannot maintain an action in either a federal or state court within the state to enforce a contract made in the conduct of its business and in violation of the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2544; Dec. Dig. § 661.*]

3. Corporations (§ 659*)—Foreign Corporations—Validity of Contracts— Estoppel to Contest.

A party to a contract made by a foreign corporation doing business in a state without authority and in violation of its statutes is not estopped to plead the invalidity of the contract when sued thereon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2561; Dec. Dig. § 659.*]

At Law. On demurrer to plea.

The plaintiff is a private corporation of South Dakota, and is the owner and engaged in the development and operation of mines in Baker county, Or.

^{*}For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On November 23, 1903, it entered into a contract with the defendant, the Baker Gas & Electric Company, a domestic corporation, whereby the latter agreed to construct and equip a pole and wire line from Baker City to the Cyclone Mine, then being operated by the plaintiff, a distance of six miles, and to furnish, after January 1, 1904, certain electrical energy, not exceeding 150 and not less than 30 kilowatts, for the period of one year. Having alleged that this defendant has breached its contract in failing to furnish the quantity of electrical energy specified, and that the other two defendant companies have become bound with the gas and electric company for the performance of such contract, this action is based upon such breach and the binding obligation of

all such companies, and judgment for damages is prayed.

The defendants have interposed a plea in abatement of the cause of action. The plea sets up, inter alia, that the contract sued on was entered into and executed in Baker county, state of Oregon; that plaintiff was the owner and engaged in the development and operation of mines in Oregon; that the agreement was for the supplying of certain electrical energy as alleged in the complaint; that the performance of such terms and conditions as by the contract stipulated upon the part of the plaintiff company, and within the intendment of such contract and agreement, would constitute the doing, carrying on, and conducting of business within the state of Oregon, and in further contemplation involved the development and operation of mines and mining property, the employment and discharge of men, and the purchase of material and supplies—a palpable engagement in business enterprise; that, during all times mentioned in the complaint, the plaintiff has failed to file or cause to be filed a written declaration of its desire to engage in business in the state of Oregon, or to otherwise comply with the provisions of law for obtaining a certificate authorizing it to be or to transact business within the state, and has never been so authorized; and prays an abatement of the plaintiff's cause.

To this plea, the plaintiff has interposed a demurrer.

Ernest Dale Owen and W. W. Banks, for plaintiff. Charles A. Johns, for defendants.

WOLVERTON, District Judge (after stating the facts as above). The sufficiency of the plea in abatement being challenged, the question is presented whether the contract sued on can be enforced, the plaintiff not having complied with the laws of the state of Oregon regulating the doing or transacting of business within the state by foreign corporations. Counsel for plaintiff affirms that it can. Defendants' counsel holds to the opposite view.

It is urged, mainly, that none but the state can take advantage of a noncompliance with its statute regulating the doing of business in the state by foreign corporations, and that one dealing or contracting with a foreign corporation not authorized to do business in a state other than that of its creation is estopped to deny that it is without such authority. A discussion of the primary question as to the effect a noncompliance with a statute regulating the doing of business within the state by a foreign corporation has upon its executory contracts or agreements, entered into while in the transaction of business contrary to such regulations or mandates, will dispose of the case in large measure.

It has long been settled that, by comity of nations and of the states, a corporation may be permitted to contract or to carry on any business, in a state other than that of its creation, that it is authorized by its charter to transact at home, unless it be contrary to the laws or regu-

lations of such other state. It has been said that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty." It cannot become a corporation or a citizen of any other sovereignty save that of its creation. If it does business in another state or sovereignty, it does so with the will or consent of the latter. either express or implied. By comity of the states as relates to the subject is meant that implied assent by which a foreign corporation is permitted to carry on its business in states other than that of its crea-As there may be comity of contract between different states and sovereignties, there may be comity of suit, which, without else, without express statutory regulations touching the subject, entitles a suitor to sue in jurisdictions other than his own. So that a foreign corporation may not only contract abroad, but may also sue abroad to enforce its contracts, under the rule of comity, where not superseded by statute or other lawful regulation. A corporation may not transact business abroad, however, unless so permitted by comity or by some regulation of statute of the foreign jurisdiction. A state may withdraw its implied assent through comity, and it may inhibit the doing of such business within its borders absolutely, or it may impose such terms and conditions as it is so disposed, as a prerequisite to the exercise of such privilege. And, where the policy of the state is thus made manifest in this respect through its legislation, the courts will not interpose to defeat its will, and will not give relief where none is intended, and especially where it is designed that such relief should be withheld. These principles are adequately sustained by federal authority. Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274; Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297. I need quote but a paragraph from 8 Wall., at page 181:

"The recognition of its (the corporation's) existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

Furthermore, it is declared, in Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 733, 5 Sup. Ct. 739, 741, 28 L. Ed. 1137, that:

"It must be conceded that, if the contract on which the suit was brought was made in violation of a law of the state, it cannot be enforced in any court sitting in the state charged with the interpretation and enforcement of its laws"—citing many authorities in support of the principle.

It would be a vain thing to insist that the federal courts are not bound to the observance of the rule. Are not they in duty bound to enforce state laws, where falling within their cognizance and not contrary to the federal Constitution or the laws of Congress, as well as the national laws? If it were otherwise, the states and the Union could not well or long coexist.

Section 6 of an act to provide for the licensing of domestic and foreign corporations, and to prescribe terms and conditions upon which foreign corporations may transact business in the state of Oregon, and for other specified purposes, approved February 16, 1903 (Laws 1903, p. 44), provides that:

"Every foreign corporation * * * before transacting business within this state, shall file the declaration and pay the entrance fees hereinafter provided, and shall duly execute and acknowledge a power of attorney, and cause the same to be recorded in the office of the Secretary of State," appointing an attorney in fact with the specific authority named in the statute.

And it is made the duty of such foreign corporation to maintain at all times within the state some qualified person as its attorney in fact; and, in default thereof, it is declared it shall not be entitled to transact any business within the state, or maintain any suit, action, or proceeding in its courts. Section 7 provides that such corporation shall file a written declaration of its desire and purpose to engage in business within the state, enumerating the things the declaration shall specify. And it is further enacted that, upon the presentation of such declaration, the person or persons presenting the same shall pay to the Secretary of State a filing fee of \$50, together with the annual license fee, whereupon the Secretary is authorized to issue to the corporation a certificate, which is constituted the legal evidence of its right to begin the transaction of the business specified within the state. And section 9 provides that no domestic or foreign corporation which shall have failed to pay the last annual license fee, or any other fee or tax which shall have become due and payable against it, shall be permitted to maintain any suit, action, or proceeding in any court of justice within the state while such delinquency shall continue.

This legislation, which is an amendment of section 5109 of Bellinger & Cotton's Compilation, strengthens that enactment and renders its interpretation more certain and definite, so that there is no more any cavil as to the intendment of the legislation relative to the time when a foreign corporation shall be authorized and entitled to do business in the state of Oregon. Were it otherwise, the construction of the old section (5109) has received explicit interpretation at the hands of both the state and federal courts, and, further, the effect of a noncompliance with the statute has been most specifically and unmistakably declared. I quote from Commercial Bank v. Sherman, 28 Or. 573, 575, 43 Pac. 658, 659, 52 Am. St. Rep. 811, the last utterance of the Supreme Court of the state upon the subject:

"It must be conceded that the contracts of any of the foreign corporations named in the title of the act of 1864, of which the section referred to is a part, carrying on business here without first having executed and caused to be recorded a power of attorney as required by the statute, are void, and no action can be maintained thereon by the corporation"—citing previous cases determined by the same tribunal.

So it has been held by Judge Deady, in this court, that such a corporation, before complying with said act, had no power to contract or

sue in the state, that the act was prohibitory, and that anything done by the corporation contrary to its mandate was illegal and void. In re Comstock, Fed. Cas. No. 3,078. The doctrine thus announced was later reaffirmed by the distinguished jurist, after a most exhaustive re-examination of the entire subject. Semple v. Bank of British Columbia, Fed. Cas. No. 12,659.

There remains, therefore, no question in these courts as to what is regarded as the proper interpretation of this statute nor of the effect of noncompliance with its provisions on the part of a foreign corporation presuming to do business within the state. And, were it not for the strenuous insistence of counsel that this case is to be controlled by other principles, I should have felt satisfied, as well as justified, to rest the case here. Further research, however, has resulted in a confirmation of the view thus entertained.

sulted in a confirmation of the view thus entertained.

In Wisconsin an act of similar import was adopted in the confirmation of the view thus entertained.

In Wisconsin an act of similar import was adopted August 20, 1897, to become effective September 1, 1898. The Diamond Glue Company, an Illinois corporation, entered into a contract with the United States Glue Company, a Wisconsin corporation, whereby the latter agreed to erect a glue factory to be supervised and operated by the former for the latter for a term of five years from the completion of the plant; the Diamond Company to have the handling and sale of the entire output, guaranteeing payment of such sales, and retaining a percentage on both sales and profits. In a complaint filed by the Diamond Glue Company against the United States Glue Company (C. C.) 103 Fed. 838, other conditions of the contract are enumerated. The United States Company, it is alleged, breached the contract December 2, 1899. The suit was brought in the federal court for the Eastern District of Wisconsin to recover damages for the breach. The question here under consideration was there presented in its fullness, and the court (Seaman, District Judge, sitting) held that (quoting from the headnote of the opinion):

"A statutory enactment within the power of a state, which prohibits the transaction of business therein by foreign corporations except upon compliance with certain conditions, invalidates any contract entered into in violation of the statute, so that the contract cannot be enforced by any court administering the law in such state; and, where the prohibition is plain, this rule governs equally with or without express terms in the statute declaring the invalidity."

This case went to the Supreme Court on writ of error, and was affirmed. 187 U. S. 611, 28 Sup. Ct. 207, 47 L. Ed. 328. In determining the cause, the court says:

"It hardly could be contended that the contract was illegal, on the ground just stated, when it was made (having been entered into prior to the statute invoked taking effect). * * * But it must be taken to have contemplated legal action, and if filing a copy of its charter was a condition precedent of the plaintiff's right to carry out its undertakings, then a promise might be implied on its part to take the necessary steps. But if, when the time came, the plaintiff did not take those steps, the defendant had the legal right to refuse to go on, whether its right be put on the ground of the plaintiff's breach of its implied undertaking or of the illegality of the proposed continuance of the work."

The facts of that case are so nearly parallel with those of this as to render the adjudication with relation thereto controlling here, and

about this construction there can scarcely be two opinions.

This cause is to be distinguished from that of Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, and other cases cited by counsel holding to the doctrine there announced, as there real property had been deeded to the foreign corporation, in disregard of the local Constitution and the statute, and it was held that, if a forfeiture were to be insisted upon, it was the function of the state, and not of the individual, to declare it, and that the question of the corporation's capacity to purchase and hold such property could not be raised collaterally by private persons, unless there was something in the statute expressly or by necessary implication authorizing them to do so. The recent case of Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79, is of this nature, but, for a like reason, is without application. The doctrine might now control the case of Semple v. Bank of British Columbia, supra, but not the preceding case of In re Comstock, nor the cases determined in the Oregon Supreme Court, and manifestly it was not appropriate as an aid to the maintenance of the action in Diamond Glue Co. v. United States Glue Co., supra.

Nor are the defendants estopped, by reason of their contractual relations with the plaintiff, from insisting that the contract is void, and the plaintiff without legal right or capacity to sue for the breach thereof, because, if so estopped, the plaintiff would be permitted to take advantage of its own offending acts done in derogation and even in defiance of the law. It would be a revolting doctrine, fraught with inconceivable deleterious results, if a foreign corporation could come into a state not its own, and there carry on a business in direct defiance of the provisions of law by which it may capacitate itself for the transaction of business therein, and then validate its acts because, forsooth, parties had dealt with it; for but few others have cause for suit except those having contractual relations in some form with such corporations. True, the state might interpose to prevent the further doing of business within its borders, but that is beside the question that an offending thing shall be clothed with ample authority to enforce its contracts anywhere simply because others have contracted with it. Suppose the state, by statute, had utterly inhibited foreign corporations from doing business therein, as it has a perfect right to do, what standing could such corporations acquire by doing business therein nevertheless? What comity would remain for doing such business, and what comity for suing in the courts of the states to enforce their contracts? None whatever. The comity being gone. the right in either aspect is entirely abrogated, and none exists. Can it be that the right may, nevertheless, exist by estoppel? Such a proposition is utterly without persuasive force. In what better situation is a foreign corporation that enters another state without the observance of conditions precedent to its doing business therein? None that That the estoppel does not exist is sustained by In re Comstock, supra, and the Oregon cases. See, also, 19 Cyc. 1289–1291. While there are cases to the contrary, I am constrained to follow these. The authorities cited by counsel upon the subject are not in point, as they relate almost wholly to estoppel against domestic corporations, and it is unnecessary to notice them further.

The remaining four objections specified by counsel are but subheads

of these two, and must, therefore, fall with them.

It follows that the demurrer to the plea in abatement should be overruled, and such will be the order of the court.

In re LOFTUS.

(Circuit Court, S. D. New York. December 14, 1908.)

Aliens (§ 68*) — Naturalization — Honorably Discharged Soldiers — Evidence.

Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331), relating to the naturalization of aliens who are honorably discharged soldiers of the United States, which requires proof of residence and good moral character "as now provided by law," was not affected by the provision of Naturalization Law June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 420), requiring two witnesses to residence and good character, and proof to the satisfaction of the court, as required by Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1330), is sufficient.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 141; Dec. Dig. § 68.*]

Application for Naturalization.

Patrick J. Loftus, in pro. per. Henry L. Stimson, U. S. Atty.

WARD, Circuit Judge. The petition for naturalization in this matter was filed under Rev. St. U. S. § 2166 (U. S. Comp. St. 1901, p. 1331), by an honorably discharged soldier, and notice posted of hearing to be had at a stated day at least 90 days thereafter, in entire accordance with Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 419); but only one of the witnesses named appeared at the final hearing. The petitioner produced an honorable discharge from the service of the United States army. It was shown that he is now a gateman in the employment of the Interborough Rapid Transit Company, and that he resided for more than a year prior to his application within the United States and is a man of good moral character. The United States attorney objected on the ground that he had but one witness as to residence and good character, and should have two, in accordance with the act of June 29, 1906, section 4 which provides:

"That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise."

The petition is under section 2166 of Rev. St. U. S., enacted by Act July 17, 1862, c. 200, 12 Stat. 597, as follows:

"Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or the

^{*}For other cases see same topic & Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States."

In 1862 the law contained no provisions as to the number of witnesses, but merely required that:

"It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least and within the state or territory where such court is at the time held one year at least and that during that time he has behaved as a man of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same but the oath of the applicant shall in no case be allowed to prove his residence." Rev. St. U. S. § 2165 (U. S. Comp. St. 1901, p. 1330).

Although the general act of 1906 expressly repealed various provisions of existing law, it made no mention of section 2166, which specially regulated the admission of honorably discharged soldiers. Congress must have intended that the admission of this class of aliens should continue to be regulated by section 2166. I do not think the two acts irreconcilable, and both should be given effect as far as possible. Congress probably regarded honorably discharged soldiers as a special class, as to whom precautions generally necessary were not required. This would be natural as to applicants who had actually been in the service of the United States and as to whose good character the officers of the United States had certified. As section 2166 expressly confines the proof in their case to such as is "now provided by law," I think that, consistently with the act of 1906, they may still be admitted under section 2166, with the degree of proof required by it.

The section does not say that the proof of residence and character shall be as provided by law, or as now or hereafter provided by law, but as now provided by law. Effect should be given to the word "now" if possible, and this can be done by treating the law existing in 1862 upon these points as incorporated into section 2166, notwithstanding the fact that the general naturalization act of 1802, of which they were a part, has been repealed. All the other provisions of the act of 1906, not being otherwise expressly regulated in the section, will be applicable to honorably discharged soldiers, viz., the form and contents of the petition, the oath in open court, the public notice of the petition, and hearing on a stated day, not less than 90 days after filing, the exclusion of anarchists and polygamists, etc.

The petition is granted.

MEMORANDUM DECISIONS.

COCHRANE v. WARNER et al. (Circuit Court of Appeals, Second Circuit. December 15, 1908.) No. 55. In Error to the Circuit Court of the United States for the Southern District of New York. Ashton Harvey (M. Edward Kelley and Otto C. Wierum, Jr., of counsel), for plaintiff in error. Kellogg & Rose (Abram J. Rose and Alfred C. Pette, of counsel), for defendants in error. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Affirmed, upon opinion of this court on first appeal. 128 Fed. 553, 63 C. C. A. 207.

WARD, Circuit Judge, dissents.

GRIFFITH v. BERKSHIRE POWER CO. (Circuit Court of Appeals, Second Circuit. November 16, 1908.) No. 68. Appeal from the Circuit Court of the United States for the District of Connecticut. This cause comes here upon appeal from a decree dismissing the bill in suit to enjoin the maintenance of a dam located in the state of Connecticut on the Housatonic river which sets back the water of that river upon lands of complainant located in the state of Massachusetts. The opinion of Judge Platt is reported in 158 Fed. 219. C. Walter Artz (Henry F. Parmelee and Henry H. Townshend, of counsel), for appellant. Henry Stoddard (Wm. Waldo Hyde and Arthur L. Shipman, of counsel), for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. This is the same dam which was the subject of controversy before this court in Andrus v. Berkshire Power Company, 147 Fed. 76, 77 C. C. A. 248. The general principles of law governing the situation are set forth in that opinion and need not be here repeated. The facts in the case require an affirmance of the decision of the Circuit Court that complainant is not entitled to injunctive relief. Prior to the building of the dam it was expected that Griffith's land would be overflowed to some extent, although apparently the exact extent of such overflow was not certainly known. Under these circumstances Griffith and the promoter of the defendant company came together and executed an agreement, which after proper recitals contains the following clause: "That, after the completion of said plant, and the overflow of the lands of said Griffith in the manner hereinbefore set forth, the said Roraback or his nominees shall pay or cause to be paid to the said Griffith the sum of \$2,500 in full payment and liquidation of all damages which shall be occasioned to the said Griffith by reason of the erection of said dam and the flowing perpetually of his land; provided, however, that the said dam shall not exceed eight feet in height above the mean level of the flow of the water in Housatonic river." It is conceded that the dam as built does not exceed the stipulated height of eight feet. Manifestly with such a contract in existence the injured party is not entitled to an injunction which would require the removal or lowering of the dam. All he could claim is the payment of the stipulated award for damages, and that he could collect by an action at law. His contention is that the contract does not correctly express the intention of the parties and that there was a mutual mistake of fact when it was executed. That all parties supposed that not more than 12 acres would be affected by the set-back and that it was the intention to pay Griffith \$200 an acre for land overflowed. We do not express any opinion as to the weight of the evidence adduced in support of this contention; indeed, it has not been necessary to examine it critically, since the bill is not one for reformation of a contract, and no such relief is prayed. It would seem that the complainant has an election between one of two courses. He may either sue for the \$2,500 which the contract stipulated he should have as full compensation, or he may sue to have the contract reformed so

as to provide for the payment of what it was (as he alleges) intended he should receive, and in the event of his prevailing in the latter suit he could, as ancillary to the relief prayed for, obtain a decree for whatever sum he might be entitled to under the contract as reformed. But in neither case, whether the contract stands as it is written or is amended as suggested, can he maintain a suit for the particular injunctive relief prayed for in this suit. The decree is affirmed, with costs.

GUTHMAN, SOLOMONS & CO. v. UNITED STATES. A. STEINHARDT & CO. v. SAME. (Circuit Court of Appeals, Second Circuit. November 25, 1908.) Nos. 107, 108 (4,904, 4,905). Appeals from the Circuit Court of the United States for the Southern District of New York. For decision below, see 159 Fed 273. Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers. J. Osgood Nichols, Asst. U. S. Atty. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Order affirmed, in open court, upon the ground that there are no samples of the merchandise in the case, and the court is therefore unable to pass intelligently upon the merits of the controversy.

HAMMETT v. CHASE, TALBOT & CO. (Circuit Court of Appeals, Second Circuit. November 16, 1908.) No. 53. Appeal from the District Court of the United States for the Southern District of New York. This is an appeal from a decree awarding demurrage and extra expenses for 12 days' detention of a schooner discharging in the port of New York. The facts are fully set forth in the decision of the District Judge reported in 158 Fed. 203. H. W. Goodrich, for appellants. Arthur Lovell, for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The charter contained this provision: "Vessel to move to such loading and discharging berth as the charterers may direct; * * * they to have the privilege of moving her thereafter by paying towages." We concur with the District Judge in the opinion that under this clause it was the duty of the charterers to furnish a tug for the towage from Jersey City to Staten Island, and that they did not shift that obligation upon the vessel by deputing the master to obtain one. We find no error in including the bill for five days' overtime of a United States inspector. Apparently it would not have been incurred if the vessel had discharged on time. Decree affirmed, with interest and costs.

HUGHES v. BERKSHIRE POWER CO. (Circuit Court of Appeals, Second Circuit. November 16, 1908.) No. 67. Appeal from the Circuit Court of the United States for the District of Connecticut. This cause comes here upon appeal from a decree dismissing the bill in a suit to enjoin the maintenance of a dam located in the state of Connecticut on the Housatonic river which sets back the water of that river upon lands of complainant located in the state of Massachusetts. The opinion of Judge Platt is reported in 158 Fed. 219. C. Walter Artz (Henry F. Parmelee and Henry H. Townshend, of comsel), for appellant. Henry Stoddard (Wm. Waldo Hyde and Arthur L. Shipman, of counsel), for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. This is the same dam which was the subject of controversy before this court in Andrus v. Berkshire Power Company, 147 Fed. 78. 77 C. C. A. 248, and in Griffith v. Berkshire Power Company (decided herewith) 165 Fed. 1004. It differs from both of those cases in the circumstance that no one contends that any contract was made or any negotiations entered into between the parties in interest prior to the construction of the dam. Apparently it was not supposed that complainant's land would be affected by the set-back of the water. After the dam was closed up, part of his land was flooded or undersoaked, a conference was had, and an effort

made to adjust matters between the power company and himself. The complainant's testimony is to the effect that, after insisting that he wanted the dam removed, he said that the damage was now done, and if they would pay him \$5,000 damages, or \$6,000 for the place, they might have it, providing he could remove the sile; that this was agreed to, but subsequently repudiated. Defendant's testimony is to the effect that the amount of damages named by Hughes was not assented to, although defendant agreed to pay whatever might be the actual damages, and paid \$160 on account thereof. Whichever version of what took place be the correct one, and we express no opinion on that point, defendant was justified in assuming that its controversy with Hughes might be adjusted on a money basis, and thereafter it settled with other persons, paying them damages based upon the assumption that the dam would remain, which damages were in excess of what it would have paid, had it known that the dam was to be removed. Under the principle laid down in the Andrus Case, complainant cannot now insist upon injunctive relief. The decree of the Circuit Court, however, should be modified, so as to provide (as was done in the Andrus Case) for an ascertainment, in the way courts of equity are accustomed to proceed, of the damages to which complainant may be entitled by reason of the construction, maintenance, and use of the dam complained of, and fixing the time within which defendant will be required to pay such damages, and providing for the issuance of the injunction prayed for upon failure of defendant to pay the same; or, at the option of complainant, the decree below may be affirmed, without prejudice to complainant's rights to bring an action at law for said damages. Costs of this appeal to the defendant.

POLK et al. v. MUTUAL RESERVE FUND LIFE ASS'N OF NEW YORK et al. (Circuit Court of Appeals, Second Circuit. October 12, 1908.) No. 1. In Error to the Circuit Court of the United States for the Southern District of New York. See 137 Fed. 273. Russell & Winslow (D. L. Snodgrass, Caruthers Ewing, and R. F. Jackson, of counsel), for appellants. George Burnham (Frank R. Lawrence, Frank H. Platt, and Gordon T. Hughes, of counsel), for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Upon dissolution of the corporation this action abated. No further relief can be administered by this court. Submitted without argument.

POLK et al. v. MUTUAL RESERVE FUND LIFE ASS'N OF NEW YORK et al. (Circuit Court of Appeals, Second Circuit. October 28, 1908.) No. 1. Appeal from the Circuit Court of the United States for the Southern District of New York. See, also, 137 Fed. 273. Russell & Winslow (D. L. Snodgrass, Caruthers Ewing, and R. F. Jackson, of counsel), for appellants. George Burnham (Frank R. Lawrence, Frank H. Platt, and Gordon T. Hughes, of counsel), for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The defendant corporation having been dissolved, actions pending against it would, in the absence of statutory provision, abate. No statute in New York prevents this; but, if the cause of action survive the dissolution, it is provided that the action may, by appropriate proceedings, be continued against the receiver. We are, however, of the opinion that practically the same relief prayed for in this action was granted in the action in which the corporation was dissolved and receivers appointed, and that the action did not survive. Motion requiring receivers to be made parties denied. Submitted without argument.

In re W. J. SCHMIDT & CO. (Circuit Court of Appeals, Second Circuit. December 15, 1908.) No. 44. Petition to Review an Order of the District Court of the United States for the Southern District of New York. The trus-

tee in bankruptcy was directed to pay the fees of the sheriff of New York on two executions levied upon property of the bankrupt within four months prior to filing of the petition in bankruptcy. Goeller, Shaffer & Eisler, for petitioner. Maurice B. Blumenthal (Valentine Taylor, of counsel), for claimant. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. There is no need to discuss the constitutional questions which have been argued. We are satisfied that the language used by Congress in the sixty-seventh section of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), providing that levies under judgment within the period named "shall be deemed null and void" was not intended to deprive state's officer of his statutory fees, accruing prior to bankruptcy, under proceedings in the state courts, which were in all respects regular and in accordance with the state law and practice. The order is affirmed.

RATHFON v. UNITED STATES FIDELITY & GUARANTY CO. (Circuit Court, E. D. Pennsylvania. December 9, 1908.) No. 21. John E. Malone and Coyle & Keller, for plaintiff. George Wharton Pepper, for defendant.

J. B. McPHERSON, District Judge. After considering the plaintiff's argument upon the motion for a new trial, I am still of opinion that the instructions given to the jury were correct and that the promissory notes referred to in the argument were clearly renewals of former obligations. No money passed at the time. The transactions were pure matters of bookkeeping, and merely carried along loans that had been made before the bond in suit attached. The motion for a new trial is refused. It was understood at the argument that, if a new trial should be refused, the defendant's motion for judgment notwithstanding the verdict would not be insisted upon. It is therefore overruled; but, as the defendant is entitled to maintain the soundness of its position upon that motion (which may become important if my instructions to the jury should prove, on appeal, to be wrong), an exception is herewith sealed to the refusal of judgment.

END OF CASES IN VOL. 165.